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Volume 4

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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Laura Beth Salant

A Petitioner for Reinstatement

No. 95-R-16159

Filed March 22, 1999

SUMMARY

After her criminal conviction for applying and sitting for the California Bar Examination for her former husband, petitioner was disbarred in 1989. She filed for reinstatement in 1995, and the hearing judge recommended that her petition for reinstatement be granted. (Hon. Carlos E. Velarde, Hearing Judge.)

The State Bar sought review contending that petitioner failed to establish her rehabilitation and present moral fitness to practice law. According to the State Bar, petitioner's failure to timely comply with California Rules of Court, rule 955 in accordance with the Supreme Court's 1989 disbarment order and her conduct, representations, and testimony regarding her efforts to remain free from contact with her former husband negated her claims of rehabilitation and moral fitness. The review department rejected the State Bar's contentions and recommended that petitioner's petition for reinstatement be granted.

COUNSEL FOR PARTIES

For State Bar: Russell G. Weiner

For Respondent: R. Gerald Markle

HEADNOTES

[1 a, b] 2504 Reinstatement–Burden of Proof
2510 Reinstatement Granted

Petitioner's failure to comply timely with the provisions of rule 955, California Rules of Court, was not, in itself, grounds for denying petition for reinstatement. Essentially, petitioner followed the suggestion of her former counsel in the disbarment proceeding to allow him (counsel) to take care of the filing of the required affidavit of compliance with rule 955. Petitioner's former counsel did not follow through and petitioner did not comply with the rule until about eight months after filing her

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petition for reinstatement. The hearing judge expressed "some reservations" about petitioner's testimony concerning her belated compliance with rule 955, yet chose to resolve the issue in her favor. The review department upheld the hearing judge's decision. In doing so, the department noted, as did the hearing judge, that at the time of her disbarment, petitioner had no clients, co-counsel or pending cases and was not obligated to return any client property covered by the rule.

[2 a, b] **165 Adequacy of Hearing Decision**
2504 Reinstatement–Burden of Proof
2510 Reinstatement Granted

A close reading of the hearing judge's conclusion that petitioner had proven rehabilitation, together with several adverse findings of petitioner's actions regarding her former husband led the review department to support the judge's positive recommendation. Regarding petitioner's testimony about the restraining orders she attempted to obtain in the State Bar Court against her former husband, the judge found it either negligent or intentionally misleading. However, he did not specify at which end of that wide range petitioner's testimony rested. Certainly, if petitioner's understanding of restraining orders was simply careless, no adverse conclusions were justified. The review department found no basis for a conclusion of dishonesty on petitioner's part regarding the status of the restraining orders. The review department also drew no adverse moral conclusions from petitioner's frequent litigation in the State Bar Court over a protective order. Petitioner had a right of reasonable access to this court to seek judicial remedies. Her contact of members of the Board of Governors and senior State Bar staff was also within her rights and she did not pursue inappropriate means to influence judicial decisions. The review department also concluded that petitioner disclosed adequate facts about the matter in her communications.

[3 a, b] **139 Procedure–Miscellaneous**
165 Adequacy of Hearing Decision
193 Constitutional Issues
199 General Issues–Miscellaneous
2504 Reinstatement–Burden of Proof
2510 Reinstatement Granted

The hearing judge's discussion of his concerns over petitioner's actions in terms of according her a "reasonable doubt" made review somewhat difficult. It is clear that in a disciplinary proceeding, where the State Bar has the burden of proving charges by clear and convincing evidence, the accused is entitled to the exercise of reasonable doubts. However, in a reinstatement proceeding, where the petitioner unquestionably has the burden of presenting clear and convincing evidence of her qualifications, petitioner can not be given the benefit of reasonable doubts. However, by reading the decision in its entirety, the review department construed the hearingjudge's decision finding reasonable doubts in favor of petitioner to not invoke the normal meaning of the term "reasonable doubt" as used in this area of law, but rather, such narrow doubt that would be acceptable in a satisfactory showing for reinstatement.

Additional Analysis

none

OPINION:

STOVITZ, J.:

In 1989 the Supreme Court disbarred petitioner, Laura Beth Salant, after her criminal conviction based upon her "deceitful acts. . . of exceptional gravity" in 1985 in applying and sitting for the California Bar Examination in place of her then husband, Morgan Lamb (M. Lamb). (*In re Lamb* (1989) 49 Cal.3d 239.) Both the majority and dissent acknowledged mitigating circumstances which evoked sympathy for petitioner and that she had shown remorse and presented evidence of integrity.

In 1995 petitioner sought reinstatement. In this proceeding, she must show by clear and convincing evidence that she has present learning and ability in the general law, that she has passed the professional responsibility examination, that she is rehabilitated and is of present good moral character. (Cal. Rules of Ct., rule 951 (f).) The hearing judge filed a 40 page decision finding in petitioner's favor on all issues but not without several concerns about litigation steps she took and testimony she recently gave, which testimony the judge deemed to be incredible. Before us, there is no dispute that petitioner passed the required professional responsibility examination and is learned in the general law. The State Bar's Office of Chief Trial Counsel (State Bar) contends that petitioner is not rehabilitated and is presently morally unfit to practice.

On our independent review, we conclude that petitioner has proven convincingly her rehabilitation. Her work experience as a paralegal for the Internal Revenue Service for the past eight years has placed her in many stressful situations and she has performed in an outstanding manner. Her character witnesses are most laudatory on her behalf. She has overcome serious health problems and performed positive community service. The evidence of every mental health professional who evaluated her, including one who acted as the Court's independent examiner, has also been uniformly favorable. Although the hearing judge had some doubts about some actions or positions petitioner took during these proceedings, the judge resolved those concerns in petitioner's favor. We agree with the hearing judge and will recommend her reinstatement.

I. DISCUSSION.

In our view, it is unnecessary to recount in detail the grave misconduct which led to petitioner's disbarment. It is fully recited in *In re Lamb*, *supra*. 49 Cal.3d at pp. 242-243.

We focus on the evidence adduced in the reinstatement petition, evaluating it in light of the misconduct which led to petitioner's disbarment. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092.) In that connection, we note that petitioner's misconduct arose from uniquely stressful situations and occurred over a very short time. As the Supreme Court majority stated in part in discussing the factual background of petitioner's misconduct, "The confluence of emotional and physical stress caused petitioner to conclude that her only hope for her unborn child was to accede to her husband's pleas that she take the July 1985 exam in his place." (*In re Lamb*, *supra*, 49 Cal. 3d at p. 243.)

A. Learning and Legal Ability.

Without dispute, petitioner satisfied in March 1996 the requirement that she pass a professional responsibility examination.

Petitioner's employment history since disbarment shows her present learning in the law and aids her rehabilitative showing. In 1990 petitioner became a paralegal for the Internal Revenue Service (IRS). Her work entails analysis and research of legal and factual issues, preparation of cases for trial, generation of related correspondence and court documents, and drafting of motions, briefs, stipulations and other litigation documents. She is her office's liaison with the bankruptcy court and she has trained others on legal issues involving litigation, bankruptcy, writs of entry, and compromises. Her paralegal work involves liens, levies, community property issues, privileges and claim priorities. She has taken numerous courses on a wide variety of legal subjects pertinent to her work. We adopt the hearing judge's findings, not disputed by the State Bar, that petitioner has demonstrated requisite learning and ability in the law.

B. Favorable Evidence of Rehabilitation.

There is also no dispute that petitioner has performed her IRS job in an outstanding manner, discharging sensitive responsibilities. She has received several outstanding performance awards and evaluations. California attorneys who supervise her work have been laudatory about her achievements. Her superiors have almost always evaluated her as outstanding. Because of her performance, she has received cash awards and has been given access to the IRS's most sensitive database of taxpayer records. Thirteen attorneys who supervise or formerly supervised petitioner's work for the IRS, or were familiar with it, provided most favorable character evidence on her behalf. These witnesses were familiar with the facts surrounding her disbarment. Many of them had read the Supreme Court's opinion in *In re Lamb*, *supra*, yet were most laudatory of petitioner's work, her ethical standards and present moral character. Several of these witnesses signed declarations of a detailed nature rarely seen in these proceedings. They each concluded that petitioner's disbarment had arisen from a very stressful situation, that petitioner has been confronted by stress in her IRS work but had handled it most appropriately and that she would not likely repeat her misconduct.

Two of the declarations from senior IRS or Department of Justice attorneys are especially noteworthy. Gregory A. Roth, an Assistant United States Attorney in the Tax Division for the Central District of California, has been a California attorney since 1982 and has known petitioner since January 1990 when she had started IRS paralegal work. Roth had frequent work and social contacts with her. Roth's five-page declaration stated that petitioner had always been open about her misconduct, she understood fully its gravity and impropriety and had expressed genuine remorse for its nature, "not merely the consequences to her from the misconduct." Roth described the stressful, conflict-laden work petitioner performed ably and that she showed determination to take the moral "high road" at the IRS. Roth stated that at the IRS, petitioner always pursued vigorously "'doing the right thing' in each case, whether it meant concession by the IRS or lengthy legal research by her to develop the case for litigation." Roth opined that petitioner consistently demonstrated extremely high ethical and moral standards. Roth's very favorable and detailed opinion as to how well petitioner handled pressure is especially significant. Roth held petitioner in such high esteem that he would trust her as his attorney and recommend her to others as an attorney worthy of trust. Roth testified in these proceedings consistently with his declaration.

Donna Herbert, a senior attorney in the Office of IRS Chief Counsel, also testified in support of petitioner and had previously filed a three-page declaration. Herbert knew petitioner since 1990 and had read the Supreme Court's opinion in *In re Lamb*, *supra*. Herbert concluded that petitioner has the highest moral and ethical standards. Her declaration is especially noteworthy for its revelation of how petitioner resisted the pressure which Herbert placed on her to take action in a case, which action petitioner deemed unwarranted.[1]

The record convincingly establishes that petitioner demonstrated significant remorse for her earlier misconduct. She made no excuse for it even though her acute concern for her health and that of her unborn child at the time were well-established factors cited both by the majority and dissent in *In re Lamb*, *supra*.

A significant factor at the time of petitioner's earlier misconduct was her diabetic condition. The record contains undisputed evidence that petitioner's diabetes is under control.

1. Herbert stated, "During . . . 1995, [petitioner] had been assigned a Tax Court case, which ultimately came to me for trial. She recommended to me that the case go to trial because she did not believe the taxpayer's story. I viewed the case differently, and tried to convince [petitioner] that she should accept the taxpayer's story and settle the case. [Petitioner] stood her ground, despite the pressure I placed upon her. The taxpayer in question ultimately engaged an attorney to represent her and the case was later settled. However, I was particularly impressed with the strength of [petitioner's] convictions in this case. I admit that I was attempting to strong-arm her into settling (as attorneys are prone to do), and she did not succumb."

We agree with the hearing judge's findings that show that petitioner has engaged in community service activities and we find them to aid her rehabilitative showing. These have involved numerous projects in connection with her daughter's school, Girl Scout activities and service as president of a community group seeking to establish a park where dogs can exercise without leash controls.

In sum, petitioner's character evidence was uniformly favorable and extensive, coming from about 30 declarants, several of whom also testified below. These references were reasonably familiar with the facts surrounding petitioner's disbarment. They had known petitioner for from one to eight years although some of the witnesses were social friends or family members. It is of course settled that character evidence, no matter how favorable, is not itself determinative of rehabilitation. (E.g., *Hippard v. State Bar, supra*, 49 Cal.3d at p. 1095.) However, the strength and weight which should be accorded the many detailed references, especially by government attorneys, makes petitioner's showing strongly positive.

Finally, the evidence of petitioner's psychological condition was uniformly favorable. Petitioner has undertaken significant treatment with several therapists over the years. We do not believe it necessary to discuss this evidence in great detail, but we note the opinions of the two experts who observed petitioner most recently.

Joan Mandell, a licensed clinical social worker[2], who treated petitioner for at least 15 months from January 1996 through the date of the hearings below, concluded that petitioner suffered from no mental health problems of any concern. Further, Mandell described that petitioner's sustained psychological achievement offered "most convincing proof of her capacity to sustain the meaningful rehabilitation she has achieved."

Petitioner also agreed to examination by an independent psychologist, Dr. Susan Gustlin-Glasser, who evaluated petitioner at the State Bar Court's own behest. Responding to specific questions posed by the hearing judge, Dr. Gustlin-Glasser reported that petitioner's rehabilitation had occurred and that it was unlikely that she would again engage in the type of behavior that resulted in her disbarment. The State Bar offered no expert evidence to the contrary and there is no expert evidence that petitioner has taken any inappropriate actions resulting from stress.[3]

C. Concerns Posed by the State Bar.

The State Bar points to several concerns to support its position that petitioner has not made the required showing for reinstatement.

[1a] First it points to petitioner's most untimely compliance with rule 955, California Rules of Court.

[1b] Petitioner was required to comply with the provisions of rule 955, California Rules of Court, shortly after her 1989 disbarment. Essentially, petitioner followed the suggestion of her former counsel in the disbarment proceeding to allow him (counsel) to take care of the filing of the required affidavit of compliance with rule 955. However, petitioner's former counsel did not follow through. It is undisputed that petitioner did not comply until May 1996, about eight months after filing her petition for reinstatement. The hearing judge expressed "some reservations" about petitioner's testimony concerning her belated compliance with rule 955, yet chose to resolve the issue in her favor. After observing all witnesses testify, including petitioner, the hearing judge concluded that he had reservations about

2. Mandell had been licensed since 1973. For 14 years, she had worked in the Department of Psychiatry at Harbor UCLA Medical Center and had served as a supervisor-administrator at a regional child guidance clinic. Since 1992, Mandell had been in full-time private practice. Seventy percent of her practice was with children. Her area of expertise was in child physical and sexual abuse victimization. Mandell served on custody evaluation panels for two branches of the Los Angeles County Superior Courts. She treated adults with various relationship problems.

3. The State Bar's significant concern as to whether petitioner has handled appropriately stress caused by her former husband's involvement in these proceedings or in her recent life and the experts' opinions will be discussed, *post*.

petitioner's testimony that she first learned about rule 955's duties in May 1996. The judge also had reservations about her testimony that she would not have attempted to delegate the filing of her own affidavit of compliance with rule 955 if she had understood the rule's duties. We uphold the hearing judge's decision that did not deem adverse to petitioner that she chose to delegate rule 955 compliance. In doing so, we note, as did the hearing judge, that at the time of her disbarment, petitioner had no clients, co-counsel or pending cases and was not obligated to return any client property covered by the rule. We agree with the hearing judge's conclusion that petitioner's failure to comply timely with rule 955 is not, in itself, a ground for denial of petitioner's reinstatement.

[2a] The hearing judge devoted nearly ten pages of his decision to whether petitioner's conduct, representations and testimony surrounding her efforts to be ostensibly free of contact with her ex-husband, M. Lamb, were inconsistent with rehabilitation. We may summarize the judge's findings as follows:

Petitioner had no contact with M. Lamb since 1993, other than at the taking of his deposition in these proceedings before trial. M. Lamb had committed violent acts toward petitioner until 1989. In her testimony at trial, petitioner stated M. Lamb had not been violent to her since 1989, although he had threatened violence against their daughter. In her closing trial brief, she suggests that M. Lamb had been violent to her after 1989 but concedes that M. Lamb could always contact her through her sister to arrange visitation of their daughter.

In the nearly one year period between September 21, 1995, and October 7, 1996, petitioner filed seven motions and two petitions for interlocutory review in this proceeding seeking State Bar Court protection against M. Lamb.

Petitioner's first such motion was a request that certain information in this public proceeding not be disclosed without certain steps taken and that parts of the petition and its attachments be sealed. On October 17, 1995, a State Bar Court judge sealed certain parts of the petition and attachments.

In support of her request, petitioner stated in a declaration under penalty of perjury that she had "sought and obtained" a court restraining order for protection against M. Lamb. However, the Superior Court to which she referred had never entered a written order. At most, petitioner testified that sometime between 1986 and 1988 there were two "oral" orders. Petitioner conceded that she realized at trial of this proceeding that, to be effective, a restraining order had to be written.

The hearing judge found petitioner's testimony on this subject not to be credible, concluding that she was, at best, negligent or at worst, intentionally misleading to secure relief from the State Bar Court.

In August 1996, petitioner sought to expand the October 1995 State Bar Court order. The hearing judge denied it, concluding that it was overly broad in referring to pre-1989 conduct and that it was inconsistent with the showing needed by a petitioner for reinstatement.

We denied petitioner's interlocutory appeal of the hearing judge's order allowing discovery to be reopened by the State Bar to take the deposition of M. Lamb.

Three weeks later, petitioner filed under seal an amended motion to gain added protective relief. It was denied and petitioner appealed to us. We denied relief. Petitioner filed a second amended motion to expand the protective order as well as a motion to strike the State Bar's anticipated response to it. The latter motion was also denied.

The hearing judge also denied petitioner's September 1996 request that the State Bar provide security for her at M. Lamb's deposition.

In September 1996, petitioner filed a request to exclude from the courtroom at trial two witnesses, one of which was M. Lamb.

On September 27, 1996, the State Bar moved to continue the trial on the grounds that petitioner delayed in providing her witness list and that the numerous motions petitioner had recently filed had impeded the State Bar's trial preparation. The State Bar's motion was granted.

In October 1996, petitioner wrote to State Senator Cathie Wright, in whose district petitioner resided, and Member of the State Bar Board of Governors Leon Goldin. Petitioner sought their help in obtaining a protective order from the State Bar Court. She wrote that she was a victim of domestic violence and that if abuse returns, it would be the State Bar's fault. She also represented that she had tried to get the State Bar Court to issue a protective order to help ensure that her husband cannot get information from the case "to directly find me or my daughter....The State Bar OPPOSES the protective order. So far, the State Bar Court has adopted the State Bar's position." Petitioner did not include in this letter that the State Bar Court had granted a limited protective order and that she was seeking an amended order.

Finally, the hearing judge found that petitioner engaged in extensive efforts to contact the superiors of counsel for the State Bar, including the Chief Trial Counsel and the President of the State Bar, in an attempt to influence them to intervene in the protective order matter.

With regard to petitioner's preparation of motions, she told the court's independent psychological evaluator, Dr. Gustlin-Glasser, that she sought advice from her attorney before filing any documents to ensure that they were "legally appropriate". The Court found that petitioner was in pro per until October 1996 and that petitioner personally prepared all motions and appeals up to that time. From those facts, the hearing judge concluded that petitioner failed to accept responsibility for her acts and sought to blame others.

The hearing judge also concluded that petitioner only told part of the truth as it met her needs. He questioned petitioner's lack of professionalism and lack of credibility regarding these motions. He described petitioner's preoccupation with M. Lamb manifested in the many time-consuming motions filed with the State Bar Court as unwarranted and seriously calling into question petitioner's judgment.

Notwithstanding the several concerns of the hearing judge set forth above, and regarding her lack of compliance with rule 955, the hearing judge gave petitioner the benefit of reasonable doubts and recommended her reinstatement. He did so based on the unique nature of the matter leading to disbarment and the totality of petitioner's rehabilitative showing, including the significant passage of time since her misconduct, her positive psychological therapy, her "exceptional employment evidence", her good character and community service record and her good health.

Concerning the expert evidence of petitioner's reaction to M. Lamb, Mandell testified that petitioner's fear of him was normal and appropriate. Mandell opined that things can occur which can stir up old feelings in people who have been apart for a very long time. According to Mandell, this reinstatement proceeding could be such a trigger. The Court's independent expert, Gustlin-Glasser, reported that although petitioner was preoccupied at times with concerns about M. Lamb, this concern was not "obsessional." Petitioner was not found to show signs of disturbed thought processes and petitioner's strong feelings regarding privacy and safety regarding M. Lamb were not dysfunctional.

We agree with the hearing judge's ultimate findings and his conclusions that petitioner has made a satisfactory showing for reinstatement. **[3a]** However, the hearing judge's discussion of his concerns over petitioner's actions regarding M. Lamb in terms of according her a "reasonable doubt" has made our review somewhat difficult.

[3b] It is clear that in a disciplinary proceeding, where the State Bar has the burden of proving charges by clear and convincing evidence, the accused is entitled to the exercise of reasonable doubts. (E.g., *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216; *In re Aquino* (1989) 49 Cal.3d 1122, 1130.) However, in a reinstatement proceeding, where the petitioner unquestionably has the burden of presenting clear and convincing evidence of her qualifications, we cannot give petitioner the benefit of reasonable doubts. (Cf. *In re Menna* (1995) 11 Cal.4th 975, 986.) However, we do not consider that the experienced hearing judge was attempting to revise the standards in reinstatement cases. To the contrary, his decision cites his explicit awareness of the law that a very high burden is borne by a petitioner seeking reinstatement. Thus, by reading the decision in its

entirety, we construe the hearing judge's decision finding reasonable doubts in favor of petitioner on the M. Lamb issues to not invoke the normal meaning of the term "reasonable doubt" as used in this area of law, but rather, such narrow doubt that would be acceptable in a satisfactory showing for reinstatement.

[2b] A close reading of the hearing judge's conclusion that petitioner has proven rehabilitation, together with several adverse findings of petitioner's actions regarding M. Lamb, lead us to support the judge's positive recommendation. Regarding petitioner's testimony about the restraining orders, the judge found it either negligent or intentionally misleading. However, he did not specify at which end of that wide range petitioner's testimony rested. Certainly, if petitioner's understanding of restraining orders was simply careless, no adverse conclusions are justified. We find no basis for a conclusion of dishonesty on petitioner's part regarding the status of the restraining orders. We also draw no adverse moral conclusions from petitioner's frequent litigation in this court over a protective order. Petitioner had a right of reasonable access to this court to seek judicial remedies. Her contact of members of the Board of Governors and senior State Bar staff was also within her rights and she did not pursue inappropriate means to influence judicial decisions. We also conclude that petitioner disclosed adequate facts about the matter in her communications.

We further hold unmerited the State Bar's claim that petitioner withheld facts from her application for reinstatement. The hearing judge did not conclude otherwise. We conclude that petitioner's disclosures were consistent with rehabilitative aims. (See *Calaway v. State Bar* (1986) 41 Cal.3d 743, 749.)

II. CONCLUSION AND RECOMMENDATION.

In over 11 years since her very serious but unique misconduct, petitioner has amassed a most impressive record of employment, outstanding character evidence and psychological rehabilitation. All witnesses agree as to her most positive future. The expert psychological evidence is uncontradicted and attorneys who engage in the enforcement of the tax and criminal laws have been especially impressive in their support for petitioner's high moral character and ability to resist inappropriate pressure. Although petitioner has shown herself very guarded over M. Lamb's possible intrusion into her life, nothing has been shown that is contrary to the very high showing required for reinstatement.

For the foregoing reasons, we recommend that the petition of Laura Beth Salant for reinstatement be granted, subject to her paying the required fees and taking the required oath.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Michael J. Moriarty

A Member of the State Bar

No. 92-O-10612, et al.

Filed March 23, 1999

SUMMARY

The hearing judge found respondent culpable of wide-ranging and serious professional misconduct over a six year period of time and involving six separate client matters. Respondent's misconduct involved incompetent actions in dealing with medical liens; mismanagement of his client trust account; concealment from and overreaching of a disabled client by unilaterally taking $9,000 in attorney's fees; repeated disobedience of court orders; using means inconsistent with the truth in seeking to maintain a civil action and wrongfully attacking opposing counsel; and falsification of six proofs of service in a civil action. The hearing judge recommended disbarment. (Hon. Nancy R. Lonsdale, Hearing Judge.)

Respondent sought review contending that the notice of disciplinary charges failed to give him adequate notice of the charges against him and that the evidence is insufficient to support the hearing judge's findings and conclusions. The review department rejected respondent's contentions, found additional misconduct to that found by the hearing judge, and adopted hearing judge's disbarment recommendation.

COUNSEL FOR PARTIES

For State Bar: Richard Harker

For Respondent: James Farragher Cambell

HEADNOTES

[1] **159 Evidence–Miscellaneous**
164 Proof of Intent
165 Adequacy of Hearing Decision
166 Independent Review of Record
169 Standard of Proof or Review–Miscellaneous
204.20 Culpability–Intent Requirement
204.90 Culpability–General Substantive Issues

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213.40 State Bar Act–Section 6068(d)
221.00 State Bar Act–Section 6106
320.00 Rule 5-200 [former 7-105(1)]

The review department's duty to independently review the record is settled. At the same time, the review department must give great weight to the hearing judge's determination that turns on credibility to be assigned to witness testimony. The department was reluctant, therefore, to ascribe to respondent a specific intent to deceive when the hearing judge who considered respondent's testimony and that of other witnesses found none. This does not exonerate respondent from moral turpitude charges as to his false statement in his motion to disqualify a superior court judge. The hearing judge's conclusion that respondent violated statute and rule of professional conduct requiring attorneys to use only means consistent with truth must be read to find culpability by respondent's gross negligence, as simple neglect would not be sufficient for a statutory violation. Gross negligence is a well-established basis for finding an act of moral turpitude.

[2] **165 Adequacy of Hearing Decision**
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)]

Even though hearing judge expressly found that respondent's violation of statute and rule of professional conduct was based on respondent's gross negligence, she inexplicably declined to apply that gross negligence to find that respondent's conduct involved moral turpitude in violation of statute prescribing attorneys from engaging in acts of moral turpitude. Gross negligence is a well-established basis for finding moral turpitude. Accordingly, review department independently found respondent culpable of act involving moral turpitude.

[3] **148 Evidence–Witnesses**
159 Evidence–Miscellaneous
169 Standard of Proof or Review–Miscellaneous
199 General Issues–Miscellaneous

Even though hearing judge is required to give respondent the benefit of all reasonable doubts, she was not required to devalue evidence she found stronger than that of respondent.

[4 a-e] **1010 Disbarment**

Respondent's wide range of misconduct spanned over six-year period and involved incompetent actions in dealing with medical liens; mismanagement of client trust account; concealment from and overreaching of disabled client by unilaterally taking $9,000 in attorney's fees; repeated disobedience of court orders; using means inconsistent with truth in seeking to maintain civil action and wrongfully attacking opposing counsel; and falsification of six proofs of service in civil action. The gravamen of this case is not only respondent's wide-ranging misconduct in six matters over a lengthy period of time without any substantial mitigation, but is importantly found in his offenses to the honest administration of justice. Past decisions involving even one such serious matter resulted in severe discipline, if necessary, for public protection. Respondent's misconduct unaccompanied by any substantial mitigation, but significant aggravation warranted disbarment.

Additional Analysis

Culpability

Found

213.21 Section 6068(b)
213.41 Section 6068(d)
213.71 Section 6068(g)
220.01 Section 6103, clause 1
221.11 Section 6106–Deliberate Dishonesty/Fraud
221.12 Section 6106–Gross Negligence
270.31 Rule 3-100(A)
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(4)]
280.41 Rule 4-100((B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
320.01 Rule 5-100 [former 7-105(1)]

Aggravation

Found

521 Aggravation–Multiple Acts–Found
582.10 Harm to Client
586.10 Harm to Public
611 Lack of Candor–Bar
691 Other

Mitigation

Found

710.10 No Prior Record

Found but Discounted

740.31 Good Character
740.32 Good Character

Standards

802.62 Appropriate Sanction
831.10 Standards–Moral Turpitude–Disbarment
831.20 Standards–Moral Turpitude–Disbarment
831.40 Moral Turpitude–Disbarment
831.50 Moral Turpitude–Disbarment
831.90 Standards–Moral Turpitude–Disbarment
861.10 Standard 2.6–Disbarment
861.20 Standard 2.6–Disbarment
861.30 Standard 2.6–Disbarment
861.40 Standard 2.6–Disbarment
861.90 Other Reason

Other

175 Discipline–Rule 955
178.10 Costs–Imposed

OPINION:

STOVITZ, J.:

Respondent, Michael J. Moriarty, asks that we review the recommendation of a State Bar Court hearing judge that he be disbarred from the practice of law. Respondent was admitted to practice law in 1972 and has no prior record of discipline.

The hearing judge's disbarment recommendation rests on findings of fact that in six matters, respondent committed wide-ranging and serious professional misconduct over a six-year period. His misconduct involved failure to properly manage his trust account, overreaching a disabled client of modest means by unilaterally taking $9,000 as his attorney fees, repeated disobedience of court orders resulting in several mistrials of a civil jury trial due to respondent's false and misleading statements to the jury, using means inconsistent with truth in seeking a continuance of another civil trial and his falsification in a civil action of six proofs of service coupled with his encouragement of an action from a corrupt motive. Our review of the record shows that respondent's offenses were surrounded by little evidence in mitigation but significant evidence in aggravation. Respondent's repeated acts of deceit stained severely the honest administration of justice. In the circumstances, the hearing judge's recommendation of his disbarment is warranted.

I. FACTS.

A. Smith Matter.

1. Key Findings.

Respondent represented Timothy Smith in 1985 against the makers of a brand of baking soda which allegedly caused serious injury to Smith when he used it to relieve indigestion. The action was tried to a deadlocked jury in San Francisco Superior Court. After a mistrial was declared, Judge Carlos Bea was assigned the case for retrial which was calendared for 1991. Judge Bea bifurcated the retrial into causation and liability phases. Smith won a unanimous jury verdict on the first phase that the baking soda caused Smith's injury. Judge Bea calendared the next phase to start before the same jury in January 1992. It was to decide whether the baking soda was defective in design or warning. If it was so found, the jury was next to decide whether such defect or failure to warn caused injury.

At request of counsel for the defendant baking soda company, Judge Bea made several oral rulings admonishing respondent not to discuss in the jury's presence any medical condition allegedly caused by the product in other users except for the stomach condition at issue. Judge Bea also admonished respondent not to state to the jury other factors such as death arising from ingested baking soda, the alleged withholding of information from government officials regarding deaths from causes other than the type of injury suffered by respondent and directed him not to mention punitive damages.

However, in respondent's opening statement and again while questioning a witness, in January 1992, respondent violated Judge Bea's order in several respects. As examples, the hearing judge found that respondent claimed to have letters referring to the baking soda causing other ailments, such as heart failure and sudden or immediate death following stomach rupture. At the civil retrial, respondent admitted that he had no evidence in the letters that stomach rupture was the cause of death.

Judge Bea admonished respondent not to mention cases involving defendants unrelated to the current one. Despite this, while questioning the defendant's chief executive, respondent referred to a recorded statement in an unrelated case as though it were a deposition in the present case. The hearing judge also found that respondent continued to ask argumentative questions of the defendant's witnesses despite Judge Bea's admonitions.

In January 1992, concluding that a fair trial was not possible and noting respondent's repeated acts of prejudicial misconduct, Judge Bea declared a mistrial, dismissing the jury. One week later, respondent moved for Judge Bea's recusal. Because respondent did not want another San Francisco judge to decide the recusal motion, it was ultimately referred by the Judicial Council to a judge of the Alameda County Superior Court who denied the motion.

In May 1992, another jury was impaneled to hear the second phase of the retrial but, on the day of respondent's opening statement, Judge Bea declared another mistrial. Leading up to this ruling were respondent's reference in opening statement to letters that had not been admitted in evidence and his inaccurate paraphrase of one letter. The hearing judge also found that, in violation of Judge Bea's rulings, respondent had continued to state to the jury that deaths and injuries were caused by baking soda when those instances had nothing to do with the circumstances involved in the case on retrial.

The next day, May 21, 1992, a third jury was impaneled. This jury rendered a special verdict for the defense. The resulting judgment was affirmed by the court of appeal in April 1995.

During the various trial proceedings in the *Smith* case, sanctions were imposed on respondent exceeding $43,000. The hearing judge found the following as to those sanctions:

In November 1991, during the first phase of trial, respondent was sanctioned $750 following a contempt adjudication. Respondent had elicited an opinion from a doctor who was deemed not competent to give such an opinion after respondent had been admonished by Judge Bea more than ten times not to elicit such an opinion.

In May 1992, after the first mistrial of the second phase of the retrial, Judge Bea imposed sanctions on respondent of $28,778.50. This order was taken under Code of Civil Procedure section 128.5 and was based on Judge Bea's finding that respondent's conduct was in bad faith and solely to harass the defendant. Judge Bea made an identical determination after the second mistrial and imposed sanctions on respondent of $12,339.24.

Finally, Judge Bea fined respondent $1,250 in June 1992 on a contempt adjudication based on respondent's contemptuous conduct on five occasions during the second phase of trial.

From the foregoing findings, the hearing judge in this disciplinary proceeding concluded that respondent failed to maintain the respect due to the courts (Bus. & Prof. Code, § 6068 (b))[1] by violating or ignoring court orders applying to his case presentation. The judge also concluded that respondent violated section 6068(d) and rule 5-200(B)[2] (using means inconsistent with truth) in misleading the jury as to a deposition in the case, and in misleading the jury in other respects. Noting that the latter conclusions were duplicative, the hearing judge assigned no added weight to the duplication for discipline reasons.

Finally, the hearing judge concluded that there was no clear and convincing evidence that respondent engaged in acts of moral turpitude in this matter because of his noncompliance with Judge Bea's orders. The hearing judge could not find sufficient proof of required bad faith to support a moral turpitude conclusion.

2. Discussion.

Respondent levies several attacks on the hearing judge's findings and the proceedings which led to them. The State Bar disputes respondent's charges and supports the findings and conclusions of his culpability.

Respondent argues at length that the record contains insufficient and inaccurate evidence of Judge Bea's orders which respondent violated. We agree with the State Bar's refutation of respondent's claim. The record contains ample evidence of Judge Bea's orders as well as of respondent's conduct. At best, respondent's attack on the record is not a quarrel with what is in evidence but is his attempt to explain his remarks in a more favorable light.

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

2. Unless noted otherwise, all references to rules are to the provisions of the Rules of Professional Conduct of the State Bar.

Respondent argues that the hearing judge improperly relied on "a collateral estoppel theory and/or 'great deference to the civil court's rulings'." Acknowledging that the hearing judge did not rely on a collateral estoppel theory to find respondent culpable of misconduct arising out of the sanction and contempt orders, respondent contends that the hearing judge was obligated to review the State Bar's evidence, including the various reporter's transcripts, to determine whether any of respondent's conduct was a cause for discipline. The State Bar opposes this argument and we agree with this opposition. Respondent's argument is unsupported by any relevant legal authority and is without merit.

The hearing judge discussed carefully the doctrine of collateral estoppel, refusing to apply it to the sanctions ordered under Code of Civil Procedure section 128.5. She did give deference to Judge Bea's final orders which were affirmed on appeal. The hearing judge's decision was correct. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605 [cited by the hearing judge].)

Respondent also attacks the notice of disciplinary charges as insufficient. However, his discussion is both general and diffuse and we determine that the charges adequately placed respondent on notice as to what offenses he was being called on to defend.

We need not discuss at length respondent's last attack on the findings that Judge Bea's sanctions order constituted reversible error under the decision in *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc* (1997) 60 Cal.App.4th 352. The State Bar disputes that *Trans-Action* supports respondent's position. We agree and note that at oral argument, respondent so conceded.

Reviewing the record independently (e.g., *In re Morse* (1995) 11 Cal.4th 184, 207), we have determined that the findings and conclusions of the hearing judge are not only fully warranted but that the appropriate conclusions are even more serious than those drawn by the judge. The judge refused to conclude that respondent committed moral turpitude, since she determined that there was no clear and convincing proof that he acted in bad faith. However, that determination covers only part of the charges in this count. The hearing judge properly concluded that respondent committed several acts of dishonesty, discussed *ante*. Those same conclusions also warrant our conclusion that respondent committed moral turpitude.

B. Middleton Matter.

1. Key Findings.

Prior to January 1992, respondent represented Margery Middleton in a legal malpractice action pending in the Humboldt County Superior Court. As respondent was preparing for trial in this matter, he realized he would also be in trial in the *Smith* case, discussed *ante*. However, he believed that the *Smith* case would conclude before the scheduled start of the *Middleton* case. Trial in *Middleton* was set for January 27, 1992 and on January 15, the *Smith* case mistried. Six days later, respondent moved to disqualify the trial judge in *Smith*. The matter was ultimately referred to the state Judicial Council which assigned the disqualification motion to the Alameda County Superior Court.

In the meantime, respondent sought a continuance of trial in the *Middleton* matter. In a declaration to support his continuance request filed in January 1992, respondent stated that he would be unavailable for trial as he had been "ordered to be available in the Judicial Council" with regard to his motion in the *Smith* case. The hearing judge found inaccurate respondent's statement to the Humboldt County Superior Court that he had been ordered to be available in the Judicial Council in that no hearing or other proceeding had been set by the Judicial Council. On the basis of her finding, the hearing judge concluded that respondent failed to use means consistent with the truth and thus violated section 6068 (d) and rule 5-200. Since she concluded that respondent did not intend to mislead the court, she found respondent not culpable of an act of moral turpitude by his making of a false statement.

In this matter, the hearing judge also found that respondent's associate attorney, John Daniel, told the superior court in May 1992 that the *Middleton* case was settled when it was not. Daniel testified below that respondent told him to so advise the superior

court. The superior court placed the matter on its dismissal calendar. Respondent filed an opposition in which he stated in a declaration that opposing counsel apparently informed the court that the case had settled and was "at a loss to understand how [opposing counsel] believed the case had settled . . . ." The superior court dismissed the case and respondent appealed, urging that the dismissal was through neglect and extrinsic fraud. The Court of Appeal concluded that respondent "dropped the ball" but remanded the case as no settlement had been reached. Upon remand, the trial court issued a new dismissal order.

After finding that neither Daniel nor respondent were credible, the hearing judge concluded that respondent did not engage in moral turpitude in accusing opposing counsel of misrepresenting that the case had been dismissed. However, the hearing judge found that respondent was responsible for: prosecuting the *Middleton* case, the misrepresentation made by his associate and the false accusation against opposing counsel. The hearing judge concluded that respondent's gross neglect and inattentiveness to investigate when it appeared that someone had misrepresented to the court that the case had been settled constituted a violation of section 6068 (d) and rule 5-200 [failure to use only means consistent with the truth].

2. Discussion.

At trial and on review, respondent contends that he understood the Judicial Council procedure on his motion to disqualify in the *Smith* case to require that he be available to appear before the Council. However, respondent was unable to point to any statute, rule, decision or order as authority for his claimed belief that he was obligated to appear or that the Council would even hold a hearing. He also contends that the hearing judge's conclusions of culpability were erroneous because such violations require a finding of specific intent to mislead. The State Bar urges us to find, on an independent review of the record, that respondent did have an intent to mislead the court. It points to the many efforts respondent made to continue the *Middleton* case in order to have time to work on the *Smith* case.

[1] Our duty to independently review the record is settled. (See *In re Morse, supra,* 11 Cal.4th at p. 207.) At the same time, we must give great weight to the hearing judge's determination that turns on credibility to be assigned to witness testimony. (*In the Matter of Sawyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 765, 770; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 124.) We are reluctant, therefore, to ascribe to respondent a specific intent to deceive when the hearing judge who considered respondent's testimony and that of other witnesses found none. This does not exonerate respondent from moral turpitude charges as to his false statement regarding the Judicial Council proceedings on his motion to disqualify the trial judge in *Smith.* The hearing judge's findings must be read to find culpability by respondent's gross negligence, as simple neglect would not be sufficient for a statutory violation. (E.g., *Call v. State Bar* (1955) 45 Cal.2d 104, 109.) Gross negligence is a well-established basis for finding an act of moral turpitude. (See *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) The hearing judge did not explain why she declined to use respondent's gross neglect to support a conclusion that he engaged in moral turpitude. On our independent review of the record, we so conclude and reverse the hearing judge's determination that no moral turpitude was involved in respondent's false statement to the superior court. Accordingly, we deem the findings of section 6068 (d) and rule 5-200 violations to be essentially duplicative of the moral turpitude findings and we therefore assign no weight to them for disciplinary purposes.

[2] For the same reasons, we also find that respondent engaged in moral turpitude by gross neglect by peremptorily accusing opposing counsel of misrepresenting to the superior court that the *Middleton* case had been settled. As to this aspect of the *Middleton* case, the hearing judge expressly found respondent to have acted in a grossly negligent manner in concluding that he violated section 6068(d) and rule 5-200. Inexplicably, the hearing judge declined to apply that gross neglect finding to conclude that respondent was culpable of moral turpitude as proscribed by section 6106. As in the first aspect of this matter, the moral turpitude finding is duplicative

of the finding of violation of section 6068(d) and rule 5-200 and we disregard the latter findings for purposes of degree of discipline. Accordingly, we need not decide respondent's claim whether violations of 6068 (d) and rule 5-200 must rest on findings of specific intent to deceive.

C. Alexander Matter

The hearing judge found no culpability and recommended dismissal of this count. On review, the State Bar does not contest the dismissal. Since our review is independent (see *ante*), we summarize the matter very briefly. In about summer 1992, Brenda Alexander contacted respondent about representing her in a medical malpractice case. Respondent agreed to evaluate the case but did not yet agree to represent Alexander. A doctor to whom respondent referred the case for evaluation reported it was not viable. It is undisputed that respondent never filed suit. Alexander testified that respondent told her he was taking the case. Respondent testified to the contrary.

The hearing judge gave specific reasons for discrediting Alexander's testimony and concluded that there was no clear and convincing evidence supporting the charges that respondent either failed to act competently or improperly withdrew from employment. Moreover the hearing judge found that respondent's office manager contacted Alexander about picking up her papers about the case so she could choose other counsel.

We adopt the hearing judge's decision dismissing this matter.

D. McKinley Matter.

1. Key Findings.

This matter arises from respondent's undisputed failure to timely pay a medical lien. Respondent urges that this was a technical violation which should not be weighed in assessing discipline. Based on our review of the record, we must disagree with respondent and agree with the State Bar which seeks to uphold the hearing judge's findings.

In 1991, respondent was counsel for members of the McKinley family in a personal injury case. A signed lien ran in favor of a medical provider, East Bay Orthopedic, Group (East Bay).

In about January 1992, the case settled for a total of $6,200. Respondent took his 1/3 attorney fee and paid the rest, $4,133, to the McKinleys. He did not pay East Bay. When East Bay contacted respondent twice in 1992, it got no answer from him. In February 1993, East Bay sought help from the State Bar. It contacted respondent. Respondent pulled his closed file, discovered the lien had not been paid, and in October 1993, respondent paid the lien of $870 from his own funds and never asked for repayment from the McKinleys.

The hearing judge found that: respondent violated rule 3-110(A) by recklessly failing to honor the medical lien until 20 months after he had received the settlement proceeds and also violated "technically" rules 4-100(A) and 4-100(B)(1) by not having in trust the $870 and by not promptly paying it.

2. Discussion.

Neither party cites any decisions supporting the hearing judge's findings. We have not held every untimely failure to pay a medical lien disciplinable. In *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113-114, we declined to find the attorney culpable of a wilful violation of rule 3-110(A) as to express contractual liens. There the record showed that the attorney negligently misplaced his records of those liens and there was no evidence of repeated or reckless conduct. In contrast, we concluded that Riley recklessly failed to perform services competently as to statutory liens. (*Id.* at pp. 111-112).

In the case before us, East Bay called this matter to respondent's attention twice over a period of several months and was finally required to seek the State Bar's aid before respondent took sufficient efforts to research the matter and resolve it. Consequently, respondent's actions were reckless. Moreover, the more common way in which failure to properly handle medical liens is addressed is by finding the trust account rules to he wilfully violated

by failing to maintain in trust the requisite funds. (E.g., *In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. 119, 127-128; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 633.) As we noted in *Sampson,* the failure to pay an outstanding medical lien can violate rule 4-100 (B) even if the attorney acted in good faith. That the hearing judge focused on rule 3-110 (A) in this count rather than the trust account rules did not show that respondent's offense was merely technical.

E. Client Trust Account charges.

1. Key Findings.

This count concerns respondent's misuse of his trust account at Pacific Bank in 1992 and 1993. Respondent also had a general (non-trust) account at this bank. In 1992 and 1993, respondent made six transfers from the general to the trust account. Two of the transfers were large, $16,000 on June 2, 1992, and $12,000 on April 19, 1993. Respondent had no explanation for any of the six transfers.

Moreover, between March and July 1992, respondent's trust account balance fell below zero at several times. Yet respondent still wrote checks on the account. Examples of these negative balances were: $-370.37 on March 31, 1992 and $-1,558 on June 23, 1992.

Between February 1992 and June 1993, respondent made several payments from the trust account on various business and personal loans. These payments were made from trust because a bank officer, unaware of the special nature of an attorney trust account, chose to make payments from respondent's trust account rather than from his other account. Some of these unauthorized uses of the trust account were reversed by the bank but the practice continued after respondent's accountant had caught the errors in earlier months.

The hearing judge concluded that although respondent was not culpable of commingling trust and personal funds because of the bank's error, he did wilfully violate rule 4-100 (A) by failure to properly maintain and supervise his trust account over several months, especially by his large, unexplained transfers from the general account. No clear and convincing evidence was presented that respondent had wilfully violated any subdivision of 4-100 (B) as in the amended charges. But, citing *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, the hearing judge concluded that respondent's gross mismanagement of his trust account amounted to moral turpitude under section 6106.

2. Discussion.

Respondent argues broadly that the rule 4-100 (A) and section 6106 charges are not supported. However, his attack on the evidence extends only to disputing the March 31, 1992, invasion by the bank of his trust account to make a loan payment. The State Bar agrees that respondent should not be held responsible for his bank's action in debiting a particular account, but correctly points out that the hearing judge's findings are supported because of the other acts of trust account mismanagement far beyond the March 31 loan debit, which are unexplained by respondent's evidence. Also, respondent's argument that no client was injured as a basis for undercutting culpability shows a complete misunderstanding of decades of Supreme Court precedent as to the important prophylactic nature of rule 4-100 (A) and its predecessor rules, 8-101 and rule 9. (Among many cases, see *Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777; *Silver v. State Bar* (1974) 13 Cal.3d 134, 144-145; *Peck v. State Bar* (1932) 217 Cal. 47, 51.)

F. Oei Matter.

1. Key Findings.

In this matter, the hearing judge found misconduct in two main ethical areas: 1) respondent forged another's signature on six proofs of service, then represented that the signature was true; and 2) respondent failed to dismiss an unjust action. The findings arose out of a medical malpractice action by the Oeis against UCSF Medical Center concerning complications surrounding the birth of the Oeis' fourth child. Respondent represented the Oeis in this case in 1994. During discovery, respondent was obligated to provide an expert witness list by July 1994. When defense counsel did not receive the list,

he asked respondent to dismiss the case. Respondent faxed defense counsel a copy of the list he claimed had been served on July 26.

The list bore a proof of service signed by one Dasmann. Respondent also filed five more documents in the case with proofs of service bearing Dasmann's name. These were signed between June 14 and September 6, 1994.

Skeptical defense counsel deposed Dasmann who testified that she worked for respondent for only one month in May-June 1994, not in July, and she did not sign the proof of service attached to the witness list. When defense counsel pressed for dismissal of the case, respondent stated to the court that his daughter had signed Dasmann's name to the six proofs.

The State Bar's documents expert opined that respondent signed Dasmann's name to all six proofs. Respondent denies this but cannot say who signed four of the six proofs. Below, respondent contended his daughter signed two of them. The hearing judge gave specific reasons for discrediting the testimony of respondent's daughter and found respondent did sign Dasmann's name to all six proofs. The hearing judge concluded that respondent did not serve the expert witness list by July 26, falsely represented that he had done so and falsely represented to the State Bar Court that his daughter had signed two proofs of service.

In the medical malpractice action, respondent propounded no discovery, took no depositions and did not timely disclose an expert witness. Yet he failed to dismiss the suit in its entirety and even refiled the identical suit naming his clients as guardians for the infant. The superior court sanctioned respondent $350 for failing to appear at a hearing as to why the case should not be dismissed. Also, the court sanctioned respondent's clients $3,000 for failing to dismiss the case. Two other sanction orders were filed, one against respondent and one jointly against respondent and his clients. The sanctions remain unpaid.

As noted, the hearing judge found that respondent had forged Dasmann's name to all six proofs. Respondent was found culpable of "serious" acts of moral turpitude (section 6106) as well as wilfully violating section 6068(d) and rule 5-200 [using means inconsistent with truth and misleading the court].

As to the sanctions order charge, the hearing judge found that respondent violated section 6103 [failure to obey court order] as to the two orders imposing sanctions against respondent. The hearing judge also found a violation of section 6068(g) [encouraging an action from any corrupt motive of passion or interest] by refiling the Oei's lawsuit with no substantive changes.

2. Discussion.

As to the proofs of service, respondent now concedes that the proofs were forged, by someone whom he does not know. He admits he must bear responsibility for failure to adequately supervise subordinates. He accepts no other responsibility and reargues the points which the hearing judge resolved against him. Specifically, respondent complains that the hearing judge devalued the testimony of his daughter and over-valued the testimony of the State Bar's questioned documents expert. As to the attempt to keep an unprosecuted cause of action alive, respondent argues that the case was always viable, based on his good-faith belief and his research. He also alleges that the medical malpractice defense bar is responsible for disciplinary charges here as it was opposing respondent who is known to support his clients to the utmost. The State Bar supports all of the hearing judge's findings, noting that respondent failed to challenge the handwriting expert's methodology and conclusions. It also supports the conclusions of respondent's violation of section 6068 (g) on the ground that since he did no discovery, took no depositions and failed to respond to defense discovery, he could not have had any good-faith belief that his client's case was viable.

[3] We adopt the hearing judge's findings and conclusions in this matter. The judge correctly gave weight to the testimony of the questioned documents expert who gave specific reasons for his qualified positive opinion that respondent, not Dasmann, signed Dasmann's name to the relevant proofs of service. Respondent had ample opportunity to challenge the methodology of the State Bar's expert but failed to

timely do so. His belated attack on the expert's analysis is unavailing. Respondent is also confused as to the role of the hearing judge. While he correctly states that the judge should give him the benefit of all reasonable doubts, the judge was not required to devalue evidence she found stronger than respondent's on this issue. (Cf. *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 775.) The judge evaluated the case fairly and properly in reaching her findings.

Respondent's defense to the charges of violation of section 6068(g) are also without merit. Respondent offered no proof of any tangible steps to move the case along. The evidence shows that his only expert doubted that the defendant health care providers were responsible for any damages to his client.

G. Giannini Matter.

1. Key Findings.

In 1988, the Gianninis hired respondent for legal action against an insurer. An agent of the insurer had covered the cost of premiums on extra insurance policies for the Gianninis by "stripping" the value of their underlying insurance policy. This rendered the basic policy of the Gianninis much less valuable. As Mr. Giannini was disabled, the diluted disability feature of his insurance was a serious threat to his security. When the Gianninis were unable to get the insurer to rescind what its agent had done, they hired respondent. Respondent accepted the Giannini's case under a 33% contingent fee contract. In 1990, respondent was able to get relief for the Gianninis both by the insurer's restoration of some of the value of the underlying policy and by a $9,000 cash payment.

When the insurer settled the matter and paid the $9,000, respondent decided on his own to keep the entire $9,000 as his legal fees. Respondent's reason for doing this was that the value of the insurance policy restored was high enough so that he earned the entire $9,000. Respondent did not tell the Gianninis that he had received the $9,000 payment. The clients learned about this in 1994 from their new insurance agent who told them that they were entitled to keep some of the $9,000. Also in 1994, new counsel consulted by the Gianninis wrote to respondent about the matter. After much delay, respondent confirmed only that he had kept the entire amount. After fee dispute arbitration, the clients were awarded most of the $9,000 ($6,000 plus $1,878 and costs).

The hearing judge found that there was "great room for dispute" over the value of what respondent recovered for the Gianninis. Accordingly, the hearing judge concluded that the only proper course for respondent was to give the clients a timely, complete accounting and settlement statement and keep the money in trust if any dispute needed resolution. Since he did not do this, the hearing judge concluded that he wilfully violated rules 4-100 (A) and (B)(1), (3) and (4). He also committed moral turpitude by his overall overreaching and concealment.

2. Discussion.

Respondent concedes that he had a 33% contingent fee arrangement but on review claims without any support that he later negotiated a $9,000 fee agreement with the Gianninis and refers to a release signed by the Gianninis. Yet respondent admits, as he must, that the release referred to the $9,000 but not as respondent's fee.

The State Bar points to undisputed facts as supporting the hearing judge's findings; i.e., that respondent never told the clients of receiving the $9,000, and the inconsistent explanation of respondent's "release". This explains the clients' silence over several years in seeking to recover the $9,000.

Our examination of the release does not aid respondent in any way. It releases only the defendants in the insurance action, mentions a $9,000 payment from them and does not purport to affect respondent's fees.

We support the hearing judge's findings, especially agreeing with the hearing judge as to the overreaching nature of respondent's misconduct. Respondent appears to be unaware of long-standing Supreme Court precedent that even if an attorney is owed fees for legal services, he may not unilaterally decide those fees and use the trust funds in his

possession to satisfy his claim. (E.g., *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358; *Most v. State Bar* (1967) 67 Cal.2d 589, 597.)

II. EVIDENCE RE MITIGATION AND AGGRAVATION.

The hearing judge found in mitigation that respondent had no prior record in 16 years of practice between admission in 1972 and his first misconduct in 1988. She gave slight mitigating weight to respondent's three character references, pointing out that they were not apprised of the full extent of respondent's misconduct. This was the only evidence in mitigation presented. We agree with the hearing judge's findings regarding this mitigating evidence and we conclude that it is clearly offset by evidence of aggravating circumstances.

Some of respondent's character evidence was aggravating in that it demonstrated respondent's bad character. Two judges each testified that respondent's conduct in their courtrooms was rude and contemptuous, well past the bounds of acceptable advocacy. Also, the record contains evidence of respondent's poor character presented by the testimony of two attorney witnesses. One witness testified that respondent lied and the testimony of the other attorney witness established that respondent lied in another matter. Further, the hearing judge found in aggravation that just before trial of this matter in the Hearing Department, respondent concealed this matter from the civil court in another matter concerning whether he had a conflicting trial date. Finally, the hearing judge found that respondent had lied to her regarding a continuance. Our independent review of the record supports the hearing judge's findings.[3]

As the judge observed, these are serious aggravating circumstances.

Also in aggravation, the hearing judge found a record of multiple acts of misconduct over a six-year period (1988 - 1994) and a "pattern" of dishonesty. Whether or not the several instances of deceit rise to a "pattern" of misconduct (see *Levin v. State Bar* (1989) 47 Cal.3d 1140 [discussion of "pattern"]), they unquestionably show multiple acts of dishonesty.

Additionally, we agree with the hearing judge's findings that respondent significantly harmed his clients and the administration of justice by his conduct in several of the matters.

III. DEGREE OF DISCIPLINE.

As in so many disciplinary cases, recommending the appropriate degree of discipline is the key issue in this proceeding. It is well settled that there is no fixed formula in arriving at the appropriate recommendation. (E.g., *Gadda v. State Bar* (1990) 50 Cal.3d 344, 354.) Rather, each case must be decided on its own based on a balanced consideration of all relevant factors. (*Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) The ultimate purpose of attorney discipline is to ensure the protection of the public, courts and legal profession (Std. 1.3, Standards for Attorney Sanctions for Professional Misconduct (Stds).)

[4a] Respondent's six matters of misconduct were wide-ranging and, collectively, most serious. Even the least serious count, the *McKinley* matter, showed respondent's incompetent actions and failure to adhere to trust account rules. The *Trust Account Matter* count showed respondent's abdication of the prophylactic controls designed to ensure that more serious losses of client funds do not occur. The *Giannini* matter displayed respondent's concealment of facts from and clear overreaching of his disabled client in the unilateral taking of $9,000. The *Smith* matter demonstrated not only respondent's repeated disobedience of court orders but his repeated falsity in getting matters before the jury not

3. The hearing judge also found that respondent suborned perjury of an expert witness in a civil matter who was allowed to testify that he had no relationship with respondent at a time that respondent represented the witness in a civil action to which the witness was a party. We do not give weight to this evidence as the testimony establishing it was objected to on hearsay grounds and was not admitted for the truth of the assertions.

even established by competent evidence. In the *Middleton* matter, respondent used means inconsistent with the truth in seeking to continue the civil trial and in wrongly attacking opposing counsel. Finally, in the *Oei* matter, respondent forged six proofs of service to maintain a lawsuit in which he had failed to participate in discovery. When the suit was dismissed, he merely refiled it in a transparent way. Collectively, respondent's misconduct spanned six years. Respondent's misdeeds harmed significantly the honest administration of justice in three of the six matters.

Looking to the Standards for guidance, there was ample basis to support the hearing judge's recommendation. (See Stds. 2.2 (offenses involving entrusted property), 2.3 (moral turpitude), 2.6 (violations of section 6068) and 1.6(b)(i) (when evidence of aggravating circumstances outweighs mitigating circumstances).)

[4b] The only significant mitigating evidence was respondent's lack of prior discipline. But the evidence of aggravating circumstances was significant. This took the form of the multiple, serious nature of respondent's misconduct which harmed clients and the administration of justice and unfavorable character evidence which, historically, is seldom seen in attorney disciplinary cases.

Neither respondent nor the State Bar have cited past decisions which are similar to this one. Respondent has cited several of our decisions but they are all significantly different from the essence of this case. *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, the attorney had misappropriated about $5,700 which he was required to keep in trust to pay liens of medical providers. Mapps' offenses were aggravated by issuance of insufficiently funded checks yet they involved none of the serious threats to the honest administration of justice found here. Also significant differences from respondent's case were that Mapps' misconduct occurred over a short period of time and he admitted his misdeeds. On our recommendation, the Supreme Court ordered a two year actual suspension.

Respondent's reliance on *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, is similarly unhelpful to him. *Fonte* involved but two matters of misconduct resulting in actual suspension for 60 days. While Fonte's matters involved a variety of ethics violations, showed overreaching to clients and were serious, they did not approach the gravity of respondent's dishonesty and repeated harm to the administration of justice. Moreover, Fonte presented evidence of very impressive mitigation.

In *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73, the attorney was actually suspended for one year for abandoning three clients and repeatedly deceiving them. There we considered many cases of other attorneys culpable of similar misconduct to guide us. As serious as Peterson's deceit was to his clients, and his lack of cooperation was with the State Bar, his case did not show the clear harm to the justice system which respondent's culpability shows.

In the Matter of Hertz (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, on which respondent also relies, seems more to persuade us to adopt the hearing judge's disbarment recommendation than to support respondent's claim that it is excessive. Hertz had committed serious misconduct in only one matter over an extended period of time. He unilaterally misapplied trust funds in a marriage dissolution matter and misled opposing counsel and the trial and appellate courts about his misdeeds. However, he did present impressive evidence in mitigation which we weighed more heavily than did the hearing judge. The Supreme Court ordered Hertz's two year actual suspension.

[4c] The State Bar correctly cites *Chang v. State Bar* (1989) 49 Cal.3d 114, to exemplify that the Supreme Court has not required a prior record of discipline when ordering disbarment in appropriate cases.[4]

4. Many other decisions of the Supreme Court in original proceedings may be cited for the same result. (E.g., *Sands v. State Bar, supra*, 49 Cal.3d 919; *Kennedy v. State Bar* (1989) 48 Cal.3d 610; *Bowles v. State Bar* (1989) 48 Cal.3d 100; *Weber v. State Bar* (1988) 47 Cal.3d 492; *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218; *Cooper v. State Bar* (1987) 43 Cal.3d 1016; *Rosenthal (Jerome) v. State Bar* (1987) 43 Cal.3d 612; *Rosenthal (Michael) v. State Bar* (1987) 43 Cal.3d 658.) More recently, see e.g., our decisions in *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657 and *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390. In both of these decisions, the Supreme Court followed our recommendation and ordered disbarment.

[4d] The gravamen of this case, correctly identified by the hearing judge, is not only respondent's wide-ranging misconduct in six matters over a lengthy period of time without any substantial mitigation, but is importantly found in his offenses to the honest administration of justice in the *Smith*, *Middleton* and *Oei* Matters. When we look at past decisions involving even one such serious matter in the proceeding, we see severe discipline imposed, if necessary, for public protection. (See *Sands v. State Bar*, *supra*, 49 Cal.3d 919; *Weir v. State Bar* (1979) 23 Cal.3d 564; *In re Jones* (1971) 5 Cal.3d 390.)

[4e] The hearing judge had the opportunity to assess respondent's character and conduct over 12 days of trial. She recommended disbarment out of concern that this case was not about simple overzealous representation of clients, as respondent had often urged, but that respondent had been intentionally and repeatedly dishonest. As the hearing judge concluded, respondent was not worthy of trust and was a serious risk to the courts and public. From our independent review of the record, we reach the identical conclusions of the hearing judge and therefore adopt her recommendation of disbarment.

V. CONCLUSION.

For the foregoing reasons, we recommend that respondent, Michael J. Moriarty, be disbarred from the practice of law in this State. We recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, in the customary manner as in other such recommendations. 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.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Kathryn Jo-Anne Dixon

A Member of the State Bar

No. 94-O-12203, et al.

Filed March 15, 1999; as corrected April 27, 1999

SUMMARY

The hearing judge found respondent culpable of 29 counts of professional misconduct involving 8 separate clients; recommended that respondent be disbarred; and ordered respondent involuntarily enrolled as an inactive member of the State Bar in accordance with Business and Professions Code section 6007, subdivision (c)(4) (inactive enrollment upon filing of a disbarment recommendation). (Hon. Nancy R. Lonsdale, Hearing Judge.)

Respondent sought review of the hearing judge's decision and order of inactive enrollment. With one exception, the review department adopted each of the hearing judge's culpability findings as well as her disbarment recommendation. The review department left in place the order enrolling respondent as an inactive member of the State Bar.

COUNSEL FOR PARTIES

For State Bar: Andrea T. Wachter

For Respondent: Kathryn J. Dixon, in pro. per.

HEADNOTES

[1 a, b] 221.00 State Bar Act–Section 6106

Respondent engaged in an act involving moral turpitude when she had client sign blank pleading forms and then later completed the forms and filed them as having been executed under penalty of perjury without first confirming the accuracy of the information with client.

[2 a-i] 193 Constitutional Issues
199 General Issues–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.

204.90 Culpability–General Substantive Issues
221.00 State Bar Act–Section 6106
320.00 Rule 5-200 [former 7-105(1)]

Disciplinary rules governing legal profession cannot punish activity protected by First Amendment, but neither false statements made knowingly nor false statements made with reckless disregard for truth are protected by First Amendment. Thus, because respondent's statements in pleadings, which she filed in superior court action and this disciplinary action, that her opposing counsel in superior court action was "well-known racist," "champion of the Emeryville pedophile ring," "operated by organized crime," "intent upon avoiding his own criminal indictment," and "motivated by racial hatred," and described young children as "niggers, hood and scums" were proved false at trial; because those statements were not mere rhetorical hyperbole, incapable of being proved true or false; and because respondent either knew statements were false or made them with reckless disregard of truth as there was no objective evidence that statements were true, hearing judge properly found respondent culpable of violating professional rules requiring attorneys to employ only such means as are consistent with truth and not to seek to mislead courts and judicial officers as well as statute proscribing acts involving moral turpitude.

[3] **193 Constitutional Issues**
213.60 State Bar Act–Section 6068(f)

Charge for violating statute proscribing offensive personality was dismissed because statute was previously declared unconstitutionally vague by federal appeals court.

[4 a, b] **220.20 State Bar Act–Section 6103.5**

Even though respondent did not promptly communicate, to her client, the terms and conditions of settlement offer in letter respondent received from opposing counsel, respondent was not culpable of violating statute requiring attorneys to promptly communicate such information to their clients because opposing counsel sent a copy of letter to respondent's client, which client received.

[5 a-c] **135.50 Procedure–Rules of Procedure**
139 Procedure–Miscellaneous
148 Evidence–Witnesses
159 Evidence–Miscellaneous

Hearing judge did not abuse her discretion in issuing a pretrial order precluding respondent from attempting to impeach State Bar's witnesses with evidence of witnesses' alleged criminal activities, terrorist activities, racism, hate crimes, molestation of foster children, etc. except by evidence of proved felonies introduced into evidence in strict compliance with Evidence Code.

[6 a-g] **135.50 Procedure–Rules of Procedure**
136.20 Procedure–Rules of Procedure
139 Procedure–Miscellaneous
192 Due Process–Procedural Right

When respondent's refusal to provide names of any witnesses or identify any exhibits as required by Rules of Practice regarding pretrial statements and exchange of exhibits was based on

respondent's dissatisfaction over hearing judge's pretrial order, hearing judge did not abuse discretion in sanctioning respondent for not complying with Rules of Practice by precluding respondent from presenting any evidence at trial.

[7 a-h] **135 Procedure–Rules of Procedure**
139 Procedure–Miscellaneous
192 Due Process–Procedural Right

Neither due process nor former Transitional Rules of Procedure, rules 508 and 509 required State Bar to give respondent exhaustive list of each complaint against her before filing notice of disciplinary charges. Former rules 508 and 509 merely gave respondent right to deny or explain her actions to State Bar and inquire of State Bar concerning the charges against her.

[8 a-c] **159 Evidence–Miscellaneous**
194 Statutes Outside State Bar Act
611 Aggravation–Lack of Candor–Found

Respondent's calling and threatening State Bar witness shortly before trial can be for no purpose other than interference with disciplinary proceeding and tends to demonstrate knowledge of culpability on part of respondent. Because such evidence was not offered to show culpability in uncharged count, it was properly admitted and considered as serious aggravation; see Penal Code section 136.1, subdivision (a)(2) (crime to prevent of dissuade another from attending or testifying).

[9 a-e] **144 Evidence–Self-Incrimination**
193 Constitutional Issues
611 Aggravation–Lack of Candor–Found

Party invoking Fifth Amendment bears burden of showing that proffered evidence might tend to incriminate. Thus, while respondents may not be disciplined solely for invoking Fifth Amendment, the improper invocation of that amendment and resulting refusal to testify may be considered as aggravation if culpability has otherwise been found.

[10] **120 Procedure–Conduct of Trial**
144 Evidence–Self-Incrimination
193 Constitutional Issues

Whether hearings to determine witness's right to Fifth Amendment privilege should be held in camera rather than open court is left to trial court's discretion.

[11] **144 Evidence–Self-Incrimination**
159 Evidence–Miscellaneous
193 Constitutional Issues

Hearing judge did not error in drawing inferences against respondent with respect to authenticity of documents written by respondent when respondent refused to answer proper questions after respondent's claim against self incrimination under Fifth Amendment was denied and she had been ordered to answer.

[12 a, b] 565 Aggravation–Uncharged Violations–Declined to Find

Hearing judge erred in concluding that respondent's agreement with former client to withdraw client's complaint with State Bar and not to testify against respondent in State Bar Court was aggravation as uncharged violation of statute making an agreement to withdraw complaint to State Bar disciplinable because that statute was not in effect at time respondent made agreement with former client.

[13 a-c] 561 Aggravation–Uncharged Violations–Found

Respondent's agreement with former client to withdraw client's complaint with State Bar and not to testify against respondent in State Bar Court was aggravation as uncharged violations of professional rules proscribing suppression of evidence (rule 5-220) and prohibiting attorneys from causing persons to be unavailable as witnesses (rule 5-310(A)).

[14 a-c] 102.90 Procedure–Improper Prosecutorial Conduct–Other
162.20 Proof–Respondent's Burden
192 Due Process–Procedural Rights
193 Constitutional Issues

It is not evident whether defense of selective prosecution is applicable in State Bar disciplinary proceedings. Even if such defense were available, respondent would have been required to show an intentional violation of essential principle of practical uniformity and an element of intentional or purposeful discrimination. That is respondent would have been required to demonstrate that she had been deliberately singled out for prosecution on basis of some invidious criterion. There is no evidence in record on any of these issues.

[15 a, b] 120 Procedure–Conduct of Trial
199 General Issues–Miscellaneous

Hearing judge properly had respondent physically removed from courtroom upon respondent's repeated failure to comply with hearing judge's orders and warning with respect to respondent's disruptive conduct.

[16 a-d] 691 Aggravation–Other–Found

Respondent's disclosure of former client's confidential information to defendants in lawsuit in which former client was plaintiff was serious aggravating circumstance and was not justified by former client's lawsuit against respondent for return of fees and legal malpractice.

[17 a-e] 1010 Disbarment

Respondent is culpable of 25 separate ethical violations of either the Rules of Professional Conduct or the State Bar Act, involving 8 separate clients. Included in those violations are four acts involving moral turpitude. In addition, there are multiple acts of serious aggravation, including acts that seriously harmed the administration of justice, the public and the profession. The total absence of any recognition by respondent of her misconduct convinced the review department that there was little hope that respondent would conform her method of practicing law to the professional standards

of this state. The magnitude of respondent's misconduct and her lack of recognition of that misconduct combined to require that the review department recommend that respondent be disbarred to protect the courts, the public and the profession of this state.

Additional Analysis

Culpability

Found

213.41 Section 6068(d)
214.31 Section 6068(m)
221.19 Section 6106–Other Factual Basis
270.31 Rule 3-100(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)]
280.51 Rule 4-100(B)(4) 9former 8-101(B)(4)]
320.01 Rule 5-200 [former 7-105(1)]

Not Found

213.45 Section 6068(d)
214.35 Section 6068(m)
220.25 Section 6103.5
275.05 Rule 3-500 (no former rule)
320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

521 Aggravation–Multiple Acts–Found
531 Pattern
541 Bad Faith, Dishonesty
582.10 Harm to Client

Mitigation

Found

710.10 No Prior Record

Standards

802.10 Standard 1.1 (Scope of Standards)

Discipline

1010 Disbarment

Probation Conditions

2311 Section 6007–Inactive Enrollment After Disbarment–Imposed
2345 Petitions to Terminate Miscellaneous Inactive Enrollment

Other

175 Discipline–Rule 955
178.10 Costs–Imposed

OPINION:

Obrien, J:

I. INTRODUCTION

Respondent Kathryn Jo-Anne Dixon, among other remedies, seeks review of a hearing department decision and order finding her culpable of 29 separate ethical violations. The notice of disciplinary charges contained 44 counts. Of those counts, seven were dismissed on the motion of the State Bar and eight additional counts were either dismissed by the hearing judge or she found no culpability. The State Bar does not challenge these dismissals or findings and we do not further discuss them. Two of the counts on which culpability was found were determined by the hearing judge to be duplicative for the purposes of assessing discipline.

The hearing judge has recommended that respondent be disbarred, and pursuant to Business and Professions Code section 6007(c)(4)[1], she ordered respondent enrolled as an inactive member of the State Bar. That order became effective July 12, 1997.

Respondent seeks review of the hearing judge's recommendation and order. In addition, her opening brief contains, without separate caption, five motions and an application for an emergency stay of the section 6007(c)(4) order enrolling her as an inactive member of the State Bar.[2] That brief further contains three separate declarations of respondent each related to a different matter and interspersed throughout the text of the brief.

Following our review, with one exception, we affirm the hearing judge's findings of culpability and affirm the decision of the hearing judge recommending respondent's disbarment. We leave in place the order enrolling respondent as an inactive member of the State Bar.

II. THE CHARGES AND FINDINGS

The hearing judge found respondent[3] culpable of 29 counts of professional misconduct involving 8 separate clients. Included within the findings of culpability were four counts involving moral turpitude. We agree with the hearing judge's findings that respondent committed misconduct in each of the following matters.

A. The Ogg Matter (Counts 1 through 4)

Luetta Ogg was referred to respondent by a paralegal with whom respondent shared office space between late January and late February 1994. Mr. and Mrs. Ogg sought guardianship of her minor grandson, who periodically lived with her but had been removed from her home by her son. In connection with the removal of the grandson, the Oggs' son had physically beaten Mr. Ogg and threatened further beatings. **[1a]** Respondent had the Oggs that sign a number of blank pleading forms, which were to be filed under penalty of perjury. Respondent advised the Oggs that she would seek temporary and permanent guardianship of the minor and a temporary restraining order (TRO) against the Oggs' son. Respondent collected a fee of $1,664 from the Oggs for her services and for costs.

Because the petition showed that the Oggs did not have physical custody of their grandson at the time of presenting the application for temporary guardianship, the probate attorney would not accept it for filing. The probate attorney attempted to call respondent and, on being unable to reach her, left a message requesting a return call. Neither the probate attorney nor the Oggs were thereafter able to reach respondent, nor did she ever contact the probate attorney.

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1. Unless otherwise noted all references to "section" are to the Business and Professions Code.

2. Each of those motions are denied, including the motion for a stay, motion to disqualify the individual prosecutor and all State Bar prosecutors, to void the proceedings, to disqualify the presiding judge and all other State Bar Court judges.

3. Respondent was admitted to practice on June 15, 1981.

The Oggs received a refund of $450 from the court for costs advanced for investigation, and a $182 refund for filing fees from the paralegal. Although the Oggs terminated respondent's services and demanded a refund, they received no refund from respondent.

On this state of the record, we concur with the hearing judge that by submitting incorrect pleadings, failing to ensure that they could be filed or acted upon and failing to communicate with the probate attorney or the clients, respondent recklessly and repeatedly failed to competently perform services for which she had been retained in violation of rule 3-110(A) of the Rules of Professional Conduct.[4] That rule prohibits an attorney from intentionally, with reckless disregard, or repeatedly failing to perform legal services competently.

[1b] Business and Professions Code section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. We agree with the hearing judge that by having the Oggs sign blank pleading forms and then completing and filing those forms as having been executed under penalty of perjury, without first confirming with the client the accuracy of the information, respondent committed an act of moral turpitude in wilful violation of section 6106.

Upon termination of her employment by the Oggs, and following demand for a refund by the clients, respondent failed to refund any portion of the fees paid her. Respondent did prepare and attempt to file a petition for temporary guardianship, petition for guardianship and TRO, but did so in an incompetent manner, and then failed to make any effort to correct the errors in the preparation of the pleading. Some portion of the unearned fee was required to be returned to the clients. Rule 3-700(D)(2) requires an attorney to promptly return unearned fees on termination of employment. Respondent willfully violated this rule.

B. The Adame Matter (Counts 12-14)

In November 1993, the grandmother of Gina Adame paid respondent $500 to represent Adame in her marital dissolution proceeding. In early November 1993 respondent wrote two short letters, one to Adame and one to opposing counsel, and later in November she wrote an additional longer letter to opposing counsel. Thereafter, and in spite of repeated calls by Adame to respondent, Adame heard nothing from respondent. She was not advised by respondent of a settlement conference set for March 29, 1994, and only learned of it through her husband, with whom she was in litigation. Respondent failed to appear at that settlement conference, although Adame did appear. Adame elected to proceed without counsel and the matter was resolved at the settlement conference. The client made demand of Respondent for a refund, citing the lack of service and the failure to communicate. Respondent made no refund of any portion of the fees.

We agree with the hearing judge that the failure of respondent to perform any services after November 1993, and her failure to attend the settlement conference, was a reckless failure to perform the services for which she was retained, all in violation of rule 3-110(A).

By failing to communicate with her client after November 1993 and by failing to inform the client of the March 29, 1994, settlement conference, respondent wilfully violated section 6068(m) requiring that she keep her client reasonably informed of developments in the matter for which respondent had been retained.

Respondent's failure to return any portion of the unearned fees to Adame was in violation of rule 3-700(D)(2).

C. The Attorney H Matter (Counts 15-18)

[2a] Attorney H represented one of several defendants in an action filed by respondent on behalf

4. Unless otherwise indicated, reference to "rule" is to the Rules of Professional Conduct of the State Bar.

of a client. He noticed a deposition of respondent's client at which respondent failed to appear. Following H's motion to compel the deposition, respondent filed a pleading in which she claimed she had not received notice of the deposition and stated H was a "well-known racist" and "champion of the Emeryville pedophile ring," "intent upon avoiding his own criminal indictment." These charges were repeated in other court documents claiming that H was "motivated by racial hatred" and that he had described children as "niggers, hoods and scums." On H's motion, the records in the superior court were sealed and sanctions were imposed against respondent.

[2b] Each of these charges and additional allegations were repeated in respondent's filing in the State Bar Court. H testified below in this proceeding. He denied each of the charges. The hearing judge found his testimony to be credible and we do not disturb that finding. The hearing judge further ruled: "There is no objective evidence whatsoever of the truth of any of respondent's charges." We agree. The record reveals nothing more than respondent's repeated unsupported conclusionary statements.

[3] Although charges were brought under section 6068(f), the "offensive personality" statute, that count was dismissed on motion of the State Bar based upon the ruling of *U.S. v. Wunsch, et al.* (9th Cir. 1995) 54 F.3d 579, 586, holding, in effect, that the section was unconstitutionally vague.

Section 6068(d) and rules 5-200(A) and (B) require that an attorney employ only such means as are consistent with the truth. Section 6068(d) adds that an attorney shall not seek to mislead a judge by an artifice or false statement of fact or law, while rule 5-200(B) applies a similar proscription. Section 6106 prohibits an attorney from engaging in acts of moral turpitude.

Our initial task is to determine whether our interpretations of these sections and rules is limited by the First Amendment to the United States Constitution.

[2c] Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment. Even when an attorney violates an ethical rule that he or she swore to obey, the First Amendment protection remains. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1054.)

[2d] Upon consideration of *Standing Committee v. Yagman* (1995) 55 F.3d 1430, and quoting from our recent opinion in *In the Matter of Anderson* (Review Dept. 1997) 3 State Bar Ct. Rptr. 775, 782, we note, "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. [Citations omitted.]"

[2e] As we have concluded the statements made by respondent are false, we next determine if respondent's allegations are mere "rhetorical hyperbole, incapable of being proved true or false" or if the statements "could reasonably be understood as declaring or implying actual facts capable of being proved true or false." (*Yagman, supra*, 55 F.3d at 1438-1439.)

[2f] Respondent's statements clearly are statements of either "actual facts or implying actual facts capable of being proved true or false." Respondent charged H with being motivated by racial hatred. Such a fact can only be proven by indirect evidence, other than by the testimony of the target of the charge. Here the target of the inquiry, H, clearly demonstrated that racial hatred played no part in his motivation for complaining to the State Bar concerning the conduct of respondent.[5]

[2g] There is a total lack of support for respondent's scurrilous charges that H described young children as "niggers, hoods and scums." Clearly, these were allegations of fact that were not true.

[2h] The charges that H was the "champion of the Emeryville pedophile ring," "operated by organized

5. The only thing that respondent ever suggested as substantiating her position was the fact that H, as a private attorney, once represented the Emeryville School District, against whom respondent had brought several actions.

crime" and that he was "intent upon avoiding his own criminal indictment" at a minimum, implies actual facts capable of being proved true or false. The record demonstrates that the charges are false.

[2i] We quote with approval the hearing judge's conclusions regarding the charges here under consideration. "Respondent is culpable of using means inconsistent with the truth, in violation of section 6068(d) and rule 5-200(A). The court doubts that any of respondent's allegations actually misled a court, but certainly she sought to do so, using her false allegations to buttress her arguments in opposition to motions filed against her client. This conduct violated rule 5-200(B). Her false statements also constitute moral turpitude under section 6106."

The identical acts are relied on for finding of culpability in the violation of section 6068(d) and the violation of both rule 5-200(A) and rule 5-200(B). Consequently, we dismiss the charges under section 6068(d).

D. The Karantsalis Matter (Counts 19-23)

Theodore Karantsalis was referred to respondent by a paralegal with whom respondent shared space in January 1994. Karantsalis telephoned and spoke with respondent. As the result of that conversation, Karantsalis sent to respondent a completed claim form for filing a claim against his employer, the City and County of San Francisco, along with other documentation concerning his claim. Respondent signed the form as Karantsalis' representative and caused it to be filed. She had a messenger deliver a contingent fee agreement to Karantsalis and pick up a $1,000 check for a retainer as set forth in the contingent fee agreement. Through the paralegal, respondent requested and received a check in the sum of $182 from Karantsalis, purportedly to cover the cost of filing his action against the City and County of San Francisco and others.

In spite of more than 50 telephone calls, commencing at the end of January, 1994, Karantsalis was unable to contact or communicate with respondent until he reached her in the middle of April, 1994, at which time respondent promised the action would be filed within a few days. Except for filing Karantsalis' claim form, the record shows no action having been taken by respondent on Karantsalis' behalf. As a result, on May 9, 1994, Karantsalis wrote respondent terminating her services as his attorney, and requesting a refund of all of the funds he had paid to her.

Karantsalis then employed attorney Michael German to represent him in his claims against his former employer and others. Respondent did not respond to German's requests and demands for the return of the documents that Karantsalis had provided respondent, and for a refund of all sums paid her. German filed the action against the City and County of San Francisco that thereafter resulted in a settlement in favor of Karantsalis.

Karantsalis initiated a fee arbitration proceeding against respondent, resulting in an award for the return of the $1,000 paid in fees and the $182 paid for filing fees. No part of that award has been paid, even though respondent represented to a State Bar investigator that she would return these funds to Karantsalis.

Count 19 alleges a violation of rule 3-110(A), which prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently. Respondent did timely file the claim against the City and County of San Francisco, even though Karantsalis had completed the claims form, except for the signature of the person representing him. Thereafter, respondent took no action on behalf of Karantsalis through the time of her termination on May 9, 1994.

We agree with the hearing judge that inaction for something slightly in excess of three months does not present clear and convincing evidence of intentional, reckless or repeated failure to competently perform in the circumstances here presented. From our reading of the record, respondent was not confronted with a statute of limitations problem, or other time sensitive issues. While surrounding circumstances may well render a three month delay in taking action a violation of rule 3-110(A), we have no evidence before us of circumstances leading to that conclusion.

Respondent is charged with a violation of section 6068(m), requiring an attorney to respond promptly to

reasonable status inquiries from a client and to keep a client reasonably informed of significant developments relating to the subject of the attorney's employment. In addition, respondent is charged with a violation of rule 3-500, imposing the same duties on an attorney. We agree with the hearing judge that respondent is culpable of violating section 6068(m). Because of the duplicative nature of the charge, we dismiss the charge under rule 3-500.[6]

We agree with the hearing judge's finding of culpability for violation of rules 3-700(D)(1) and (2). Those rules require an attorney to promptly release to a client all papers and property belonging to a client on termination, and to return any advance fee that has not been returned. The record demonstrates that, as of the time of trial, respondent had neither returned Karantsalis' papers nor refunded the unearned advanced fees.

As the hearing judge found, respondent also failed to refund the $182 advance for filing fees. That conduct was in wilful violation of rule 4-100(B)(4) requiring an attorney, on request of the client, to promptly return to the client funds the client is entitled to receive.

E. The Torres Matter (Counts 24-31)

In December 1993, Carmen Torres retained and paid $800 to respondent to represent her in a child care license revocation proceeding brought by the California Department of Social Services (Department), represented by attorney S. The record shows that respondent gave notice to the Department of her representation of Torres on December 18, 1993. The hearing on that proceeding was originally set for January 13, 1994, but because the notice of that hearing was not mailed until January 3, 1994, S offered no objection to respondent's request for a continuance from the January 13 date. Respondent's request for continuance was made on January 10, 1994.

With the approval of respondent, the hearing was reset for Monday, February 28. Unknown to Torres, S or the Administrative Law Judge (ALJ), on about February 3, 1994, respondent had substituted in as defense counsel on a criminal proceeding long pending in the Pleasanton Municipal Court that had a scheduled trial date of Monday, February 28, 1994. Respondent knew of that trial date when she became defense counsel in the municipal court matter. On Wednesday, February 23, respondent called S, indicating that she would like to settle the Torres matter. On that same day, as the result of an unsuccessful motion respondent had brought in the criminal matter, respondent was advised that the criminal matter would definitely go to trial on February 28. The following day respondent again called S and advised him that Torres would not agree to a settlement. In fact, respondent had not spoken with or otherwise communicated with Torres. Respondent advised S that she would again seek a continuance, complaining that she had been struck by a truck two or three weeks prior. She still said nothing about the criminal trial scheduled for the same day as the Torres hearing. S indicated he would oppose the continuance. On February 25, respondent made an in-person appearance in the superior court on a writ she sought as the result of the denial of her motion made in the criminal matter. The superior court continued the hearing on the writ to Monday, February 28. Respondent did not mention to the superior court her required appearance at the ALJ proceeding also scheduled for February 28. Still on February 25, respondent contacted the ALJ and advised him that she had decided not to seek a continuance of the administrative proceeding, but that a superior court judge had ordered her to appear at 9:00 a.m. on February 28, and asked that the Torres hearing start at 10:15 or 10:30 on the following Monday, February 28. Respondent did not otherwise advise the ALJ of any of the conflicting appearances scheduled for February 28.

In the meantime Torres had been making repeated efforts to reach respondent to discuss the hearing, leaving many messages to which respondent

6. We note that the hearing judge did not consider the violation of rule 3-500 in determining discipline, because of its duplicative nature.

did not reply. Finally, a meeting was scheduled for the day before the administrative hearing but respondent did not appear. As the result of repeated efforts on the day before the hearing by Torres to reach her, respondent told Torres she could not meet with her and that she would be late to the hearing the next day. Respondent had not discussed the hearing with Torres, and in response to Torres' inquiry as to whether she should bring witnesses, letters or other documents to the hearing, respondent told her not to bring anything.

On February 28, S, Torres, the ALJ, the court reporter and all of S's subpoenaed witnesses appeared for the administrative hearing. Sometime after 10:30 a.m., respondent called Torres and told her that she would not be at the hearing and would refund to her the money she had paid. Respondent has repaid $400 of the $800 paid by Torres. At the insistence of S, the hearing was continued and a few days later, S and Torres, without counsel, settled the administrative proceeding. Respondent spent the entire day of February 28 dealing with matters relating to the criminal matter and picking a jury for that case.

[4a] On January 3, 1994, S had written respondent concerning hearing dates, discovery and suggesting "a lifetime non-licensure/minimal admissions stipulation." Neither the existence of, nor any portion of the contents of that letter were divulged to Torres by respondent, although, a copy was mailed by S to Torres.

At her first meeting with Torres, respondent told her that S was a racist with a prejudice against Mexican-Americans and blacks. Respondent, in corresponding with the State Bar, claimed that S referred to Torres as a "dirty spick."

We agree with the hearing judge that S credibly testified that he does not have a prejudice against Mexican-Americans or black persons; that he made no comments that could give rise to such an impression; that he never used the phrase "dirty spick"; or that he has any "vendetta" against respondent. We note from the record that S is married to a Mexican-American woman.

In the Torres matter respondent is charged, inter alia, with violating rule 3-110(A). We agree with the hearing judge that by failing to advise Torres regarding the licensing matter, failing to prepare for the hearing and failing to appear for the administrative hearing, respondent repeatedly failed to perform services competently. For reasons that are discussed below, we disagree that the failure to advise Torres of the settlement offer is a proper element in this finding of culpability.

As required by section 6068(m), respondent was obligated to respond to reasonable status inquiries and keep Torres informed of significant developments in her matter. The record is clear that respondent failed to reasonably respond to Torres' requests for information or to inform her of the status of her matter. In failing to respond to Torres' increasingly desperate phone calls and in failing to meet with her as agreed, respondent violated section 6068(m).

We find, as did the hearing judge, that in the Torres matter respondent has again resorted to false accusations of racial animus. As was true in the attorney H matter, we find that respondent's statements that S was racist toward Mexican-Americans and blacks were false, as was the statement that S had referred to Torres as a "dirty spick." The statement that S was racist was based on inferred facts that by clear and convincing evidence have been shown to be false. As discussed in relation to the attorney H matter, ante, such statements by respondent are not subject to First Amendment protection. Such false statements, without factual support, constitute moral turpitude within the meaning of section 6106.

As we have indicated, both section 6068(d) and rule 5-200(B) effectively require an attorney to use means only as are consistent with the truth, and not to mislead a judicial officer. Respondent had known since January 13, that she was scheduled for a jury trial on February 28, the same day as the Torres administrative law matter was set for hearing. She advised no one of that conflict. On the Friday before the Monday administrative hearing and the jury trial, respondent first notified the ALJ that there were reasons she could not appear on February 28. Even then, she did not disclose all of the true facts relating to her non-availability.

There is clear and convincing evidence that respondent used means inconsistent with the truth, and sought to mislead a judicial officer. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 489.) The identical facts are relied on to support the charge under section 6068(d) and the charge under rule 5-200(B). We, therefore dismiss the charge under rule 5-200(B).

[4b] On the facts set forth, the hearing judge determined that respondent had failed to convey all of the terms and conditions of a written offer of settlement made by an opposing party to Torres, as required by section 6103.5. Our review of the record indicates that the only written offer of settlement was contained in S's letter of January 3, 1994, addressed to respondent, with a copy sent to Torres. The hearing judge is correct in finding that respondent did not convey an offer of settlement to Torres. However, Torres did receive a copy of the letter containing the proposal made by S. Assuming the letter to be an offer of settlement, we determine that since Torres had a copy of that letter, respondent was not required to separately provide a copy to her client. We reverse the finding of culpability under section 6103.5.

Rules 3-700(D)(1) and (2) require that an attorney promptly return to a client, upon the request of the client, all papers and property of the client and to promptly refund any unearned attorney fees paid in advance. Respondent had not, even at the time of trial, returned to Torres her file, although repeatedly requested by Torres. After several months, respondent returned a portion of fees paid by Torres, but at the time of trial still had not repaid $400 in unearned fees. We agree with the hearing judge that respondent is culpable of a violation of rules 3-700(D)(1) and (2).

F. The Marie Williams Matter (Counts 32-35)

The Department of Social Services (Department) commenced an administrative accusation against Marie Williams, arising out of her operation of a day care home. The Department was represented by attorney G, an attorney regularly assigned to that department. Attorney G had not had any prior contact with respondent.

In October 1993, Williams retained respondent to represent her in that proceeding, delivered her complete file to respondent and paid the requested $500 retainer, all in her initial meeting with respondent. In that meeting respondent described G as being racist against "minorities," and that "she'll hang you if she can." (Williams is African-American.) After learning that G is African-American, respondent advised Williams that G did not like white people.

G contacted respondent for the purpose of discussing settlement, along with preliminary details prior to the hearing. During that telephone conversation, in what can only be described as a rambling statement, respondent began talking loudly about a child pornography ring, and a child abuse ring in the Emeryville area, and accused the Department of having all white males making decisions. When G asserted that she was opposed to child abuse, respondent yelled words to the effect, "You better be careful. You better remember what happened to Damian Gaines."[7] G took the statement relating to Damian Gaines as a threat and reported it to her superiors.

The Williams matter was set for hearing on January 4, 1994, but because of Williams' sudden and serious illness a day or so prior to the hearing date, that hearing was taken off calendar, even though G and all of her witnesses appeared on the scheduled date. Following that hearing date, both G and Williams repeatedly attempted to contact respondent by telephone, regularly leaving messages, but received no response.

G caused the matter to be set for settlement conference on June 3, 1994, in the offices of the ALJ. In spite of repeated efforts by Williams to reach respondent, she had neither discussed the case with her client nor prepared her for the conference. On the night before the settlement conference, respondent called Williams at approximately 10:00 p.m.,

7. Damian Gaines was an investigator who, while working for the Emeryville office of the Department prior to G's arrival there, was the victim of an unsolved murder during a high profile investigation by the Department.

advising Williams to be at the settlement conference early. At the scheduled conference, Williams, her friend, G and the ALJ were present, but respondent did not appear.

Thereafter, Williams terminated the services of respondent and settled her case. After repeated efforts, Williams was able to retrieve her file from respondent but in spite of repeated requests for a refund of her $500 retainer, respondent has returned no part of those funds to her client.

Respondent repeatedly and recklessly failed to perform services competently in violation of rule 3-110(A) by failing to meet with and advise Williams concerning her administrative matter, regularly failing to return opposing counsel's telephone calls, failing to prepare for the settlement conference, and failing to appear at that conference.

Under section 6068(m), respondent had a duty to promptly respond to reasonable status inquiries from her client and advise the client of significant events. In calling her client only the night before the settlement conference and failing to inform Williams that she would not appear at that conference, respondent violated section 6068(m).

We conclude that respondent's accusation that G was a racist against minorities was false. The record shows that the statements were made with reckless disregard for their truth. In accusing G of being racist against minorities there is clear and convincing evidence that such statements were false. Such false statements are not entitled to constitutional protection. (*In the Matter of Anderson*, *supra*, 3 Cal. State Bar Ct. Rptr. 775, 782; *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 411.) In making the false racism statements about G, respondent was culpable of moral turpitude in violation of section 6106.

We do not find there to be clear and convincing evidence that the statements made to G regarding the murder of Damian Gaines were intended as a threat. While such a statement, made in the context of an excited monologue regarding child abuse is frightening, it is plausible that such a statement was for the purposes of alerting G to a perceived risk on the part of respondent. However, as indicated, the false statements that G was racist support the finding of culpability under 6106.

By failing to return Williams' $500 retainer fee, respondent willfully violated rule 3-700(D)(2), requiring an attorney to promptly refund any advanced fee that has not been earned.

G. The Fuller-Kendall Matter (Counts 40-43)

In late 1993 Virginia Fuller was represented by attorney Scheib in a superior court action and three citation matters, all regarding her license to operate an intermediate health care facility. Due to other litigation commitments, Scheib requested that Fuller obtain new counsel. In December of 1993 and January 1994, Fuller spoke with respondent a number of times about representing her on the pending matters. In January, prior to retaining respondent, Fuller had settled the three citations.

On the evening of February 3, 1994, Fuller met with and retained respondent, paying the requested retainer of $2,500. Fuller sought the right to pay fees in installments as she would have to borrow the funds for a retainer, but that was not agreeable to respondent.

Respondent agreed to immediately substitute as attorney of record in the civil litigation, to amend the existing Fuller complaint and to attempt to amend or set aside the settlement in the citation matters. Respondent agreed to contact Fuller's prior attorney, Scheib, the day following the meeting between Fuller and respondent. Respondent advised Fuller that the last day to file for the modification of the resolution of the citation matters was February 10, 1994. At the conclusion of the meeting of February 3, a meeting for February 5 was scheduled.

On numerous occasions between February 3 and February 9, Fuller attempted to contact respondent by telephone. At no time between the meeting of February 3 and February 11 was Fuller able to reach respondent, nor did respondent respond to any of Fuller's telephone calls or attend the meeting scheduled for February 5. Following Fuller's employment of respondent, attorney Scheib attempted to reach respondent approximately six times over the next week or ten days, all without success.

Because of the lack of response from respondent and because the time for modification of the disposition on the citation either was about to, or had expired, Fuller notified respondent's paralegal assistant that she no longer wanted respondent to represent her. On February 11, 1994, Fuller wrote respondent that she had terminated her services and made demand for a refund of the $2,500 retainer she had paid. This was followed by repeated telephone calls from Fuller to respondent's office requesting a refund of the paid retainer.

On February 14, Scheib received a substitution of attorney from respondent. The following day, Scheib wrote respondent advising her that Fuller had instructed her not to sign the substitution of attorney.

Upon receiving no refund, Fuller sought arbitration of her right to have fees returned to her. That arbitration resulted in an award against respondent for a refund of the full fee, plus the loan origination fee and interest. No portion of the arbitration award has been paid.

In this matter, respondent is again charged with a violation of rule 3-110(A). In failing to take action to attempt to modify the citation dispositions, respondent recklessly failed to act competently, as found by the hearing judge. From our reading of the record, we are unable to determine that there was a lack of competence in failing to file a substitution of attorney in the civil matter, as found by the hearing judge. However, the misconduct found does support a willful violation of rule 3-110(A).

In failing to meet Fuller as agreed, and in failing to respond to any of Fuller's many telephone calls, respondent willfully violated section 6068(m) as found by the hearing judge.

The hearing judge found that in failing to refund any of the fees paid by Fuller, in spite of an arbitration award requiring a return of the full sum, respondent willfully violated rule 3-700(D)(2), requiring a prompt refund of unearned fees. We agree.

H. The Jacqueline Williams Matter (Count 44)

Jacqueline Williams retained respondent to represent her in a civil rights action pending in the federal court. Respondent settled the action to Williams' satisfaction in April 1994.

During the course of the litigation, Williams had given her entire file to respondent. In addition to the federal court case Williams was, in propria persona, pursuing a municipal court case, involving different issues, but which required some of the information contained in the file she had delivered to respondent. Despite repeated requests by Williams to respondent and to her office, no portion of that file had been returned to Williams up to the date of the hearing in this matter.

We agree with the hearing judge that such conduct constitutes a violation of rule 3-700(D)(2), requiring an attorney to promptly return property and papers to a client on the client's request.

2. ARGUMENTS OF RESPONDENT

In a 70-page document entitled "Appellant's Opening Brief," respondent sets forth what purports to be some 25 issues she raises in her defense. At no point does she address the content of the evidence presented against her, other than statements such as "All of the charges against Dixon are totally false, and the product of the vindictive, racist desire of the State Bar's witnesses, set forth in the declaration below, to engage in the coverup up (sic) crimes of abuse against children and illegal human experimentation regarding Emeryville children, and terrorism by Karantsalis."

Such allegations go to the credibility of the witnesses' testimony, a subject uniquely within the province of a hearing judge to determine. The hearing judge's determination of credibility must receive great weight because that judge heard and saw the witnesses and observed their demeanor. (*Resner v. State Bar* (1967) 67 Cal.2d 799, 807; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.) Respondent's repeated allegations of perjury and lies on the part of nearly all of the witnesses against her contributes nothing to our analysis of this issue.

For the purposes of this opinion, respondent's arguments are addressed under the headings (A) Evidence Exclusion Order, (B) Notice Issues, (C)

Discriminatory Prosecution and (D) The Conduct of the Hearing Judge. Other issues raised by respondent have been considered and are dismissed as either non-meritorious or frivolous.

A. Evidence Exclusion Order

Following the filing and service of the notice of disciplinary charges (NDC), respondent filed 13 separate motions to dismiss and 8 petitions for interlocutory review of the denial of those motions, each of which was denied. Many of the grounds relied on in those motions to dismiss were also asserted as affirmative defenses in respondent's response to the NDC. Following the filing of her response to the NDC, respondent filed additional motions: to dismiss; recuse the hearing judge; abate the proceedings; stay the proceedings; and augment the proceedings. Each of these motions was denied, and many resulted in unsuccessful interlocutory petitions for review.

[5a] Included in respondent's motions was a motion to increase the allotted trial time in this matter from ten days to from five to six weeks. As disclosed in that motion, respondent sought one week of trial "to present the evidence of . . . criminal activity" of an attorney who had complained to the State Bar about respondent's assertions in documents filed with a court that the attorney was a racist, and protector of pedophiles and thieves. She sought an additional week of trial to present evidence concerning a former client and his subsequent attorney "because it is necessary to present the INS witnesses and police who will testify as to their terrorist activities and the use of automatic weapons, racism and hate crimes." She sought two additional weeks of trial to present evidence that three attorneys employed by the Department, identified by the State Bar as witnesses in the proceeding against respondent, were responsible for "covering up" the rape of a two-year-old infant, the molestation of Emeryville foster children and that the evidence somehow related to "the hate murder of Shellmound whistle blower, Damian Gaines."

[5b] In denying the motion for additional trial time, the hearing judge's order of September 19, 1996, provided: "This Court will adhere strictly to Evidence Code §677. If evidence of proven felonies is to be introduced under the exception of Evidence Code §678, it must be submitted by the certified record of the judgment. The hearing judge's citations to Evidence Code sections 677 and 678 were in error as those sections do not exist. We believe that the hearing judge intended to indicate that she would adhere strictly to the hearsay rule (Evid. Code, § 1200) and that if evidence of felonies was to be introduced under the exception to the hearsay rule set forth in Evidence Code section 1300, a certified record of the judgment was required. As no criminal judgment was sought to be introduced into evidence below, any error was harmless. The Court will not allow 'witness and documents' of 'criminal activity;' 'INS witness and police who will testify as to . . . terrorist activities and the use of automatic weapons, racism and hate crimes; 'Trial of the 'Shellmound cases;' 'police file and witnesses' about 'the hate murder of Shellmound whistle blower Damian Gaines'; 'witness as to the rape of the infant;' 'The molestation of Emeryville foster children or any other witnesses or evidence which are peripheral and largely irrelevant to the issues in this case'."

[6a] Following that order, and after granting both parties an extension of time to file their pretrial statements, as required under rule 211 of Rules of Procedure of the State Bar of California (Rules of Procedure), respondent filed a document entitled "Status Conference Statement and Application for Stay." In that document, respondent stated that she has been deprived of the opportunity to present witnesses and a defense. She identified no witnesses she wished to call, she failed to identify herself as a witness; she did not identify any exhibits or other evidence she wished to introduce, nor did she make any effort to comply with the provisions of rule 1223 or rule 1224, Rules of Practice of the State Bar Court (Rules of Practice).[8]

8. Rule 1223 requires that the pretrial statement include some 17 items, including witnesses to be called except for rebuttal or impeachment, undisputed facts, and like items. Rule 1224 requires an exchange of exhibits prior to the pretrial conference.

[6b] On written motion of the State Bar, the hearing judge considered evidentiary sanctions against respondent, prohibiting her from calling any witnesses or introducing any exhibits in the culpability phase of her hearing. In her response to that motion, respondent stated, "On September 19, 1996, [the hearing department judge] barred Dixon from introducing evidence to defend herself and to impeach the liars, pedophiles, terrorists and lawyers bent on obstructing justice and committing racketeering . . . . Therefore, Dixon has no names of witnesses and exhibits to file, nor can she filed (sic) details about the case, because all defenses and means of impeachment of witnesses were barred by the September 19, 1996 order."

Respondent is certainly entitled to such a position. However, having taken such a course, she cannot now be heard to complain that she was not permitted to call any witnesses. We note that there was no evidentiary sanction imposed on respondent's calling witnesses or introducing evidence in the disciplinary phase of the trial. Nonetheless, respondent offered no witnesses, other than her own brief testimony, nor did she offer any documentary evidence in that phase of the trial. That was her choice.

[6c] The referenced Rules of Practice require that the pretrial statement disclose all witnesses except those to be called for impeachment purposes or in rebuttal. (Rule 1223(g), Rules of Practice. The hearing judge granted the State Bar's motion for evidentiary sanctions based on respondent's failure to file a proper pretrial statement and the fact that respondent failed to appear at a properly noticed pretrial conference held on October 8, 1996, combined with respondent's statement in response to the motion for sanctions that she had no witnesses to call.

[6d] Rule 211(f) of the Rules of Procedure, concerning pretrial statements and pretrial conferences, provides, "Failure to file a pretrial statement in compliance with this rule may constitute grounds for such orders as the Court deems proper, including but not limited to the exclusion of evidence or witnesses." This rule is not unlike Government Code section 68609 authorizing sanctions, including the power to dismiss, to enforce the trial delay reduction program. To a similar effect is Code of Civil Procedure section 575.2 granting courts authority to dismiss actions or a part thereof, enter default or other lesser penalties, against a party for failure to comply with local rules for the supervision and management of actions. (See also rule 227, California Rules of Court; rules 1105.3 and 1109 Super. Ct, L. A. County Rules.)

We note that under Government Code section 68609, the power to dismiss is limited to those situations where it appears that less severe sanctions would not be effective, or when noncompliance has not been the fault of the party, as distinguished from the attorney. (Wantuch v. Davis (1995) 32 Cal.App.4th 786, 795; but see also, Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal.App.3d 481, 490.)

[6e] In light of respondent's response to the motion for sanctions, it is clear that the hearing judge had no alternative but to preclude respondent's introduction of evidence. Respondent affirmatively stated she had no witness or other documentary evidence to introduce. Under such circumstances, to permit a respondent to call witnesses and introduce evidence would have rendered the entire pretrial scheme of rules and procedure utterly meaningless.

The motion by the State Bar for evidentiary sanctions was a procedural matter. While, in general, we review decisions of the hearing department on a de novo basis, since its creation this court has held that procedural matters are reviewed by this court for an abuse of discretion. (In the Matter of Rubens (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 474 [denial of continuance precluding respondent's counsel from participating]; In the Matter of Johnson (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [denial of right to recall excused witness]; In the Matter of Respondent L (Review Dept. 1993) 2 Cal. State Bar Rptr. 454, 461 [abatement of proceedings].)

In *In the Matter of Rubens*, *supra*, 3 Cal. State Bar Ct. Rptr. 468, 474, we held that "[t]o prevail on a procedural argument in a disciplinary matter, an attorney must show both an abuse of discretion by the hearing judge and specific prejudice resulting from the alleged procedural error." (See also, *Morales v. State Bar* (1988) 44 Cal.3d 1037, 1047.)

[6f] In the instant case, respondent can show neither of the elements required for relief. The bald refusal to provide the names of any witnesses addressing either the issue of culpability or discipline, along with the refusal to identify any exhibits, left the court with no realistic alternative to imposing evidentiary sanctions. We conclude that there was no abuse of discretion in ruling on the motion for evidentiary sanctions.

We further note that even in the event our ruling were otherwise, by her own admission, respondent had no witnesses to call nor exhibits to introduce.

[5c] **[6g]** Respondent does not directly attack the hearing judge's ruling denying the additional trial time and prohibiting the introduction of evidence of purported of collateral misconduct by many of the witnesses scheduled to testify on behalf of the State Bar. However, she does use that denial as the basis for her refusal to identify witnesses and evidence. We determine that the hearing judge's September 19, 1996, ruling limiting the evidence was well within her discretion, and was proper.

Respondent further challenges the evidentiary sanctions on due process grounds. Her arguments in this area also fail.

It is true that sanctions of the sort before the court here are not permitted where a party does not have notice and a chance to defend. (Biond, Flemming & Gonzales v. Braham (1990) 218 Cal.App.3d 842, 850; see also Code Civ. Proc., § 177.5.) Here, respondent had every opportunity to defend the motion for evidentiary sanctions. Courts have granted dismissal solely on the grounds of counsel's failure to comply with fast track rules. (Intel Corp. v. USAIR, Inc. (1991) 228 Cal.App.3d 1559-1565.) We also note that Code of Civil Procedure section 575.2 authorizes dismissal, default or other lesser penalties for a failure to comply with properly adopted local rules. There was no due process violation.

B. Respondent's Claim of Lack of Notice

[7a] Respondent argues that because the Notice of Disciplinary Charges (NDC) was filed without giving her adequate notice of the proposed charges, there was a violation of the State Bar's own rules and a denial of due process. We disagree.

[7b] The NDC was filed on August 31, 1995. On July 28, 1995, the State Bar wrote respondent advising her of eight separate cases against her, and listing the names of the complaining witnesses. That letter states that unless a pre-filing settlement is reached respondent will be charged with violations, including, but not limited to, ten separate statutory violations and not less than six separate rule violations. Respondent was invited to meet with an attorney for the State Bar on or before August 18, or charges would be filed.

[7c] Sometime between the close of business on Friday, July 28, 1995, and the following Monday morning, respondent left a message with the State Bar attorney handling the matter requesting that the State Bar file the charges so that respondent can have a public hearing. Respondent's message continued, "This is a complete fraud against me" and that there can be no settlement.

[7d] The only statutory or rule violation included in the NDC that was not listed in the July 28 letter was rule 4-100(B)(4) [requiring an attorney to promptly return funds which the client is entitled to receive]. A violation of that rule was charged in two client matters in the NDC.

[7e] At the time of filing the NDC, rules 508 and 509[9] of the Transitional Rules of Procedure of the State Bar were in effect. Rule 508 then provided, in effect, if it was concluded that charges were to be filed the Office of Investigation, or the examiner (State Bar attorney) may notify the attorney of the acts, matter or transaction under investigation and fix a time within which the attorney may submit a written explanation.

9. Rules 508 and 509 of the Transitional Rules have been repealed. Former rule 508 has been substantially modified and now appears as rule 2409.

[7f] Rule 509 provided, in effect, that if a NDC was to be filed the respondent shall have the opportunity to deny or explain the subject of the investigation.

[7g] We find no violation of either the Rules of Procedure or the requirements of due process. Here, respondent was given notice of each of the complaints against her, and a list of all but one of the 17 statutes and rules (many of which were charged in several different client matters) with which she was to be charged. That list did not purport to be exclusive and did include all of the complaining witnesses. Former rule 509 merely gave the attorney an opportunity to deny or explain his or her acts.

[7h] Respondent complains that the names of Elvina Clarke and Marie Williams, each her former clients, were not listed. However, attorney S, an attorney for the Department of Social Services, which was involved in both the Clark and Marie Williams matters, was listed. Respondent knew of S's involvement with the Department. Thus, she knew that her involvement with clients having business with the department had resulted in complaints to the State Bar. Prior to the filing of the NDC, respondent had every opportunity to inquire of the State Bar concerning the charges against her. She declined the opportunity to avail herself of that opportunity and now seeks to overturn the finding of culpability based on her failure to take advantage of that opportunity.

We also note that the Rules of Procedure provide for a full panoply of discovery procedures, including the incorporation of the Civil Discovery Act.[10] (Rule 180, Rules Proc. of State Bar.) Respondent availed herself of none of the discovery available. That discovery would have permitted her to completely preview the State Bar presentation of evidence against her. Having failed to take advantage of her discovery rights, she cannot now be heard to complain that her due process rights were somehow violated. She had full notice of the charges against her, and the right to ascertain the exact evidence against her, all well prior to the time of trial.

Respondent further complains that the hearing judge improperly found aggravating circumstances without prior notice. She fails to identify those areas of aggravation about which she complains. Being required to review the record de novo, we search out those areas in which aggravation was found. We note that aggravation or mitigation are properly a consideration only after a determination of culpability, and then are to be used only in fixing the discipline. (Standard 1.1, Standards for Attorney Sanctions for Professional Misconduct (standards).)

In addressing the issue of evidence of unpled aggravating circumstances in Edwards v. State Bar (1990) 52 Cal.3d 28, 36, the Supreme Court stated, "Because this evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct, because the evidence was used merely to establish a circumstance in aggravation, and not as an independent ground of discipline, and because the review department's conclusion was based on petitioner's own testimony, we find no violation of petitioner's right to notice of the charges against him."

In the matter before us, with an exception noted below, none of the evidence in aggravation was introduced to show an independent ground of discipline. The aggravating evidence in which respondent falsely accused witnesses of being terrorists, racists, white supremacist militia members, protectors of pedophiles and stalking her (Karantsalis matter) was advanced by respondent. She made these false accusations in pleadings she filed. The evidence was introduced by the State Bar to show properly plead independent ethical violations, but such evidence also showed serious and multiple acts of aggravation.

In the Karantsalis matter, the State Bar presented evidence that, following the termination of her representation in the Karantsalis litigation, she stated to opposing counsel that she would testify as to information he had given her. She also sent declarations dealing with the merits of Karantsalis' action to opposing counsel.

10. Commencing with section 2016 of the Code of Civil Procedure.

However, in the Karantsalis matter, there was neither a charge of moral turpitude nor a charge that respondent failed to take reasonable steps to avoid prejudice to a client on withdrawal. We determine that the evidence of this misconduct was to show an independent ethical violation and not merely for the purpose of inquiring into the charged misconduct. Under these circumstances, the better practice would have been to file a separate charge against respondent for such misconduct. However, there was no objection to the testimony or introduction of documentary evidence showing these facts.

We conclude that absent an appropriate objection to the introduction of evidence of misconduct other than that charged, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters. (In the Matter of Koehler (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628 [respondent attorney's admission that he attempted to conceal funds from Franchise Tax Board by placing the funds in his client trust account held proper aggravation].).

[8a] One of the witnesses testifying for the State Bar was a para- legal with whom respondent shared office space for a period of approximately one month. That witness testified that shortly before the trial in this matter, respondent telephoned her and called her a thief and a liar "and said she was going to get me or kill me". The hearing judge treated this as an aggravating circumstance. We agree.

[8b] As the hearing judge noted, the calling and threatening of a witness in a disciplinary matter shortly before the scheduled trial date can be for no purpose other than the interference with a disciplinary proceeding. That testimony tends to demonstrate a knowledge of culpability on the part of respondent, and it tends to lend credence to the testimony in the Marie Williams matter in which the attorney for the department took the reference to the murder of Damien Gaines to be a threat. It was not offered to show culpability in an uncharged count. For these reasons, the testimony was admissible. Having been properly admitted, the hearing judge was entitled to consider that evidence in aggravation. (Edwards v. State Bar, supra, 52 Cal.3d 28, 36.)

[9a] Respondent asserts that the hearing judge erred in finding aggravation in respondent's refusal to testify. Respondent asserted a right not to testify during the culpability phase of the hearing, relying on the privilege against self incrimination under the Fifth Amendment to the United States Constitution. Respondent refused to provide any basis for the assertion of the privilege except in camera.

[9b] The hearing judge sought briefing on respondent's right to assert the privilege against self incrimination. In her response, respondent provided no basis for her claim of privilege other than to argue that "[n]o person can be can be sanctioned for asserting the Fifth Amendment."

[9c] With that statement we agree. However, "[f]or the reasons set forth in the federal case law, we hold that a blanket refusal to testify is unacceptable; a person claiming the Fifth Amendment privilege must do so with specific reference to particular questions asked or other evidence sought." (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.) Evidence Code section 404 provides in part "the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; . . ."

[10] "We see no reason to mandate that hearings to determine the right to a Fifth Amendment privilege invariably be held in camera rather than in open court. As this course will be more appropriate in some cases than it will in others, we think it wiser to leave room for trial court discretion." (Ibid, p. 1048.)

It is well settled that an attorney disciplinary matter is not a criminal case for purposes of the Fifth Amendment and that an attorney may be called as a witness at his or her disciplinary hearing. (*Black v. State Bar* (1972) 7 Cal.3d 676, 686; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 697.)

[9d] While an attorney may not be disciplined solely for invoking the Fifth Amendment (*Spevack v. Klein* (1967) 385 U.S. 511, 514), the improper invocation of the Fifth Amendment and the resulting refusal to testify may properly be considered an

aggravating factor since culpability has otherwise been found. (*In the Matter of Frazier, supra*, 1 Cal. State Bar Ct. Rptr. 676, 697; std. 1.2(b)(vi).) **[11]** Nor do we find error in the hearing judge drawing inferences against respondent upon her refusal to answer proper questions, after her claim against self incrimination had been denied and she had been ordered to answer the questions. These proper inferences included the authentication of documents apparently in the handwriting of respondent. She had refused to respond to questions regarding their authentication.

[12a] [13a] Respondent refused to answer proper questions put to her as to whether or not she entered into an agreement with a former client to withdraw his complaint and refuse to testify in a State Bar proceeding involving respondent. From this the hearing judge inferred that respondent had made an agreement with a client to withdraw his complaint and to refuse to testify in the current matter. Although respondent was not charged with such misconduct, the hearing judge found that it constituted serious misconduct.

[12b] [13b] We agree that such an inference is proper. However, the found agreement predated the adoption of amendments to section 6090.5 that make an agreement to withdraw a complaint to the State Bar a disciplinable offense. We are unable to locate any holding, that in the absence of statutory or rule of professional conduct proscribing such conduct, it may be considered as an aggravating circumstance.

[12c] [13c] Rule 5-220, requiring an attorney not to suppress any evidence that the attorney's client is obligated to produce, and rule 5-310(A) prohibiting an attorney from causing any person to make themselves unavailable as a witness were in effect. We agree that the agreement inferred against respondent violated those sections and is properly considered as aggravation.

C. Discriminatory Prosecution

[14a] This court has held "[i]t 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 Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 107.) Without deciding the issue, we consider the arguments of respondent.

[14b] For such a defense to prevail, respondent must show "an intentional violation of the essential principle of practical uniformity" and "an element of intentional or purposeful discrimination." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297.) "[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion." (Ibid., at p. 298.)

Respondent argues that the State Bar's prosecution of her is to deter respondent from litigating child abuse cases, to stop her from representing black persons and children, to stop her from testifying against her former client Karantsalis in his civil action, to aid private attorneys in pending civil litigation and to target her, based on the recommendation of a federal judge that respondent be investigated.

Her latter point, even if shown, would not in any way support her argument that her prosecution was discriminatory. Had respondent produced compelling evidence of any of the balance of her charges, we would give consideration to the issue. However, the record is devoid of any such evidence.

The record is replete with declarations of respondent vilifying various witnesses, the prosecutor, and hearing judge. She claims the attorneys for the Department were deliberately covering up child abuse and a pedophile ring. She claims the witnesses in the Karantsalis matter were terrorists and members of a white supremacist group. She further claims that each of the witnesses is a liar and perjurer.

As the hearing judge determined, each of these witnesses credibly testified in denial of the accusations of respondent. While we agree with the hearing judge that those accusations have been credibly refuted, even if true, they do not demonstrate discriminatory prosecution.

[14c] We note that respondent has done no discovery in the matter before the court, whether in

support of her defense of discriminatory prosecution, or otherwise. She placed herself in a position were she was properly precluded from introducing evidence in the culpability phase of the trial. As the result, the record is barren of evidence to support her claim of discriminatory prosecution, and that claim is denied.

D. The Conduct of the Hearing Judge

As an additional point of error, respondent complains that the hearing judge acted as a partisan on behalf of an interested party and that her decision "is a diatribe of hate includ[ing] hate language against Dixon"; that the hearing judge conducted a "Star Chamber" proceeding; that she deprived Dixon of medical care and that she ordered a security guard to beat respondent in the ribs.

We have read the entire record with care. The cold record does not reveal the tone of voice used by respondent, but does show a repeated and consistent disregard for the rulings of the court and admonitions to be seated, to cease a line of questioning or to cease a line of argument. Taking the context of the exchanges, it does not take a great leap of faith to accept the hearing judge's description that respondent "repeatedly screamed at the Court."[11]

The record as a whole reveals that the court dealt most creditably and evenhandedly with a trial under most demanding circumstances. There is no support in the record for respondent's charges of mistreatment by the hearing judge.

III. DISCIPLINE

A. Mitigation

Respondent was admitted to practice in June, 1981. The misconduct found commenced in late 1993. Respondent has no record of prior discipline. No other evidence that may be considered for the purposes of mitigation was presented.

For mitigation, standard 1.2(e)(1) of the Standards for Attorney Sanctions for Professional Misconduct (standard) requires "many years of practice coupled with present misconduct which is not deemed serious". We agree with the hearing judge that respondent's 12 plus years of practice without prior discipline is a mitigating factor. (See *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688 [14 years entitled to mitigation]; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [14 years entitled to mitigation].)

B. Aggravation

Respondent's misconduct constitutes multiple acts of wrongdoing, including four acts of moral turpitude and involving the abandonment of clients, failure to return unearned fees, misleading the court and failing to communicate with clients. Such multiple acts of misconduct constitute an aggravating factor in measuring discipline. (Standard 1.2(b)(ii).)

In addition, respondent has displayed a pattern of serious misconduct in falsely accusing witness, oppos-

11. **[15a]** On the fourth day of trial on the issue of culpability, respondent started the session with a series of written motions, including one of a series of motions to recuse the prosecutor and the hearing judge. After being informed by the court that the motions would be reviewed during a break, respondent continued to argue the motions, demanding a personal apology from the court for a prior ruling. After three orders from the court to be seated, respondent stated "am I correct in believing that I can continue to experience the type of hatred and bias that you have demonstrated toward me by forcing me to sit here in pain." Following the next order to be seated, respondent stated to the court "Your bias is incredible." After an additional order to be seated, respondent stated to the court "This is a star chamber."

[15b] On the last day of trial bearing on the issue of discipline and while being examined as a witness, respondent undertook a non-responsive tirade against a former client and his subsequent attorney, resulting in at least fifteen orders from the court to respondent to sit down in the witness chair, two orders to stop using threatening gestures, and seven warnings that she would be removed from the courtroom if she did not comply with the orders of the court. Upon respondent's repeated failure to comply with such orders or heed the warnings, the court ordered respondent removed from the courtroom. As the Supreme Court had observed, a hearing judge has the power to exercise reasonable control over the proceedings. (*Dixon v. State Bar* (1982) 32 Cal.3d 728, 736; see also, *In the Matter of Frazier, supra*, 1 Cal. State Bar Ct. Rptr. 676, 689.) [15 a, b - see fn. 12]

ing counsel (including the State Bar prosecuting attorney), former clients and the hearing judge of being racist and the protectors of pedophiles and child abusers. This pattern is exacerbated by respondent regularly referring to the witnesses and prosecutor in this matter as "liars", "perjurers", as well as similar comments concerning the hearing judge.[12]

It is an aggravating factor when an attorney commits multiple violations of the Rules of Professional Conduct which demonstrates a pattern of misconduct. (Std. 1.2(b)(ii). "Only 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.)

We find that the proof of respondent's misconduct in abandoning clients, failing to refund fees, and making misrepresentations to courts lacks a showing of the "prolonged period of time" necessary to show a pattern. However, there is clear and convincing evidence of respondent's continued use of false and vituperative language in pleadings, motions and other filings as well as in her direct dealing with former clients, witnesses, opposing counsel and the court. Her conduct previously described in the attorney H matter, the Torres matter, the Marie Williams matter, and the Jacqueline Williams matter, involving false accusations of racism, pedophilia, and child abuse, all occurring in late 1993 and early 1994, have been a constant theme of respondent throughout these proceedings commencing in August, 1995 and continuing through the appeal process now being considered. In our judgment, this is serious misconduct repeated over a substantial period of time.

[16a] Also consistent with this repetitive misconduct are respondent's actions in the Karantsalis matter. Following Karantsalis' termination of respondent as his attorney, and his engaging another attorney to represent him, respondent called counsel for two of the defendants in the matter she had been handling and suggested that she be deposed concerning the merits of Karantsalis' claim. She also offered a declaration based on information Karantsalis had given her as his attorney. In addition, she sent a declaration dealing with the merits of Karantsalis' suit to counsel for one of the defendants. All of this was accompanied by respondent's regular reference to Karantsalis in these proceedings as a "terrorist".

[16b] Respondent purports to justify her actions because Karantsalis had filed an action against her for recovery of the fees he had paid her and for malpractice.

[16c] When an attorney is sued for malpractice, it does not constitute a full waiver of the attorney-client privilege. It does amount to a waiver as to those issues necessary to resolve the malpractice claim. "[W]hen, in litigation between an attorney and his client, an attorney's integrity, good faith, authority, or performance of his duties is questioned, the attorney is permitted to meet this issue with testimony as to communications between himself and his client." (Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal.App.2d 212, 228.) "If a disclosure of the communication is not essential to preserve the rights of the attorney, it continues to be privileged; and counsel should not, in any event, disclose more than is necessary." (81 Am. Jur.2d, Witnesses, § sec. 400, p. 360.)

[16d] In this case, respondent used information that she was duty bound to keep confidential for the

12. While a witness was on the stand, respondent referred to him as a "plant", "ringer" and "liar". She accused a lawyer witness testifying at the call of the State Bar of manufacturing charges, covering up the fracture of an infant's skull, and of lying. She referred to a hearing judge's ruling as a "fascist act" and a former client testifying on behalf of the State Bar as a "terrorist". At no point was there even a scintilla of evidence to support these claims.

Following the sustaining of an objection put to a former client-witness, respondent, in reference to the court's ruling, stated: "Because you're protecting [the witness] and [prosecutor] from [a showing of] terrorism."

On at least two separate occasions in open court, she falsely accused the hearing judge of lying about the proceedings. In addition, her pleadings and motions are replete with references to the lies and other alleged misconduct of the hearing judge. A reading of the record refutes each and all of these charges.

benefit of her former client, not for her defense of Karantsalis' claim against her, but rather in an effort to assist the parties against whom she had asserted a claim on behalf of that client. It was not used to defend the malpractice claim against her, but rather to aid in defeating her former client's claim against third persons. That constitutes a breach of the fundamental trust that must exist between an attorney and client. In our judgment, this is a serious aggravating circumstance.

[8c] Shortly before the commencement of the trial in this matter respondent telephoned Ms. M, a witness testifying on the call of the State Bar, and threatened to "get" or "kill" her, and further called her a thief and a liar. When M hung up on her respondent repeatedly telephoned M. We consider this attempt to intimidate a witness to be a most serious aggravating circumstance. (See Pen. Code, § 136.1(a)(2).)

Respondent's pattern of labeling opposing counsel, witness, judges and others as racists, fascists, pedophiles and persons covering up molestation and abuse of minor children seriously harms the administration of justice, the public and the profession. Among the long series of such false claims, particularly egregious was respondent's assertion to her client that the opposing attorney employed by the Department of Social Services was "racist" against minorities. When the client learned that the attorney was an African-American, respondent claimed the attorney did not like white people. Again, we find this course of conduct to be a serious aggravating circumstance.

[9e] We find respondent's improper refusal to testify when called by the State Bar to be a further aggravating circumstance. When called as a witness, respondent asserted a right not to testify on the grounds that it was an unconstitutional proceeding, was without jurisdiction, and that the proceeding was "twisted and warped by a judge who is biased against me and the prosecutor is biased against me." Following several attempts by the hearing judge to have respondent identify the criminal liability to which she would be exposed by such testimony and to explain the obligation to testify, respondent continued her refusal. This is an aggravating factor. (*In the Matter of Frazier*, *supra*, 1 Cal. State Bar Ct. Rptr. 676, 697; *Black v. State Bar*, *supra*, 7 Cal.3d 676, 688.)

As noted by the hearing judge, respondent either abandoned or stopped communicating with six clients. In spite of demands, arbitrations awards, and promises to do so, respondent has failed to return unearned fees. These fees were collected from persons of limited means, all of which was known to respondent. The loss of the fees paid was a hardship to these clients and constituted harm within the meaning of Standard 1.2(b)(iv). This, combined with the harm caused by respondent's failure to appear at scheduled hearings and proceedings, is an aggravating factor.

In addition, we determine that respondent's misconduct was surrounded by bad faith [defamatory statements concerning witnesses, former clients, the prosecutor and the hearing judge], and overreaching [collecting fees and performing little or no service]. This, too, is an aggravating factor. (Standard 1.2(b)(iii).)

[17a] In the matter before us, we have determined that respondent is culpable of 25 separate ethical violations of either the Rules of Professional Conduct or the State Bar Act, involving 8 separate clients. Included in those violations are four acts involving moral turpitude. In addition, there are multiple acts of serious aggravation, including acts that seriously harmed the administration of justice, the public and the profession.

[17b] We take the liberty to quote at length from *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45, because the misconduct described so closely parallels that before us:

[17c] "Multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment. (See std. 2.3, Stds. for Atty. Sanctions for Prof. Misconduct, div. V, Rules Proc. of State Bar; compare *Dixon v. State Bar* (1982) 32 Cal.3d 728, 739, 740.) Petitioner's pattern of serious, recurrent misconduct is a factor in aggravation. (*Garlow v. State Bar* (1988) 44 Cal.3d 689, 711.) Further, unrestrained personal abuse and disruptive behavior characterized petitioner's conduct during the State Bar proceedings. (See *Alberton v. State Bar* (1984) 37 Cal.3d 1, 11, fn. 18.) Failure to cooperate with the State Bar during disciplinary proceedings itself may support severe discipline. (*Middleton v. State Bar* (1990) 51 Cal.3d 548, 560.) It is evident that petitioner has no appreciation that her method of practicing law

is totally at odds with the professional standards of this state. Disbarment is thus necessary to protect the public, preserve confidence in the profession, and maintain high professional standards. (*Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1235.)" (Emphasis added.)

[17d] We find, as did the hearing judge, that "[respondent] has breached the high duty of loyalty owed to her clients, violated basic notions of honesty and endangered public confidence in the legal profession." (See *Grim v. State Bar* (1991) 53 Cal.3d 21, 29.) It is our determination that respondent has far exceeded the "truculence" found in *In re Morse* (1995) 11 Cal.4th 184, 209.

[17e] The total absence of any recognition by respondent of her misconduct convinces us that there is little hope that respondent would conform her method of practicing law to the professional standards of this state. The magnitude of respondent's misconduct and her lack of recognition of that misconduct combine to require that we recommend that respondent be disbarred to protect the courts, the public and the profession of this state.

IV. RECOMMENDATION

We recommend that respondent be disbarred and that her name be stricken from the roll of attorneys admitted to practice in California.

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.

V. COSTS

We recommend that costs incurred by the State Bar in this matter be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code.

We concur:

NORIAN, J.
STOVITZ, R.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Emir A. Phillips

A Member of the State Bar

No. 94-O-11471

Filed August 4, 1999

SUMMARY

A hearing judge found respondent culpable of professional misconduct and recommended that respondent be disbarred. In addition, the hearing judge automatically ordered respondent involuntarily enrolled as an inactive member of the State Bar under the present version of Business and Professions Code section 6007, subdivision (c)(4), which became effective January 1, 1997, and which mandates the automatic inactive enrollment of a respondent upon the filing of a disbarment recommendation. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent sought interlocutory review contending that the hearing judge erred in automatically ordering him enrolled inactive under the present version of section 6007, subdivision (c)(4) because this disciplinary proceeding was commenced before the January 1, 1997, effective date of the present version of section 6007, subdivision (c)(4). According to respondent, the hearing judge should have applied the prior version of section 6007, subdivision (c)(4), which was in effect at the time this disciplinary proceeding was commenced and which provide for notice and the opportunity for a hearing before he could be involuntarily enrolled inactive. The review department agreed with respondent's contentions and reversed the hearing judge's inactive enrollment order without prejudice to respondent's inactive enrollment under the former version of section 6007, subdivision (c)(4) if appropriate after notice and hearing.

COUNSEL FOR PARTIES

For State Bar: David C. Carr

For Respondent: David A. Clare

HEADNOTES

[1 a-f]	139	**Procedure–Miscellaneous**
	199	**General Issues–Miscellaneous**
	2319	**Section 6007–Inactive Enrollment After Disbarment–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.

To apply amendments to Business and Professions Code section 6007, subdivision (c)(4), effective January 1, 1997, against an attorney whose disciplinary proceeding began before January 1, 1997, effective date of amendments would be impermissible retroactive application of amendments. That is because amendments had dramatic effect on attorney's legal ability to practice law and deprived attorney of right to request hearing on inactive enrollment and because amendments neither clarified prior law nor merely changed procedure of trial.

[2 a, b] **139 Procedure–Miscellaneous**
199 General Issues–Miscellaneous
2319 Section 6007–Inactive Enrollment After Disbarment–Miscellaneous

Even though respondent received extensive trial on disciplinary charges, he was never formally notified that outcome of trial could result in his immediate and automatic inactive enrollment under amendments to Business and Professions Code section 6007, subdivision (c)(4), effective January 1, 1997. Reasonable notice is crucial to a meaningful hearing. Thus, disciplinary trial itself could not have provided respondent with minimal protection on issue of inactive enrollment because issues can differ from case to case between the appropriate level of discipline for misconduct compared to the need for immediate public protection to protect existing or future clients from additional risk of harm. And disciplinary hearing did not fulfill explicitly recognized right to request hearing on the propriety of inactive enrollment provided for under former version of section 6007, subdivision (c)(4) before its amendment effective January 1, 1997.

Additional Analysis

Other

2315.20 Procedural Error
2315.90 Other Reason

OPINION:

STOVITZ, J.:

[1a] In this first impression case, we must decide whether a statutory amendment providing for automatic inactive involuntary enrollment of an attorney upon the recommendation of a hearing judge for disbarment may be applied to an attorney whose disciplinary proceeding started before the law's effective date. We hold that it may not.

I. BACKGROUND.

A. Disciplinary proceeding.

Respondent, Emir Phillips, was admitted to practice law in California in 1991. In April 1996, formal disciplinary charges were filed against him. In June 1998, after a lengthy trial, the hearing judge filed a 68-page decision recommending that respondent be disbarred and ordering him enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4).[1]

B. Changes in the pertinent inactive enrollment law.

[1b] When this disciplinary proceeding was started against respondent, and prior to January 1997, the State Bar Act authorized an attorney's involuntary inactive enrollment on a number of grounds. As pertinent here, upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or the public, an attorney may be involuntarily enrolled inactive. (Former § 6007, subd.(c).) Expedited procedures for this ground of inactive enrollment have been adopted and are described in *Conway v. State Bar* (1989) 47 Cal.3d 1107, which upheld, against a due process challenge, the constitutionality of section 6007, subdivision (c) and certain of its implementing procedural rules. *Conway* noted the right of the accused attorney to request a hearing prior to any decision for inactive enrollment under section 6007, subdivision (c). Public protection is a prime consideration in a section 6007, subdivision (c) inactive enrollment proceeding, and the proceeding may be very roughly analogized to a preliminary injunction proceeding in a civil matter. During such an inactive enrollment proceeding, the effect of any recommendation of disbarment in an underlying disciplinary matter, created a rebuttable presumption affecting the burden of proof that the factors warranting inactive enrollment are established. (Former § 6007, subd. (c)(4).)

[1c] Effective January 1, 1997, the basic elements in section 6007, subdivision (c) for inactive enrollment on proof of an attorney's substantial threat of harm were retained but section 6007, subdivision (c)(4) was amended so that inactive enrollment shall be ordered upon filing of a disbarment recommendation. The effect of the amendment was to create an automatic inactive enrollment upon a disbarment recommendation, without any additional hearing.

II. DISCUSSION.

[1d] In *In the Matter of Jebbia* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51, decided today, we considered an analogous question which arose in a conviction referral proceeding where the offenses were committed at a time before the State Bar Act was amended to subject the crime arising from those offenses to summary disbarment. We held that it was a retroactive application of the 1997 summary disbarment amendments to apply them to the facts. We also held that none of the pertinent exceptions to a retroactive application existed. Specifically, we held that the summary disbarment amendments were not merely clarifying of the original law and that the amendments did not merely change the method of trial or disposition but affected substantive rights. Without opining on the appropriate degree of discipline to recommend, we afforded Jebbia a hearing on the issue of the appropriate degree of discipline.

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1. Unless noted otherwise, all later references to sections are to the provisions of the Business and Professions Code. The pertinent amendments to section 6007, subdivision (c) were adopted in 1996 but did not take effect until January 1, 1997. The operation of section 6007(c)(4) to this case will be discussed, *post*.

[1e] We hold that the principles of our discussion in *Jebbia* apply here although this is an inactive enrollment proceeding, not one arising from a criminal conviction. The 1997 amendments to section 6007, subdivision (c)(4) have as dramatic an effect on the legal ability to practice law as the 1997 amendments to section 6102, subdivision (c) had in *Jebbia*. An attorney enrolled inactive is barred from the practice of law as much as a disbarred attorney. Indeed, involuntary inactive enrollments may become effective just three days from the order as contrasted to a Supreme Court order of disbarment which traditionally affords thirty days before becoming effective. (Compare rule 220 (c), Rules Proc. of State Bar with Cal. Rules of Ct., rule 953 (a).)

[2a] Urging that we uphold the hearing judge's order of inactive enrollment, the State Bar contends that respondent received all the hearing to which he was entitled when he received a full disciplinary hearing. Respondent received an extensive disciplinary trial hut was never formally notified that the outcome of the hearing could result in his immediate inactive enrollment. Reasonable notice is crucial to a meaningful hearing. (E.g., *In re Ruffalo* (1968) 390 U.S. 544, 552.) Absent such notice, any disciplinary hearing by itself would not provide minimal protection to respondent on the issue of inactive enrollment as the issues can differ from case to case between the appropriate degree of discipline warranted for misconduct found compared to the need for immediate public protection to protect existing or future clients from additional risk of harm.

[1f] [2b] The State Bar states that respondent had no "vested" right to a hearing on involuntary inactive enrollment prior to 1997. Whether or not respondent's right was "vested", if the State Bar sought to enroll him inactive under section 6007, subdivision (c)(4), prior to 1997, the principles of *Conway* v. *State Bar*, *supra*, explicitly recognized his right to request a hearing on the propriety of such enrollment. The State Bar also emphasizes *Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, as supporting the hearing judge's decision. *Murrill* dealt with using a federal criminal conviction as a basis for a disciplinary hearing of an accountant. The court held that, although the conviction predated the accountancy statute allowing disciplinary proceedings based on certain conviction of crime, that accountancy statute was properly applied to Murrill. Our reading of *Murrill* shows that he was afforded a hearing on the charges and allowed to defend against license revocation. In contrast, the effect of the hearing judge's application of section 6007, subdivision (c)(4) in this matter deprived respondent of any hearing or opportunity to defend against involuntary inactive enrollment.

III. RECOMMENDATION.

For the foregoing reasons, we reverse that portion of the hearing judge's decision enrolling respondent inactive under the text of section 6007, subdivision (c)(4), eff. January 1, 1997 and hereby order that respondent's inactive enrollment be terminated immediately. This decision is without prejudice to respondent's inactive enrollment, if warranted, under section former 6007, subdivision (c)(4) after appropriate notice and proceedings.

We concur:

OBRIEN, P.J
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Dennis A. Jebbia

A Member of the State Bar

No. 97-C-17839

Filed August 4, 1999

SUMMARY

Respondent was convicted of seven counts of making false statements to a federally insured financial institution to influence action in securing loans (18 U.S.C. § 1014), felonies involving moral turpitude. The State Bar filed a motion for respondent's summary disbarment under the present summary disbarment statute (Bus. & Prof. Code, § 6102, subd. (c)), which was effective January 1, 1997. Even though respondent's criminal convictions occurred after the January 1, 1997, effective date of the present version of the summary disbarment statute, he committed the criminal acts underlying his convictions before the January 1, 1997, effective date.

Because respondent committed the underlying criminal acts before the January 1, 1997, effective date of the present version of the summary disbarment statute, the review department concluded that recommending respondent's summary disbarment under present version of the statute would be a retroactive application of the statute, which was bared by the principles set forth in *In the Matter of Jolly* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 740, 744-746. Accordingly, the review department denied the State Bar's motion for summary disbarment. Moreover, because review department concluded that respondent's conviction did not meet the statutory requirements for disbarment under the former version of the summary disbarment statute, the review department referred the matter to the hearing department for a hearing and recommendation as to discipline.

COUNSEL FOR PARTIES

For State Bar: Janice G. Oehrle

For Respondent: R. Gerald Markle

HEADNOTES

[1 a-c] 191 **Effect/Relationship of Other Proceedings**
1512 **Conviction Matters–Nature of Conviction–Theft Crimes**
1517 **Conviction Matters–Nature of Conviction–Regulatory Laws**

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1519 Conviction Matters–Nature of Conviction–Other
1521 Conviction Matters–Moral Turpitude–Per SE
1553.51 Conviction Matters–Standards–Enumerated Felonies–Summary Disbarment
1699 Conviction Cases–Miscellaneous Issues

Respondent's convictions of making false statements to federally insured financial institution to influence action on loans, felonies involving moral turpitude, did not occur in respondent's practice of law or in manner such that a client was victim. Thus, respondent's convictions did not meet statutory criteria for disbarment under former version of summary disbarment statute that was in effect between 1986 and January 1, 1997. And respondent's summary disbarment was warranted, if at all, only under present version of statute (Bus. & Prof. Code, § 6102, subd. (c)), effective January 1, 1997.

[2 a-c] 139 Procedure–Miscellaneous
192 Due Process–Procedural Right
193 Constitutional Issues
199 General Issues–Miscellaneous
1553.51 Conviction Matters–Standards–Enumerated Felonies–Summary Disbarment
1699 Conviction Cases–Miscellaneous Issues

Retroactive law is one that affects rights, obligations, acts, transactions, or conditions performed or existing before adoption of law. Even though respondent's criminal convictions occurred after January 1, 1997, effective date of present version of the summary disbarment statute (Bus. & Prof. Code, § 6102, subd. (c)), respondent committed criminal acts underlying those convictions before January 1, 1997, effective date. Thus, respondent's summary disbarment under present version of statute would be improper retroactive application of statute because, but for amendments to statute effective January 1, 1997, respondent would not be subject to summary disbarment.

[3 a-c] 139 Procedure–Miscellaneous
192 Due Process–Procedural Right
193 Constitutional Issues
199 General Issues–Miscellaneous
1699 Conviction Cases–Miscellaneous Issues

In two situations, applying statute to acts before statute's effective date are not retroactive application of statute: when statute merely clarifies, rather than substantially changes law; and when statute changes trial procedure, but does not change legal consequences of parties' past conduct. Amendments effective January 1, 1997, to summary disbarment statute (Bus. & Prof. Code, § 6102, subd. (c)) are not clarifying or procedural because they significantly broadened scope of crimes for which attorneys are subject to summary disbarment.

Additional Analysis

Discipline
1541.10 Conviction Matters–Interim Suspension–Ordered
1541.20 Conviction Matters–Interim Suspension–Ordered

OPINION:

STOVITZ, J.:

In *In the Matter of Jolly* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 740, we held that the changes to the summary disbarment law effective January 1997[1] may not be applied retroactively to an attorney's criminal conviction that predated those changes. In this review we must decide whether an attorney who committed criminal acts before the changes, but who was convicted of his crimes after the changes, may be recommended for summary disbarment under the amended law. We hold that the 1997 law may not be so applied under the circumstances presented here.

I. BACKGROUND

A. Jebbia's conviction.

[1a] Respondent, Dennis A. Jebbia, was admitted to practice law in California in 1981. Between November 1992 and September 1995, respondent knowingly made false statements to federally insured lenders to influence action in securing loans to purchase or refinance real property. In October 1997, respondent was charged with federal felonies and, in February 1998, on his plea of guilty, he was convicted of seven felony counts of violation of title 18 of the United States Code, section 1014, for knowingly making false statements to a federally insured financial institution. Respondent's crimes inherently involve moral turpitude.

When notified of respondent's felony convictions and crimes involving moral turpitude, we placed respondent on interim suspension. When his convictions became final, the State Bar's Office of Chief Trial Counsel (State Bar) moved for his summary disbarment under the 1997 law. In his opposition to that motion, respondent raised the issue of retroactive application of the summary disbarment law, and we now review the question.

B. Changes in the summary disbarment law.

[1b] We discussed the summary disbarment law in *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71. There we observed that summary disbarment was abolished in 1955, but restored to California law in 1986 as section 6102, subdivision (c)[2]. (*Id.* at pp. 77-78.) Between 1986 and 1996, a key element of the summary disbarment law was that the crime be one which occurred in the practice of law or in a manner such that a client of the attorney was a victim. (*In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 743.) The record in this case fails to show that this element was met, and the State Bar concedes that it was not. However, effective January 1, 1997, section 6102, subdivision (c) was changed to eliminate that requirement.

Another important change between the 1997 law and the prior law, but which is not at issue here, concerns the substantive elements of the crimes eligible for summary disbarment. As we noted in *In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 743, 745, fn. 5, the 1997 law makes eligible for summary disbarment any crime involving moral turpitude.

[1c] As the chronology shows *ante*, respondent committed his criminal offenses well before the new law took effect. Criminal charges were filed 10 months after the effective date of the amended law, and he was convicted 14 months after that date. Respondent would be eligible for summary disbarment only if the amended law applies to his case.

II. DISCUSSION.

In *In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 740, we reviewed in detail the text and history of the amendments to section 6102, subdivision (c). We observed that section 6102, subdivision (c) does not contain an express retroactivity provision, nor could we glean a legislative intent

1. Business and Professions Code, section 6002 (c), discussed *post*. Although the statutory amendments were adopted in 1996, they did not become effective until January 1, 1997.

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

to apply the law retroactively. We also discussed the significance of the interests involved both in protecting the public and in affording the accused attorney an opportunity to present evidence in order to persuade our court and, ultimately, the Supreme Court that a degree of discipline less than disbarment should be imposed. We consulted a number of appellate decisions, most decided by our Supreme Court, and concluded that none of the extrinsic factors properly considered by us warranted giving section 6102, subdivision (c) retroactive effect. (*In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 744-746.) Because Jolly's conviction predated the changes to section 6102, subdivision (c), it was unnecessary to decide the question before us in this case.

In this case, the State Bar takes the view that the conviction is the critical act and urges that so long as the conviction occurred after January 1, 1997, the current version of section 6102, subdivision (c) (as amended effective January 1, 1997) may be applied. The State Bar has cited several authorities dealing with the triggering effect of convictions, but none of those authorities deal with the principles of retroactivity that we discussed in *Jolly* or that are at issue here. Respondent cites the retroactivity cases we discussed in *Jolly* and some others to urge that we hold that the current version of section 6102, subdivision (c) may not be applied to any conviction based on criminal acts committed before January 1, 1997.

[2a] We deem the critical question in this case to be whether applying the amended summary disbarment law is a retroactive application of it to criminal acts which occurred before the amended law's effective date. We hold that it is and that, therefore, the principles in our *Jolly* decision bar such a retroactive application of this law.

[2b] As we observed in *Jolly*, "[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.)" (*In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 744 [citing *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391]; see also *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 [observing that "[a] statute is retroactive if it substantially changes the legal effect of past events"].)

[2c] At least as to convictions occurring before the effective date of the amended law, we held in *Jolly* that the statute would clearly be retroactive as the amended statute would deprive Jolly of important rights. (*In the Matter of Jolly*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 744-746.) Respondent would also be deprived of those rights as, but for the amended statute, he would not be subject to summary disbarment.

[3a] In two situations, applying a statute to acts prior to the law's effective date will not make a statute retroactive. Those situations are statutes which merely clarify rather than substantively change existing law (e.g., *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243) and those statutes which change the procedure of trials, but do not change the legal consequences of the parties' past conduct (e.g., *Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 911-913).

[3b] The "clarifying" exception to retroactivity was explained in *Western Security Bank* as law changes which, even if material, were adopted only to clarify a statute's true meaning. In such a case, the courts rule that applying the amended law has no retroactive effect as the "true meaning of the statute remains the same" as the original law. (*Western Security Bank v. Superior Court*, *supra*, 15 Cal. 4th at p. 243.) In determining whether the Legislature intended an amendment to clarify the original statute, courts look to the timing of the amendment and other appropriate indicia. (*Id.* at pp. 243-245.) Although the change in the current version of the summary disbarment law concerning sister state crimes appeared to clarify the prior law's intent, the other changes to the summary disbarment law applicable here significantly broadened the law's scope to crimes well beyond those of the prior law. We noted, *ante*, that the prior summary disbarment law required that the crime arise in the practice of law or such that the attorney's client be a victim. Those requirements were dropped in the 1997 amendments. In addition, the prior law made convictions ineligible for summary disbarment unless an element of the offense was the specific intent to "deceive, defraud, steal or make or suborn a false statement." Although these intent requirements were retained in the amendment, any felony crime involving moral turpitude was added as

an offense eligible for summary disbarment. (See *In the Matter of Jolly, supra*, 3 Cal. State Bar Ct. Rptr. at p. 745, fn. 5.) Respondent's offense, because it did not appear to involve the practice of law or a client as victim, is one which was not eligible for summary disbarment under the prior law but is eligible under the amended law. Other examples of varied felonies ineligible for summary disbarment under the prior law but eligible under the 1997 amendment are an attorney's perjury in testifying falsely in his or her own case and drug or sex crimes, whether or not involving clients, but which involve moral turpitude. Considering the much broader reach of the 1997 amendments, we cannot consider them merely clarifying.

[3c] The remaining exception is whether the amendment merely affects the trial of cases without depriving anyone of a right had at the time of commencement of the suit. As the court in *Murphy v. City of Alameda*, *supra*, 11 Cal.App.4th at p. 912 made clear, if an amendment "imposed new and different liabilities" based on the parties' past conduct, it would be a retroactive application. To highlight that the controlling issue is not whether the amendment is labeled "substantive" or "procedural," the court observed that a law could appear to be procedural in form, but use language concerning a proof burden which had the effect of altering or destroying preexisting substantive rights by imposing an impossible evidentiary requirement. (*Ibid.*) For the reasons discussed, the 1997 amendments affect much broader conduct of attorneys and cannot be seen as merely affecting the trial of conviction referral proceedings.

The State Bar has cited *Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, to urge that we consider application of the 1997 summary disbarment amendments to Jebbia not to be retroactive. In *Murrill*, the court applied disciplinary procedures arising under a new law to an accountant's conduct which arose prior to the new law, but after the accountant was convicted of crimes arising from his offenses. For the reasons the Supreme Court gave in *Fox v. Alexis* (1985) 38 Cal.3d 621, 626-627, we conclude that *Murrill* does not support the State Bar's position.[3]

Indeed, as we noted in our *Jolly* decision, the court held in *Fox* that there was no intent to apply the law in *Fox* retroactively to driving offenses arising before the change in law.

The clear effect of the 1997 summary disbarment law amendments is to obviate any trial and eliminate any opportunity to persuade that a lesser degree of discipline is appropriate as to the expanded crimes to which the amended law applies. It therefore applies retroactively. At the time respondent committed these offenses, the summary disbarment law did not apply to his crimes. We also consider carefully, as we did earlier in *Jolly*, the Supreme Court's statement in *In re Ford* (1988) 44 Cal.3d 810, 816, fn. 6. But, for the reasons stated in *Jolly*, 3 Cal. State Bar Ct. Rptr. at p. 745-746, we do not consider the Court's statement in *Ford* as inconsistent with our analysis.

Nothing in our opinion prevents the State Bar Court Hearing Department from recommending any appropriate degree of discipline after hearing, and we take no position on the appropriate degree of discipline in this matter. Also, our holding will apply to few cases as the passage of time results in more crimes occurring on or after January 1, 1997.

III. DISPOSITION.

For the foregoing reasons, we deny the State Bar's request for a summary disbarment recommendation and refer this matter to the Hearing Department for hearing and recommendation on the degree of discipline to impose.

We concur:

OBRIEN, P.J.
NORIAN, J.

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3. As the Supreme Court noted in *Fox v. Alexis*, *supra*, 38 Cal.4d at p. 627 the court of appeal in *Murrill* assumed that the statute was applied retroactively, and addressed only the issues of whether the revocation of the accountant's license deprived him of a vested property right or was an ex post facto criminal law.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Joseph R. Jaurequi

Petitioner for Reinstatement

No. 99-R-10528

Filed November 29, 1999

SUMMARY

The State Bar sought interlocutory review of a hearing judge's order denying its motion to dismiss the petition for reinstatement, contending that the hearing judge erred because the petition did not show compliance with Business and Professions Code section 6140.5, subdivision (c). The State Bar argued that an attorney who resigns with disciplinary charges pending must reimburse the Client Security Fund for all sums paid out as a result of the former attorney's misconduct, together with interest thereon and appropriate costs, as a condition precedent to the former attorney's filing of a petition for reinstatement. The review department disagreed and denied the State Bar's request to reverse the hearing judge's order.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: R. Gerald Markle

HEADNOTES

[1 a-c] **167 Abuse of Discretion**
2504 Reinstatement–Burden of Proof
2509 Reinstatement–Procedural Issues
2590 Reinstatement–Miscellaneous

The sole issue raised is whether the requirement set forth in Business and Professions Code section 6140.5, subdivision (c), that an attorney who resigns with disciplinary charges pending reimburse the Client Security Fund (CSF) for all sums paid out as a result of the former attorney's misconduct together with interest and costs, is a condition precedent to the former attorney's filing of a petition for reinstatement. The issue is not whether, at the time he filed his petition, petitioner was eligible for reinstatement, but rather whether he had a right to file his petition for reinstatement. Section 6140.5, subdivision (c) mandates that the amount paid out by CSF because of the dishonest conduct

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of a lawyer, plus applicable interest and costs, shall be paid as a condition of reinstatement of membership. There is no language in that section that precludes or purports to preclude the filing of a petition for reinstatement without including a showing of repayment to the CSF. And the review department was unaware of any law, rule of court, or rule of procedure that required an affirmative showing that reimbursement has been made to CSF before or at the time of filing a petition for reinstatement. Moreover, there was no dispute that reinstatement occurs only when the Supreme Court so directs after State Bar Court proceedings, not when a petition for reinstatement is filed. Accordingly, the State Bar failed to establish either an abuse of discretion or error of law.

Additional Analysis

None

OPINION:

OBRIEN, P.J.:

The State Bar seeks interlocutory review of a hearing judge's denial of its motion to dismiss Joseph R. Jaurequi's petition for reinstatement. The State Bar contends that the hearing judge erred in denying its motion because Jaurequi's petition does not show that he complied with Business and Professions Code section 6140.5, subdivision (c). According to the State Bar, the requirement in that statutory provision that an attorney who resigns with disciplinary charges pending reimburse the Client Security Fund (CSF) for all sums paid out as a result of the former attorney's misconduct, together with interest thereon and appropriate costs, is a condition precedent to the former attorney's *filing* of a petition for reinstatement. We disagree.

BACKGROUND

On June 22, 1988, Jaurequi resigned from the State Bar with disciplinary charges pending against him. In his petition for reinstatement, filed May 11, 1999, Jaurequi acknowledged that he was obligated to reimburse CSF in an amount of $4,719.31. He further acknowledged that he had paid only $500 to CSF before filing his petition.

The State Bar brought a motion to dismiss the petition in the hearing department on the sole ground that Jaurequi failed to reimburse CSF for the money it paid out as the result of Jaurequi's misconduct together with interest and costs. The hearing judge denied the motion because she concluded that under "the plain language" of section 6140.5, subdivision (c) reimbursement to CSF "shall be paid *as a condition of reinstatement of membership*," but not as a prerequisite to filing a petition for reinstatement. The hearing judge then concluded that, should the record produced at trial support it, she could recommend reinstatement to the Supreme Court conditioned upon Jaurequi thereafter reimbursing CSF.[1] She further noted that rule 951(f) of the California Rules of Court does not require reimbursement to CSF as a condition of reinstatement.

This petition for interlocutory review followed.

POSITIONS OF THE PARTIES

The State Bar seeks (1) reversal of the hearing judge's order denying its motion to dismiss Jaurequi's petition and (2) remand with instructions to grant its motion. According to the State Bar, "the plain language" of section 6140.5, subdivision (c) requires that Jaurequi fully reimburse CSF before *filing* his petition. In addition, the State Bar argues that that statutory provision does not permit the type of conditional reinstatement referred to by the hearing judge in her order denying its motion to dismiss. Further, it asserts that rule 951(f) of the California Rules of Court does not purport to set forth all of the requirements for reinstatement of a former attorney; that the legislature has the right to add additional requirements such as that contained in section 6140.5, subdivision (c); and that the Board of Governors of the State Bar has the right to impose additional requirements, such as a filing fee (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 660) and a five-year waiting period between the time of resignation with charges pending and filing a petition for reinstatement (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 662(b)).

As a final point, the State Bar argues that requiring the State Bar and the courts to go through a hearing in a reinstatement proceeding in which the petitioner may never be able or willing to make the required reimbursement to CSF is a waste of State Bar and judicial resources.

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1. The hearing judge did not, however, address how a recommendation authorizing Jaurequi to complete the required reimbursement to CSF after his reinstatement would be consistent with the basic requirement that a petitioner establish, by clear and convincing evidence, his or her rehabilitation before being reinstated to the practice of law. While the Supreme Court has not ruled out the possibility of a conditional reinstatement, the condition, at a minimum, must be consistent with the requirement that the petitioner establish rehabilitation *before* being reinstated. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1098; *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673-674, 674, Fn.3.)

Jaurequi, on the other hand, argues that rule 951(f) of the California Rules of Court sets forth the only required elements for reinstatement; that section 6140.5, subdivision (c) is a revenue statute that contemplates the failure to reimburse CSF may result in a continued administrative suspension after reinstatement similar to that imposed by Business and Professions Code section 6140.7, which section adds discipline costs to a member's dues bill in the year following the imposition of those costs. He argues that the issue is not whether he has reimbursed CSF, but rather whether he has passed a professional responsibility examination; shown his rehabilitation and present moral fitness to practice law; and established his present ability and learning in the general law as required by rule 951(f).

DISCUSSION

There is no challenge to the State Bar's position that this is a proper case for interlocutory review. We agree with that position.[2]

[1a] However, we limit our decision to that which is before us. Despite the parties' expanded arguments on interlocutory review, the sole issue raised is whether the requirement set forth in section 6140.5, subdivision (c) that an attorney who resigns with disciplinary charges pending reimburse CSF for all sums paid out as a result of the former attorney's misconduct, together with interest and costs, is a condition precedent to the former attorney's *filing* of a petition for reinstatement.

[1b] We do not determine whether, at the time he filed his petition, Jaurequi was eligible for reinstatement, but rather whether he had a right to *file* his petition for reinstatement. Jaurequi's right to be reinstated can only be determined following a hearing resolving, among other issues, his rehabilitation and present moral qualifications for the practice of law. (Cal. Rules of Court, rule 951(f). Although "the plain language of the statute" has been advanced by both parties as supporting their cause, we nonetheless look first to that language to resolve the issue before us. It is fundamental that, in interpreting a statute, the first step is an examination of the language of the statute. "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls." [Citations]" (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239.) Of course, "a statutory provision must be read and construed in context." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 16 disapproved on another point in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.)

[1c] Section 6140.5, subdivision (c) mandates that the amount paid out by CSF because of the dishonest conduct of a lawyer, plus applicable interest and costs, "shall be paid as a condition of reinstatement of membership." There is no language in that section that precludes or purports to preclude the filing of a petition for reinstatement without including a showing of repayment to the client security fund. And we are unaware of any law, rule of court, or rule of procedure that requires an affirmative showing that reimbursement has been made to CSF before or at the time of filing a petition for reinstatement. Moreover, there is no dispute that reinstatement occurs only when the Supreme Court so directs after State Bar Court proceedings not when a petition for reinstatement is filed. Accordingly, the State Bar has failed to establish either an abuse of discretion or error of law.

Because we conclude that the language of the statute is without ambiguity, doubt, or uncertainty, we do not reach an analysis of either the legislative history of the reason for or the practicality of the statute. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, *supra*, 6 Cal.App.4th at p. 1239; 7 Witkin, Summary of Cal. Law (9th ed., 1999 supp.) Constitutional Law, § 94, pp. 42-45.) Nor do we reach the

2. In his response to the State Bar's petition for interlocutory review, Jaurequi alleges that, since the filing of his petition for reinstatement, he has paid the full amount due, plus interest, to CSF. In a closing memorandum filed without leave of court, the State Bar confirms CSF's receipt of that payment. Because of the State Bar's argument that the payment of such sums to CSF is a precondition to filing a reinstatement petition and because of the expected recurrence of the question, we conclude that such payment should not preclude us from resolving the issue before us.

State Bar's remaining arguments such as the potential waste of judicial and State Bar resources.

Similarly, we do not address Jaurequi's arguments that section 6140.5, subdivision (c) is nothing more than a revenue statute and that any requirement for reimbursement to CSF should be handled as an administrative matter either after a State Bar Court recommendation of reinstatement or a Supreme Court order of reinstatement.

CONCLUSION

We deny the State Bar's requests to reverse the hearing judge's order denying its motion to dismiss Joseph R. Jaurequi's petition for reinstatement.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Marc A. Duxbury

A Member of the State Bar

No. 96-C-03132

Filed November 30, 1999

SUMMARY

The hearing judge found that circumstances surrounding respondent's misdemeanor conviction on a single count of violating Insurance Code section 750, subdivision (a) (prohibiting attorneys from offering compensation for the referral of clients) involved moral turpitude. Finding respondent's conviction aggravated by failing to appreciate the seriousness of his misconduct, but mitigated by five years of discipline free practice, no subsequent misconduct, and good character evidence, the hearing judge recommended a two-year stayed suspension with two years' probation and 120-days' actual suspension. (Hon. Madge S. Watai, Hearing Judge.)

State Bar sought summary review of the hearing judge's discipline recommendation contending that it was inadequate and that the appropriate level included a one-year period of actual suspension. In addition, the State Bar attacked each of the hearing judge's three mitigation findings and complained that she erred by not finding lack of candor aggravation and by not giving sufficient aggravating weight to the aggravating factors she did find. The review department reversed one of the hearing judge's mitigating findings and reduced the level of mitigating credit with respect to another. After modifying the hearing judge's mitigation findings and considering applicable case law, the review department modified the hearing judge's discipline recommendation by increasing the recommended period of actual suspension from 120 days to 6 months.

COUNSEL FOR PARTIES

For State Bar: Charles Weinstein

For Respondent: James N. Dicks

HEADNOTES

[1] **130 Procedure–Procedure on Review**
139 Procedure–Miscellaneous
735.50 Mitigation–Candor–Bar–Declined to Find
795 Mitigation–Other–Declined to Find

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Even if issue had properly been before review department on summary review, respondent would not have been entitled to any mitigating credit for self reporting to State Bar his misdemeanor conviction for paying for referral of clients because respondent had a pre-existing statutory duty to report his criminal conviction.

[2 a, b] **165 Adequacy of Hearing Decision**
169 Standard of Proof of Review–Miscellaneous
199 General Issues–Miscellaneous
710.34 No Prior Record
710.39 Mitigation–No Prior Record–Found but Discounted

Even though respondent was not entitled to any mitigating credit for five years of discipline free practice under standard 1.2(e)(i) and case law, there was no error in hearing judge's giving respondent mitigating credit for discipline free practice because weight assigned to such mitigation by hearing judge was nominal (i.e., "exists in name only;" not real or substantial).

[3] **710.35 Mitigation–No Prior Record–Found but Discounted**
710.59 Mitigation–No Prior Record–Declined to Find

Case law permits long period of discipline free practice to be treated as mitigation even though present misconduct is serious.

[4 a, b] **165 Adequacy of Hearing Decision**
740.31 Mitigation–Good Character–Found but Discounted
740.39 Mitigation–No Prior Record–Found but Discounted

Good character evidence consisting of recent letters from two judges before whom respondent had regularly appeared and two attorneys who had known respondent since 1986 was not entitled to substantial mitigating credit because evidence did not come from a wide range of references in general and legal communities as required by standard 1.2(e)(vi). However, respondent was entitled to some mitigating weight for that evidence because it represented a fair reference from legal community.

[5 a, b] **615 Aggravation–Lack of Candor–Bar–Declined to Find**

While it is true that the hearing judge found that some aspects of respondent's testimony lacked credibility, she did not find that respondent's testimony lacked candor or was dishonest. Absent such a finding, aggravation under standard 1.2(b)(vi) is inappropriate.

[6 a-g] **586.11 Aggravation–Harm to Administration of Justice–Found**
623 Aggravation–Lack of Remorse–Found but discounted or not relied on
740.31 Mitigation–Good Character–Found but Discounted
1523 Conviction Matters–Moral Turpitude–Facts and Circumstances
1552.59 Conviction Matters–Standards–Moral Turpitude–Declined to Apply

Appropriate level of discipline for respondent's misdemeanor conviction for paying for referral of two clients (Ins. Code, § 750, subd. (a)), where circumstances surrounding conviction involved moral turpitude, was two-year stayed suspension with two-year period of probation and six-month period of actual suspension.

[7] **130 Procedure–Procedure on Review**
695 Aggravation–Declined to Find
1699 Conviction Cases–Miscellaneous Issues

Where factual findings were used by the hearing judge to find culpability, it would be improper to again consider those same findings as factors in aggravation.

Additional Analysis

Mitigation
Found
750.51 Insufficient Time since misconduct
Declined to Find
750.52 Mitigation–Rehabilitation–Declined to Find
Discipline
1613.08 Stayed Suspension–2 years
1615.04 Actual Suspension–6 months
1617.08 Probation–2 years

OPINION:

OBRIEN, P.J:

The State Bar seeks summary review under the provisions of rule 308(a)(2) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings (Rules of Procedure for State Bar Court Proceedings) from the decision of a hearing judge recommending that respondent Marc A. Duxbury be suspended from practice for a period of two years, execution stayed, and that respondent be placed on probation for two years, conditioned, *inter alia*, on his being suspended for the first 120 days of the probationary period. The State Bar urges that, based on respondent's conviction of a misdemeanor charge of violating Insurance Code section 750, subdivision(a), prohibiting one from offering compensation for the referral of clients, he should suffer actual suspension for a period of one year.[1] Respondent, after asserting in the hearing department that his misconduct warranted only a reproval, now argues that the recommended actual suspension of 120 days is appropriate.

PROCEDURAL HISTORY

The State Bar filed its request for summary review in April 1998. In its request the State Bar seeks review of only the hearing judge's discipline recommendation. Rule 308(a)(2) of the Rules of Procedure for State Bar Court Proceedings expressly authorizes the summary review of discipline recommendations as long as no challenge is made to any of the hearing judges' material findings of fact. Accordingly, in an order filed on May 8, 1998, we provisionally granted the State Bar's request for summary review.

In its opening memorandum on summary review, the State Bar not only raised the issue of discipline, but also raised contentions that some of the hearing judge's findings of fact support conclusions of law that are different from those reached by the hearing judge. Respondent did not object to the State Bar's raising these additional contentions and addressed them on the merits in his responsive memorandum. Accordingly, because rule 309(a)(1) of the Rules of Procedure for State Bar Court Proceedings expressly authorizes the summary review of "contentions that the facts support conclusions of law different from those reached by the hearing judge," we shall address the additional contentions raised by the State Bar in addition to addressing the issue of discipline.

Moreover, we adopt our May 8, 1998, order provisionally granting the State Bar's request for summary review as our final order and proceed under the rules for summary review.

HEARING JUDGE'S FINDINGS OF FACT

There is no dispute regarding the facts in this matter. Respondent was admitted to practice law in this state in June 1989. As the result of a nolo contendere plea to an amended criminal complaint respondent was found guilty of a misdemeanor violation of Insurance Code section 750(a) and placed on summary probation for a period of one year, conditioned on his performing 100 hours of community service. As the result of respondent's plea, eight remaining counts charging violations of Insurance Code section 750(a) were dismissed.

The circumstances leading to the arrest and conviction of respondent started with a June 1994 telephone call from a Dr. Hudgins, a chiropractor known to respondent, who suggested that respondent meet with "Antonio Barajas" of South Bay Marketing and described "Barajas" as "a guy with cases to sell." Hudgins added that "Barajas" charged $500 a case, that he (Hudgins) knew that respondent could not purchase cases, but that investigative services would be provided with the referral. In this same conversation, respondent was told that Hudgins would get patient referrals from "Barajas" and receive "marketing services" for which Hudgins would pay $500 to $1,500 a month.

1. In the State Bar's reply memorandum it urges actual suspension of one year, while in its opening memorandum, it sought a two-year actual suspension.

Respondent then met with "Barajas," who was in fact Tony Torres, an undercover peace officer with the State of California. Torres secretly recorded his meeting with respondent. Torres stated he would refer cases to respondent for a fee of $500 per person, regardless of how many individuals were involved in the underlying accident and that the price would include a police report, third party insurance information, a report of an intake interview with the "client" and, if desired, photos, witness interviews, pictures of skid marks, and property damage estimates. The fee would not be varied based on the extent of the investigation.[2]

Respondent indicated that he would pay for investigative services to be done by the time he got the case; however, he did not want South Bay Marketing personnel driving prospective clients to see him because he did not want an obvious connection between him and South Bay Marketing. Respondent offered to recruit another chiropractor for South Bay Marketing; however, that chiropractor declined to participate.

Respondent received two cases from South Bay Marketing, each with two alleged plaintiffs. The first case, the subject of the charges for which respondent was convicted, resulted in an itemized billing to respondent in the amount of $1,000 which was paid from respondent's personal account, but never billed to the "clients." Respondent received an investigative package, which included a police report, photos, interviews, uninsured motorist certificate, and a check for property damage.

Respondent met with the two "clients" who told him they had met "Barajas" at church. Respondent sent the clients for medical treatment, received medical reports, and then negotiated a tentative settlement for them with the insurance carrier. Upon his inability to contact the clients, respondent filed an action to protect the statute of limitations and then moved to withdraw from the case because he could not locate his clients. In his efforts to locate the "clients," respondent hired a private investigator and learned that they had given him bogus social security numbers and addresses. He also learned that South Bay Marketing's address was merely a mail drop.

The second matter referred to respondent also involved two "clients" and was delivered with only a police report and aggressive verbal demands from "Barajas" for the payment of $1,000 in fees. Torres advised that, unless he was paid, he would send respondent no more cases. Respondent did not pay the $1,000, claiming he was not furnished with investigation results.

HEARING JUDGE'S CONCLUSIONS OF LAW

Respondent's conviction of a violation of Insurance Code section 750, subdivision (a) conclusively establishes that respondent gave consideration for the referral of at least one client. (Bus. & Prof. Code, § 6101, subd. (a).) That conviction has been properly called to the attention of the State Bar.[3] [1 - see fn. 3]

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2. During the meeting with Torres respondent stated, "I'm gonna be frank with you . . . in the past I've had arrangement this (sic) with somebody and they were throwing cases that were kinda dogs, you know, they weren't real good cases. They were questionable liability and slip and fall. [¶] He was giving clients the idea that his cases were worth, you know [unintelligible] and that's how he was getting his clients and I didn't know it. [¶] I got no problem with that but to make it legitimate and legal and through the State Bar correct, I've got to pay for some sort of a service. And what I'm paying for is the investigative service. I understand that. I like the way you guys set it up."

3. [1] In his responsive memorandum on summary review and at oral argument, respondent stressed the fact that he voluntarily reported his criminal conviction to the State Bar and suggested that he is entitled to mitigating credit for that act. First, whether respondent is entitled to mitigation for reporting his conviction to the State Bar is not before us on summary review. Second, even if it were properly before us, respondent would not be entitled to any mitigation for self reporting his conviction because he had a preexisting duty, under Business and Professions Code section 6068, subdivision (o)(5), to report it within 30 days after his no contest plea. (Cf. *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530 [respondent not entitled to mitigation for merely participating in disciplinary proceeding because he had a preexisting duty to do so under Business and Professions Code section 6068, subdivision (i)].)

Respondent's conviction is not a crime that involves moral turpitude per se. Under the provisions of Business and Professions Code sections 6100, 6101, and 6102, when the conviction is for other than a crime inherently involving moral turpitude, it becomes the obligation of this court, for disciplinary purposes, to make a recommendation to the Supreme Court as to whether the crime or the facts and circumstances surrounding it involved moral turpitude or "other misconduct warranting discipline." (*In re Kelley* (1990) 52 Cal.3d 487, 494; see also Cal. Rules of Court, rule 951.) "In examining the circumstances giving rise to an offense, we are not restricted to examining the elements of the crime, but rather may look to the whole course of an attorney's conduct which reflects upon his fitness to practice law. (Citations.)" (*In re Hurwitz* (1976) 17 Cal.3d 562, 567.)

The purported investigation that respondent was paying for was nothing more than a deliberate subterfuge to obscure the true nature of the fact that respondent entered into an agreement to pay for cases and, in at least one instance, carried out that agreement. Respondent made no effort to determine the legitimacy of "South Bay Marketing," did not want their representatives to transport clients to his office, sought to involve another chiropractor in the scheme, and admitted to Torres that he had made similar arrangements in the past. Further, the fact that the charges of South Bay Marketing were based on the number of clients referred, and not on the extent of the investigation, makes clear that the payment was for the referral of clients and not investigation.

Citing *Kitsis v. State Bar* (1979) 23 Cal.3d 857, the hearing judge concluded that respondent's actions surrounding in his conviction for violating Insurance code section 750, subdivision (a) involved moral turpitude. In *Kitsis v. State Bar*, *supra*, 23 Cal.3d at p. 866, the Supreme Court held that the attorney's solicitation of clients violated Business and Professions Code section 6068 and that the deliberate and knowing violation, by an attorney, of any of the duties set forth section 6068 usually involves moral turpitude.

Neither party disputes the hearing judge's conclusion of moral turpitude.

DISCUSSION

The State Bar argues that the hearing judge gave mitigating credit in three instances that were not warranted under the facts, erroneously failed to aggravate for lack of candor, and failed to give proper weight to three matters it urges in aggravation.

[2a] Initially, the State Bar complains that the hearing judge gave respondent "nominal" mitigating credit for the absence of prior discipline. He was indicted in January of 1997, for misconduct that commenced in the middle of 1994. Five years of discipline free practice does not entitle an attorney to mitigating credit under standard 1.2(e)(i) of the Standards for Attorney Sanctions for Professional Misconduct[4] (*In re Naney* (1990) 51 Cal.3d 186, 196 [seven years without discipline "not a strong mitigating factor"]; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [four year practice insufficient for mitigation].)

[3] Without supporting case law citation, the State Bar further argues that, since respondent's crime was found to involve moral turpitude, he could not receive mitigating credit under standard 1.2(e)(i) because, under the language of that standard, it is not applicable when the present misconduct is deemed serious. We all but rejected such an argument almost 10 years ago in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13. In *Stamper* we noted that the Supreme Court has repeatedly applied standard 1.2(e)(i) in cases involving serious misconduct. **[2b]** In any event, the hearing judge assigned only "nominal" weight to respondent's discipline free practice. "Nominal" is defined as: "Titular; existing in name only; not real or substantial; . . ." (Black's Law Dictionary, 6th ed. 1990) p. 1049, Col. 1.) Since the weight assigned to mitigation for discipline free practice "exists in name only," there is no error.

4. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct (standards).

Second, the State Bar complains that respondent should be afforded no mitigating weight for the fact that he has committed no misconduct since the conduct resulting in his conviction. We agree. Neither sufficient time has passed between respondent's misconduct and the present nor has he provided sufficient evidence of rehabilitation to be entitled to mitigating credit under standard 1.2(e)(viii). (*In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 479-480.) Accordingly, we reject the hearing judge's limited mitigation finding under standard 1.2(e)(viii).

[4a] The hearing judge afforded respondent "substantial mitigating weight" for evidence of good character. This evidence consisted of recent letters from two judges before whom respondent had regularly appeared and two attorneys who had known respondent since 1986. All were found to have been reasonably well acquainted with the salient facts of respondent's conviction. In its third complaint as to the hearing judge's mitigation findings, the State Bar challenges this determination, arguing that standard 1.2(e)(vi) requires "an extraordinary demonstration of good character . . . 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."

[4b] We agree that the evidence does not meet the standard that requires a wide range of references from the legal and general communities (see *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387), but it does represent a fair reference from the legal community. As such, we afford some mitigating weight to that evidence, which is less than the substantial mitigation afforded by the hearing judge. (Cf. *Preston v. State Bar* (1946) 28 Cal.3d 643, 651 [in reinstatement proceedings, the testimony of attorneys and judges who have known the petitioner for years is entitled to great weight because attorneys and judges are morally bound by their oaths not to recommend a petitioner unless they are personally satisfied of his or her rehabilitation]; see also *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403 [where testimony of eight character witnesses, five of whom were attorneys, was given great consideration in reinstatement proceeding]; but see *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171 [testimony of three character witnesses -- one judge, one attorney, and one client -- was not given significant weight in mitigation in a disciplinary proceeding because of the inadequate number of witnesses].)

[5a] In its complaints as to the hearing judge's aggravation findings, the State Bar argues that the hearing judge improperly failed to apply standard 1.2(b)(vi), requiring an attorney to display candor and cooperation to the State Bar during disciplinary proceedings. In addition, the State Bar argues that the hearing judge gave insufficient weight to her finding of harm to the administration of justice under standard 1.2(b)(iv), multiple acts of misconduct under standard 1.2(b)(ii), and indifference to rectification or atonement under standard 1.2(b)(v).

[5b] We reject the State Bar's contention that the hearing judge erred by not finding lack of candor aggravation under standard 1.2(b)(vi). While it is true that the hearing judge found that some aspects of respondent's testimony lacked credibility,[5] she did not find that respondent's testimony lacked candor[6] or was dishonest. Absent such a finding, aggravation under standard 1.2(b)(vi) is inappropriate. (*In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 777 [hearing judge's finding that the respondent's testimony on an issue was "'incredible, self-serving, and not supported by any evidence'" did not establish, by clear and convincing evidence (std. 1.2(e)), that the respondent's testimony lacked candor or was dishonest].)

5. This determination was based on a recording Torres made of his meeting with respondent where respondent stated that "in the past I've had arrangement this (sic) with somebody and they were throwing cases that were kinda dogs, you know, they weren't real good cases."

6. Contrary to the State Bar's contention in its opening memorandum, the hearing judge did not "expressly" find that respondent's testimony lacked candor; she found only that part of respondent's testimony was not credible.

We consider the State Bar's remaining three arguments pertaining to aggravation under our discussion of discipline.

DISCIPLINE

In the interest of uniformity and fairness, we look to the standards and like cases to guide us in assessing the recommended discipline. The standards have been declared by the Supreme Court to be guidelines, and it is well settled that the degree of professional discipline must come from a balanced consideration of all applicable factors. (See, e.g., *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.)

[6a] The State Bar invites our attention to standard 3.2.[7] In spite of the admonition of that standard, the State Bar in its closing brief argues for only a one-year period of actual suspension. They ask us to consider *In re Gross* (1983) 33 Cal.3d 561, *Kitsis v. State Bar*, *supra*, 23 Cal.3d 857, and *Goldman v. State Bar* (1977) 20 Cal.3d 130, among other cases.

In *Gross* the attorney suffered a misdemeanor conviction for capping, and in addition, was found culpable of presentation of false claims, including the falsification of medical reports and bills. The Supreme Court imposed a three-year period of actual suspension on that attorney.

In *Kitsis*, the attorney had been involved in capping and solicitation of over 200 individual clients. In addition, he had misled one of his cappers by telling her that such conduct was legal. The attorney in *Kitsis* was disbarred.

In *Goldman*, the two attorneys were found culpable of capping as to six clients. They were found to have full knowledge that their employees solicited individuals involved in accidents to employ the Goldman office and signed clients to retainer agreements. Each of the attorneys in *Goldman* was actually suspended for one year.

[6b] The hearing judge placed reliance on *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178 where Nelson was found to have formed a partnership for the practice of law with a non-lawyer with whom he split fees. Nelson used the non-lawyer as a "runner" and "capper." The misconduct in *Nelson* was more serious than that before us; however, there was far more mitigation in *Nelson*. In that case there was strong evidence of remorse, restitution, rehabilitation, candor, and cooperation. Nelson was given an actual suspension of six months.

[6c] We find *Nelson* to be the most analogous of the cases considered. In *Gross* the misconduct was far more serious than capping. In *Kitsis* the capping misconduct involved a great number of clients and is deemed more serious than that before us. In *Goldman* those soliciting clients were employees of the attorney's office and were having clients sign retainer agreements.

[7] The State Bar argues that we should consider the following factual findings of the hearing judge in aggravation that respondent: (1) agreed to pay for four client referrals and, in fact, paid for two; (2) solicited another to participate in the scheme; and (3) had participated in prior related misconduct as evidenced by his statements to Torres. Ordinarily, each of these items would be entitled to aggravating weight. However, each of these factors was used by the hearing judge to find that the facts and circumstances surronding respondent's violation of section of Insurance Code section 750, subdivision(a) involved moral turpitude. To again consider those factors in aggravation would improperly give them double weight. (*In the Matter of Sampson* (1994) 3 Cal. State Bar Ct. Rptr. 119, 132-133.)

[6d] Respondent lacked a full understanding of the seriousness of his misconduct. This is an aggravating factor under standard 1.2(b)(v). The hearing judge found that, although respondent did not fully comprehend the wrongfulness of his misconduct,

7. Standard 3.2 provides in part: "Final conviction of a member of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two-year actual suspension, . . ."

respondent made clear he would never again engage in similar misconduct and was obviously remorseful in weighing aggravation under standard 1.2(b)(v). We find no error in the hearing judge's assessment of that aggravation.

[6e] Although there was no harm to a client, respondent's misconduct caused harm to the administration of justice. This is an aggravating circumstance under standard 1.2(b)(iv). This aggravating circumstance was appropriately considered and weighed by the hearing judge.

[6f] Based on our modification of findings of mitigation and our consideration of the authorities cited, we modify the discipline recommended by the hearing judge. The discipline recommended by the State Bar, even that recommended in its reply memorandum, appears too harsh in light of the discipline imposed in *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 190-191. However, our findings reducing mitigation require an increase in the disciplinary time of actual suspension.

RECOMMENDATION

[6g] On our evaluation of the limited record before us and based upon the hearing judge's findings of fact and conclusions of law on moral turpitude, we adopt all of the recommendations of the hearing judge except we recommend that respondent be actually suspended during the first six months of his probationary period. Except as modified herein, the decision of the hearing judge, filed on March 31, 1998, remains the final decision of the State Bar Court in this proceeding. (See Rules Proc. for State Bar Court Proceedings, rule 220(a); *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 696.)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Robert H. Wyshak

A Member of the State Bar

Nos. 92-O-20339; 95-O-13441

Filed September 21, 1999

SUMMARY

While acting as escrow agent and trustee, respondent engaged in multiple acts of dishonesty and concealment which defrauded two separate sellers of valuable real estate. In a third matter, respondent engaged in misconduct, including some causing serious harm to the victim and the honest administration of justice, by advancing in court unfounded charges of sexual harassment in order to delay or defeat an unlawful detainer action. In a fourth matter, respondent disobeyed a federal court order to produce documents in a civil case. The hearing judge recommended disbarment. (Hon. Michael D. Marcus, Hearing Judge.)

Respondent requested review. The review department adopted the findings of the hearing judge in the four matters and the disbarment recommendation. All together, respondent committed a wide variety of serious ethical violations in the four matters, none of which was excused by the evidence he offered. Considering the extreme seriousness of respondent's misconduct, his showing in mitigation was insufficient to justify lesser discipline. The very factors that caused the hearing judge to recommend disbarment caused the review department to do so as well; notably, the grave seriousness of respondent's misconduct coupled with his lack of any meaningful regret, understanding, insight, or acceptance of any responsibility for the consequences of his misconduct.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Erica Tabachnick

HEADNOTES

[1] **257.00 Rule 2-100 [former 7-103]**

Respondent's communication with an opposing client when he knew that the opposing client was represented by counsel was a wilful violation of rule 2-100 (A), Rules of Professional Conduct. The

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

contact occurred during litigation and respondent had no excuse for the communication. Had he meant to extend a courtesy to opposing counsel, a much different method and communication would have been appropriate. It is well settled that rule 2-100 (A) and its predecessor former rule 12 are therapeutic rules designed, in part, to shield the represented party from well-meaning, but misguided advances by an attorney to an adverse party as well as deliberately improper ones.

[2] **194 Statutes Outside State Bar Act**
214.50 State Bar Act–Section 6068(o)

The duty to report sanctions timely pursuant to section 6068, subdivision (o)(3), Business and Professions Code, is not excused solely because of the pendency of an appeal of the sanction order.

[3] **142 Evidence–Hearsay**
159 Evidence–Miscellaneous

The hearing judge did not err by admitting evidence under Evidence Code section 1223, the so-called coconspirator's exception to the hearsay rule. The law supporting use of the coconspirator exception to the hearsay rule does not require absolute proof of a conspiracy, but only that there be independent evidence to establish prima facie the existence of a conspiracy and other preliminary facts. Those requirements were adequately met here.

[4] **130 Procedure–Procedure on Review**
142 Evidence–Hearsay
159 Evidence–Miscellaneous

Where statements could have been offered not to prove the truth of the matter stated, but for the purpose of showing that they were made in respondent's presence to disprove respondent's claim of lack of knowledge, the statements were not hearsay. In the absence of an objection and a request, made in accordance with Evidence Code section 355, that the use of the statements be admitted into evidence for the limited purpose, any error in their admission was waived. In any case, the statements were admissible under the adoptive admissions exception to the hearsay rule.

[5 a-d] **221.00 State Bar Act–Section 6106**
511 Aggravation–Prior Record–Found
582.10 Aggravation–Harm to Client–Found
586.12 Aggravation–Harm to Administration of Justice–Found
621 Aggravation–Lack of Remorse–Found
1010 Disbarment

This case presents serious acts of dishonesty which served to defraud two sellers of valuable real estate. Respondent's many ethical violations featured harm to victims and the honest administration of justice. Offenses concerning the administration of justice have been considered as very serious by the Supreme Court. Disbarment is not reserved just for attorneys with prior disciplinary records. A most significant factor is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. This factor makes disbarment appropriate despite the fact that respondent presented some mitigating evidence.

Additional Analysis

Culpability

Found	
213.41	Section 6068(d)
213.61	Section 6068(f)
213.71	Section 6068(g)
220.01	Section 6103, clause 1
221.11	Section 6106–Deliberate Dishonest/Fraud
273.31	Rule 3-310 [former 8-101(B)(4)]

Aggravation

Found	
521	Multiple Acts
541	Bad Faith, Dishonesty
591	Indifference

Mitigation

Found	
725.51	Lack of Expert Testimony
740.10	Good Character

Other

175	Discipline–955
178.10	Costs–Imposed
2225.90	Other Reason

OPINION:

STOVITZ, J.:

Respondent Robert H. Wyshak requested that we review the recommendation of a hearing judge that he be disbarred. Respondent was admitted to practice over forty years before the found acts of misconduct in four matters and has no prior discipline. Independently reviewing the record, we agree with the findings of the hearing judge in those four matters and adopt his recommendation. The record shows that, while acting as escrow agent and trustee, respondent engaged in multiple acts of dishonesty and concealment, which defrauded two separate sellers of valuable real estate. In a third matter, respondent engaged in misconduct, including some causing serious harm to the victim and the honest administration of justice, by advancing in court unfounded charges of sexual harassment in order to delay or defeat an unlawful detainer action. In a fourth matter, respondent disobeyed a federal court order to produce documents in a civil case.

All together, respondent committed a wide variety of serious ethical violations in the four matters, none of which is excused by the evidence he has offered herein. Considering the extreme seriousness of respondent's misconduct, his showing in mitigation was insufficient to justify lesser discipline. The very factors that caused the hearing judge to recommend disbarment cause us to do so as well; notably, the grave seriousness of respondent's misconduct coupled with his lack of any meaningful regret, understanding, insight, or acceptance of any responsibility for the consequences of his misconduct.

I. STATEMENT OF THE CASE.

A. Respondent's Background.

Respondent graduated from Harvard Law School and was licensed to practice law in California in 1948. He served in the U.S. Attorney's Office in Los Angeles and headed its Tax Division, several years after admission. He then became law partners with his wife, Lillian Wyshak. The Wyshaks had a very well known Beverly Hills tax practice for over 25 years until they divorced and dissolved the partnership. In the early 1980's, respondent started practicing on his own, remaining officed in Beverly Hills with listed branch offices in Palm Springs, Costa Mesa, and Washington, D.C. At times, respondent's sole practice was not nearly as successful as when he practiced with Lillian. All of the misconduct occurred during respondent's sole practice. Respondent also served briefly as a judge pro tem hearing small claims cases.

B. Respondent's Dealings with Eggleston.

Sometime in 1981 or 1982, respondent met George Eggleston. He was impressed with Eggleston's seemingly wealthy, successful background and persuasive abilities. He had advised Eggleston in about 1982 about the tax shelter aspects of an alcohol fuel idea. However, respondent knew Eggleston had serious problems with tax shelters he had organized and that, sometime in the early 1980's, Eggleston was convicted of tax evasion and served six years in prison.[1] After Eggleston's release from prison in about 1988 or 1989, he and respondent visited socially from time to time. Below, respondent testified that he never hired Eggleston as an employee and never had a business relationship with him. Respondent admitted, in the hearing department, that he lied when he gave contradictory testimony under oath in an earlier federal civil deposition.

C. Culpability Findings and Related Facts.

1. The Mollan-Masters Matter.

Charlotte René Mollan-Masters was an educational consultant who lived in Ashland, Oregon and had no prior experience with real estate. Her mother had died, and her father was ill. Mollan-Masters was trustee of her parents' trust. She wished to sell her father's Palm Desert condominium, which was in the Palm Valley Country Club development. The real

1. Respondent did not represent Eggleston in his federal criminal prosecution.

estate market was down and there were no buyers after about a six-month listing period. However, Eggleston made a "creative" bid for the property. Respondent was to serve as trustee and as escrow. Mollan-Masters did not know respondent or Eggleston and did not negotiate directly with Eggleston or respondent. Eggleston bargained with Mollan-Masters's realty agent. Mollan-Masters's personal attorney did look superficially at respondent's background and found he was a Harvard Law graduate and had other positive qualities.

The deal Eggleston put together and respondent drafted into escrow instructions and a trust agreement was unusual in that it provided for a purchase price of $220,000 to be paid over several years from the earnings of a "cash grant" of $218,853 to be placed in escrow and in trust with respondent serving as trustee. The funds represented by the cash grant were to be released to the seller in three equal, annual installments of $72,951. No real property secured the purchase contract, but the trust agreement called for the funds to be invested in government or corporate bonds. Respondent received a fee of $1,000 for his escrow services.

There was ample documentation that the $218,853 grant was to be in cash and that respondent represented that it had been received in escrow as a cash or equivalent payment. The purchase contract recited that a "cash funded irrevocable trust" was to be "established for seller." The irrevocable trust agreement respondent prepared made several references to the cash grant. It recited the delivery of it to respondent as trustee and respondent acknowledged receipt of it "as the Original Trust Assets." This trust agreement required that the "funds from the Cash Grant" be placed in specific types of investments. Exhibit 1 attached to the irrevocable trust agreement was a document entitled "cash grant" in the amount of $218,853 "which amount is equal to the sum of the [payments to Mollan-Masters]." The cash grant recited that it was delivered to the trustee on the effective date of the trust. Finally, respondent's escrow settlement statement dated June 23, 1992, showed credits to the escrow account of $218,853.

At the time escrow closed in June 1992, respondent sent Mollan-Masters $25,000. She never received any more funds from the sale. It is undisputed that no funds supporting the cash grant were ever received in escrow.

At the end of August 1992, Mollan-Masters wrote to respondent asking a number of questions about the sale and the irrevocable trust. Respondent replied to her by letter, stating in part that the only bank trustee account established for the assets of the irrevocable trust was with his law firm. Respondent concealed that there never were any assets in this account at the time. Mollan-Masters replied on September 1, 1992, expressing concern that she had received no proof that the trust was funded, that she went ahead with the sale because of respondent's sterling reputation, and that she and her lawyers want documentation supporting the transfer of property as "[a]ny good escrow firm would provide . . . . "

The sale contract required Mollan-Masters to demand in advance that respondent pay the first installment due at the end of June 1993. She made this demand, but respondent did not reply, ignoring repeated phone calls and even requests sent by certified mail. In November 1993, Mollan-Masters saw respondent by surprising him at his Beverly Hills office. He told her that he had been duped in that others were responsible for not funding the trust. Respondent solicited a $10,000 retainer fee from Mollan-Masters to represent her against those allegedly at fault. He told her who was at fault, but did not mention Eggleston, mentioning instead other victims of Eggleston's business deals. Mollan-Masters declined respondent's offer for representation and never heard further from him. Unknown to Mollan-Masters, the Palm Desert property went into foreclosure.

As found by the hearing judge, title to this property was held by one or more of Eggleston's entities. Ultimately, Eggleston's in-laws, the DeMonds, were living in the property. In September 1994, the Palm Valley Homeowner's Association started an unlawful detainer action to remove the DeMonds. Respondent opposed vigorously this action.

At the State Bar Court trial, respondent testified that the "cash grant" was nothing more than a promise by the buyer to pay periodically.

The hearing judge found that respondent committed moral turpitude in violation of section 6106 by falsely representing that he had received the purchase price as cash and was holding it in trust. However, the hearing judge found that respondent did not violate Business and Professions Code section[2] 6068, subdivision (m) or rule 4-100(B)(3) Rules of Professional Conduct of the State Bar[3] as those duties pertain to clients, and Mollan-Masters was not a client. Accordingly, the hearing judge dismissed the latter two charged violations with prejudice.

We adopt those findings.

2. The Pennington Matter.

In this matter, the hearing judge only found respondent culpable of failure to comply with a federal district court's discovery order. (§6103.) Our review of the record supports that finding. It is therefore unnecessary to detail the Pennington transaction except to set forth facts showing that respondent was personally involved in actions taken in this matter. Those facts support the hearing judge's findings in the other matters.

One of the homes William Pennington owned was in Indian Wells, California, with an adjacent vacant lot. One of Eggleston's trusts offered to buy the Indian Wells property for $1.7 million with about $300,000 to be paid in cash and the rest in periodic payments per a promissory note unsecured by any realty. The promissory note payment stream was described as secured by Ginnie Mae or Hong Kong bonds. Respondent was to act as escrow agent.

Shortly after the deal, Pennington hired counsel to undo it, but it was too late. Pennington's counsel tried to get information from respondent as to whether or not respondent actually held the bonds. Respondent's first reaction was that he did not create this transaction and did not sign the papers bearing his name. Respondent confronted Eggleston who assured him there were bonds backing up the payments. Respondent testified that he researched a Goldman, Sachs account which contained valuable bonds and then no longer objected to Eggleston's deal with Pennington. Respondent also testified that when he learned that Eggleston had forged his name he neither reported Eggleston to any authorities -- he claimed he did not know to whom he should report Eggleston -- nor did he disassociate himself from Eggleston.

In May 1992, Pennington filed a federal diversity-of-citizenship fraud lawsuit against respondent, Eggleston, the real estate broker and Eggleston's cohorts seeking punitive damages. The case was assigned to United States District Court Judge Spencer Letts, who was concerned from the outset about the unusual realty transaction -- so unusual that even counsel could miss the import of it -- and that it seemed to Judge Letts that Pennington was unaware that he was in jeopardy for having entered into it.[4]

The hearing judge decided that because the State Bar did not introduce sufficient clear and convincing evidence about the most serious charges in the Pennington matter, the only charge sustained was the section 6103 violation arising from respondent's failure to comply with Judge Letts's discovery order to produce certain documents. We agree with the hearing judge.

Concerning respondent's failure, he admitted, in his testimony in this proceeding that he did not provide the ordered discovery. His purported defense was that he deemed it advisable to assert his privilege against self-incrimination.

In sum, we adopt the hearing judge's culpability determination that respondent violated section 6103. In addition, we adopt his dismissals with prejudice of

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

3. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar.

4. A partial transcript of a pretrial hearing Judge Letts conducted in the civil case shows that by the time of the hearing, the Judge had gotten a sense, although he stressed it was not yet a proven finding, that there might not be an honest person in this case and he suggested to Pennington's attorney that Pennington needed to protect his position in the deal as soon as possible.

the charged rule 3-310(B)(1) (representation of adverse interests), section 6106 (moral turpitude) and section 6068, subdivision (m) (communication with client).

3. The Freund Matter.

This transaction to sell property owned by the Freunds was structured similarly to the Mollan-Masters matter. The Freunds owned a three bedroom condominium at the Lakes Country Club in Palm Desert, California. Mrs. Freund had the condominium furnished by a decorator, and she testified that it was in very good condition. She decided to sell it with all the furnishings. The Freunds were represented by attorney William Finestone, a certified specialist in trust and estate planning with considerable experience in that field.

One of Eggleston's trusts offered to buy the Freunds' home. Respondent acted as escrow agent. The deal was finalized in July 1992. The purchase price was $238,305.30, to be paid in semi-annual installments of $6,216.66 with a lump-sum payment of the $207,322 balance on January 3, 1995. To support the purchase, Eggleston's trust was to promptly deposit in escrow a "cash grant" of $300,000. Those funds were to be invested in unspecified government securities or investment grade instruments. Respondent was to act as trustee of the invested funds. There was no realty securing the sale.

On July 15, 1992, respondent advised attorney Finestone that he held the $300,000 cash grant. The documents prepared by respondent were similar to those in the Mollan-Masters matter. Respondent produced on his letterhead an "Opening Statement" of the trust dated July 21, 1992, showing "initial trust assets" of $300,000 represented by the cash grant.

A few months after the deal was finalized, Finestone was unable to get any information from respondent about what assets were in trust. Mrs. Freund was able to visit the property and found that the property looked terrible, in part because all of her quality furnishings had been replaced with old furniture.

Finestone also found a legal problem with the trust respondent created: that a law office was not a qualified trustee under the Probate Code. In November 1992, Finestone petitioned the Superior Court to remove respondent as trustee. After vigorous opposition by respondent, which stretched the matter well into 1993, respondent was removed and a bank was named successor trustee. The Superior Court held a hearing before removing respondent. The probate judge asked respondent about the assets of the trust. Respondent replied that the only asset was the piece of paper he produced entitled "Cash Grant." When respondent was unable to account to the probate court for any assets, the judge cited him for contempt.[5]

The Freunds never received reconveyance of their property nor any funds.

In February 1994, respondent wrote a letter to the State Bar stating in part that the "cash grant" was not required to represent any cash at the time it was given, but only to consist of money from time-to-time to satisfy the payment schedule. Respondent contended that only the piece of paper entitled "cash grant" was required to be received in the trust and that is all that respondent held.

The hearing judge found respondent culpable of committing moral turpitude by representing that he held $300,000 in trust when he did not, permitting escrow to close without receiving and holding that $300,000, and failing to pay funds to the Freunds. The hearing judge dismissed with prejudice charges of violation of section 6068, subdivision (m) (communicate with client) and of violation of rule 4-100(B)(3) (failure to render an accounting) on the ground that there was no attorney-client relationship between the Freunds and respondent as required by those authorities. We adopt the hearing judge's findings with the

5. As the parties point out in their briefs, the hearing judge erroneously found that the probate court found respondent in contempt. We correct this minor error.

small correction we noted *ante*. In addition, we adopt his dismissals with prejudice.[6]

4. The Zwiebel Matter.

In March 1992, Dr. Dirk Zwiebel had served for 29 years as a clinical psychologist and theologian.

Zwiebel and his wife, Alberta, had a home in Monrovia, California. They needed to move to North Carolina to be close to one of the Zwiebel's parents who was very ill. They decided to lease their Monrovia home. Respondent came to look at the property as a prospective tenant and promoted his background, even stating that he had earlier been a federal judge. Respondent also pointed out that he worshipped at the same church as the Zwiebels in Pasadena. However, the Zwiebels did not apparently know respondent before this meeting. Eggleston soon contacted the Zwiebels and proposed a deal to refinance both their Monrovia house and a valuable house they owned free-and-clear in Pasadena.

The Zwiebels were committed to a trip to Israel and there was pressure to complete the deal. Eggleston offered a complex lease-financing arrangement. One of Eggleston's trusts would provide the financing. One of the loans involved in the transaction was to be secured by a promissory note and the cash payments on the note would be secured by bonds to be held in trust by respondent, acting as trustee. Eggleston's trust was also given an exclusive option to buy the Monrovia property. The agreement which was prepared included the Zwiebels' Pasadena property, but according to Ms. Zwiebel, the document she signed did not include reference to the couple's Pasadena property.

Before leaving for Israel, respondent asked the Zwiebels to give a limited power of attorney to a relative of Eggleston, Gorton DeMond. Dr. Zwiebel understood that DeMond was an elderly person who was not known to him. Zwiebel questioned respondent as to whether giving a power of attorney to DeMond was wise. Respondent replied that DeMond was honest "as the day was long" and that DeMond would give the funds of the refinancing to respondent to hold in trust. Dr. Zwiebel gave the requested power of attorney to DeMond. It was then used by Eggleston or others and without knowledge to the Zwiebels to obtain outside loans for both Zwiebel properties at high rates of interest and with very short repayment periods.

When the Zwiebels returned from Israel they found Linda Tracy, an Eggleston acquaintance, living in their Monrovia property. The Zwiebels asked respondent to revoke the deal because it was not what they had agreed to. Respondent failed to act as requested. Eggleston told Dr. Zwiebel that if he sued him and respondent, that they would grind him into the ground.

Dr. Zwiebel was unable to get information from respondent as to the refinancing funds to come from Eggleston's trust. He even tried without success to locate respondent at any one of the three office addresses respondent listed on his letterhead. Both properties ended up in foreclosure, and Dr. Zwiebel was very bitter about losing what he considered his retirement security.

At one time, a realtor had a listing to sell both Zwiebel properties. This realtor demanded a share of the refinancing proceeds. Dr. Zwiebel related this demand to respondent who, in February 1992, offered to represent Zwiebel in opposing the realtor's demand. The record shows that respondent wrote a letter opposing the realtor's demand.[7]

In July 1992, the Zwiebels filed an unlawful detainer action in Pasadena Municipal Court against Eggleston and those affiliated with him who occupied the Monrovia property. Respondent represented Tracy and demurred successfully to the complaint. Next, the Zwiebels hired a new attorney, Emanuel

6. On the motion of the State Bar, the hearing judge dismissed without prejudice a charged violation of section 6103 (failure to obey a court order) in the interest of justice. We adopt that dismissal.

7. Respondent's letter to the realtor opened by stating that respondent represented Gorton DeMond and the Centurion Trust, a trust for which Dr. Zwiebel was a beneficiary.

Barling Jr. He filed a multi-count fraud action against Eggleston, respondent, and others in Los Angeles Superior Court; dismissed the earlier unlawful detainer action; filed a new one; and moved for summary judgment. To defend and induce the Zwiebels to drop their action, Eggleston contrived a sham claim for Tracy that Dr. Zwiebel had sexually harassed her. Respondent was present when this scheme was discussed. He not only failed to object to it, but drafted papers filed in court to advance it. This spurious scheme ended when Tracy decided that she would not lie any longer to accuse Dr. Zwiebel. Respondent merely went along with Eggleston's response that declarations by Tracy and others charging Dr. Zwiebel with harassment had already been sent to the Zwiebels' counsel Barling and it was too late to recant.

The testimony of paralegal Rebecca Fedorow, who worked for Eggleston,[8] was relevant to several counts, but especially to the Zwiebel matter. Fedorow testified that she was present at meetings at which respondent and Eggleston were also present. At different meetings, Eggleston told her that he had forged a power of attorney used to refinance one of the Zwiebels' property, that names of some of the trusts used for the realty transactions were chosen arbitrarily from place names on a map of England, and that some of the trusts existed in name only. Fedorow also saw Eggleston sign respondent's name to pleadings in the Zwiebel and Pennington matters while respondent was present and to which respondent did not object. Fedorow was also present in a meeting with Eggleston, respondent, and others when Connie MacMillan, an acquaintance of Tracy, stated adamantly that she would not lie in court to falsely assert that Dr. Zwiebel sexually harassed Tracy. In response to this, Eggleston said that MacMillan's declaration to the contrary had already been sent to opposing counsel and could not be changed. Fedorow observed respondent take no action. She also observed that respondent did not speak out in protest.

In the Pennington matter, respondent told Fedorow that there were no bonds to support the payments due Pennington. She observed respondent become very nervous about this lack of security as the parties and Judge Letts were demanding to know about it.

In the Zwiebel matter, also relevant was the testimony of Dan Kempka, who was a computer business principal. He had become involved with Eggleston because Eggleston had secured financing for Kempka's business. Thereafter, relations soured between Kempka and Eggleston. One reason was that Kempka learned that Tracy was put on the payroll of Kempka's business just to keep her paid to be "kept on" in the Zwiebel matter and to do whatever Eggleston asked Tracy to do because she needed money. Eggleston told Tracy that in the unlawful detainer action by the Zwiebels, Tracy should "tell the story" that Dr. Zwiebel had made sexual advances to her in his Pasadena home. Eggleston said, at a meeting Kempka attended with respondent also present, that this strategy of a sexual harassment claim would prolong the litigation as long as possible so that the Zwiebels would just give up. Eggleston said that Tracy would do anything as she needed the money.

From the above facts, the hearing judge concluded that respondent committed five violations of subdivisions of section 6068 in making untrue allegations against Dr. Zwiebel, advancing untrue facts prejudicial to Zwiebel, and encouraging an action for a corrupt motive. (§6068 subds. (d), (f) and (g).) The hearing judge concluded that one of the charged violations of subdivision (d) of section 6068 in the Zwiebel matter was duplicative of another charged violation of the same subdivision. Accordingly, after finding respondent culpable of the first charged violation, the hearing judge dismissed the second charge with prejudice. We adopt that dismissal.

While the unlawful detainer action was pending and while respondent knew the Zwiebels were

8. According to Fedorow, Eggleston hired her and assigned her to work for an attorney named Levenberg. However, Fedorow did not do any work for Levenberg and spoke with him only two or three times by phone. Fedorow's work appeared to be to handle various litigation involving Eggleston and his associates. Fedorow held a law degree from the University of New Mexico, but was not a member of the California Bar.

represented by Barling, respondent communicated directly with Dr. Zwiebel that Dr. Zwiebel had to be present at a court hearing or risk being held in contempt of court. The hearing judge found that, as a result, respondent wilfully violated rule 2-100 (A) by communicating this information directly to Zwiebel without the knowledge or consent of his counsel.

In July 1993, Pasadena Municipal Court Judge Philip Argento filed a decision, more than 90 pages in length, ordering respondent to pay sanctions of $80,000 under section 128.5 of the Code of Civil Procedure. This document was admitted only for the purpose of showing that Judge Argento's order had a reasoned basis.[9] Respondent failed to report this sanction to the State Bar, claiming it was on appeal. He claimed he reported it two years later after his appeals had failed. The hearing judge concluded that respondent had wilfully violated section 6068, subdivision (o)(3).

Finally, the hearing judge found that respondent wilfully violated rule 3-310(E) by representing different parties adverse to each other without informed written consent.

We adopt the hearing judge's findings in the Zwiebel matter and add an additional factual finding, based on undisputed evidence, that respondent's advancement of spurious charges of sexual harassment against Dr. Zwiebel caused great anguish to the Zwiebels.

D. Findings and Related Facts in Mitigation and Aggravation.

Respondent practiced for over forty years with no record of discipline prior to the misconduct found here. (Rules of Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(i).)

After respondent dissolved his law practice with his former wife, he had difficulty developing clients and became depressed. He consulted with a doctor and began taking medication, but the hearing judge gave no weight to this circumstance as it was neither supported by expert evidence nor established that the condition had been resolved as required by standard 1.2(e)(iv).

The hearing judge considered mitigating respondent's character evidence. (std. 1.2(e)(vi)). This included witnesses who testified favorably on respondent's behalf and established that he had been an important contributor to the founding and support of the Arab-American Bar Association. However, the hearing judge's evaluation of some of this evidence was tempered by some witnesses who appeared either uninformed about the charges and tentative findings against respondent or were limited in their evaluation of him. We adopt the hearing judge's mitigation findings.

In aggravation, the hearing judge found that respondent's misconduct in the Mollan-Masters, Freund and Zwiebel matters was surrounded by bad faith, dishonesty and concealment. (std. 1.2(b)(iii)). The judge also found aggravating that respondent engaged in repeated and multiple acts of serious misconduct. (std. 1.2(b)(ii).) Respondent's lack of contrition for the effect of his misconduct and indifference to rectifying those effects were also found to be aggravating. (std. 1.2(b)(v).) Finally, the hearing judge found to be very seriously aggravating, respondent's incredible testimony and lack of candor.

II. DISCUSSION.

A. Culpability.

Respondent levies many attacks on the findings. Overall, he claims that he had no dealings with the victims until after the transactions were completed, that he had no attorney-client relationship with the victims, and that Eggleston is to be blamed for all the victims' losses. Respondent further contends that the findings deviated from the notice of charges, that certain hearsay evidence was improperly received,

9. Judge Argento described the creation of his decision re sanctions as the most arduous task he had performed as a judge.

and that other evidence was not adequately weighed by the hearing judge. Independently reviewing the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we have concluded that respondent's claims are without merit and that the evidence establishing his culpability is clear and convincing.

1. The Mollan-Masters and Freund Matters.

In the Mollan-Masters and Freund matters, respondent patently deceived both sellers that the escrows he administered contained the dollar amounts of the property purchase price when he knew that they did not. Knowing that the escrows were bare or nearly bare of buyers' consideration, respondent defrauded the sellers by nevertheless conveying the properties. Respondent's misleading use of the device that he and Eggleston referred to as a "cash grant," which was nothing more than an "empty" piece of paper, aided his deception. The use of that term clearly conveyed to the sellers, bolstered by the documents respondent created, that adequate consideration for the sales existed.

Respondent's testimony that Eggleston committed all the wrongs in these matters and that he did not know of and was ignorant of Eggleston's real estate scams was not deemed credible by the hearing judge. The hearing judge's credibility determination calls for great deference in our review, is well supported by the evidence, and the judge's reasoned decision. We agree with that determination. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); see also *Kelly v. State Bar* (1988) 45 Cal.3d 649, 655; *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829.)

Respondent's belated attempt to introduce questioned documents evidence through expert witness testimony allegedly showing that Eggleston signed respondent's name to the documents was properly devalued by the hearing judge for lack of foundational evidence. Moreover, abundant evidence showed that, in these two matters, Respondent personally drafted the escrow instructions and the escrow settlement statements. Shortly after both transactions, he dealt contemporaneously with the sellers, never disavowing the transactions or the supporting documents.

Moreover, even if, arguendo, we were to credit fully respondent's expert handwriting evidence, it would not show that all the key documents bearing his signature were signed by another.

Unquestionably, respondent's misconduct in both the Mollan-Masters and Freund matters involved moral turpitude as found by the hearing judge. Respondent's attempt to show that he did not stand in an attorney-client relationship affords no defense and ignores the evidence that in the Mollan-Masters matter he sought to be retained as the victim's attorney after deceiving her. Whether or not respondent sought to act as an attorney for these parties, he was the escrow agent and trustee in both transactions. Decisions of the Supreme Court make clear that, in the capacity of escrow agent, holder *or* trustee, respondent owed the sellers the same high duty of honesty and obedience to fiduciary duty as if he were acting as their attorney. (See, e.g., *Crooks v. State Bar* (1970) 3 Cal. 3d 346, 355, *Simmons v. State Bar* (1969) 70 Cal.2d 361, 365, *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) In addition, respondent's acts of deceit justify attorney discipline as conduct involving moral turpitude, regardless of whether respondent was acting as an attorney. (§6106; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 262.)

2. The Pennington Matter.

In the Pennington matter, respondent's own testimony shows that he failed to obey the federal district court's discovery order to produce documents and thus violated section 6103. Respondent's sole excuse was that he was seeking to assert Fifth Amendment rights. Yet, he never provided evidence that he timely raised his Fifth Amendment privilege claims in Federal Court. In addition, respondent did answer interrogatories in the same civil case. Further, it appears that, even if respondent had timely perfected his constitutional claims, it would not have protected his refusal to produce the documents in contravention of the court order to do so. (See, e.g., *United States* v. *Doe* (1984) 465 U.S. 605, 610-613 [Fifth Amendment protects against compelled production of documents only if the production has both a "testimonial" and "incriminating" effect against a natural person]; see also *Braswell v. United States* (1988) 487 U.S. 99, 102-103.)

3. Zwiebel Matter.

Respondent's many breaches of professional ethics were manifest in the Zwiebel matter. The most serious charges surrounded his prosecution for one of Eggleston's tenants of an untenable claim of sexual harassment by Dr. Zwiebel. The evidence, including the testimony of Dr. Zwiebel and Ms. Federow, amply established that respondent had no basis for the claims against Dr. Zwiebel and knew they were untenable. Respondent's misconduct harmed the Zwiebels and the administration of justice in several important, serious respects. At two stages of the civil process, he made untrue charges against Dr. Zwiebel to frustrate the Zwiebels unlawful detainer action, in violation of section 6068, subdivision (d). One of these instances of false statement also constituted the advancement of untrue facts prejudicial to the reputation of Dr. Zwiebel in violation of section 6068, subdivision (f). Finally we agree with the hearing judge that respondent's acts also served to encourage the specious sexual harassment claim for a corrupt motive or interest in violation of section 6068, subdivision (g).

Respondent's claim that the conclusions of the hearing judge were duplicative is not well taken. The judge's conclusions were directed at different offenses and, where they involved the same section of the Business and Professions Code, they arose from different acts of respondent. Thus, the judge found multiple violations, not duplicative violations. The hearing judge was sensitive to avoiding duplicative findings and conclusions, and he refused to find respondent culpable of the section 6068, subdivision (d) violation in count eight of the charges because it duplicated the misconduct charged and found in count seven. Moreover, we and the Supreme Court have found attorneys culpable of different subdivisions of section 6068 concerning offenses directed at the administration of justice. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 42, 45; *Sorenson v. State Bar* (1991) 52 Cal.3d 1036, 1042; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 187.) In sum, none of the hearing judge's culpability determinations are duplicative.

[1] In the Zwiebel matter, respondent also communicated directly with Dr. Zwiebel when he knew that Dr. Zwiebel was represented by counsel upon a subject of controversy in wilful violation of rule 2-100 (A). This contact occurred during litigation. We uphold the hearing judge's findings and reject respondent's meritless defense that the communication was justified or reasonable. Respondent had no excuse for the communication. Had he meant to extend a courtesy to Zwiebel's own counsel, a much different method and communication would have been appropriate. It is well settled that rule 2-100 (A) and its predecessor former rule 12 are therapeutic rules designed, in part, to shield the represented party from well-meaning, but misguided advances by an attorney to an adverse party as well as deliberately improper ones. (*Abeles v. State Bar* (1973) 9 Cal.3d 603, 609 [construing former rule 12]; see also *Mitton v. State Bar* (1969) 71 Cal.2d 525, 534.)

Respondent does not specifically attack the hearing judge's conclusion that he violated rule 3-310 (E) by representing conflicting interests regarding the Zwiebel's Pasadena property. And, in any event, the record clearly supports the hearing judge's conclusion.

[2] Respondent claims that he was not required to report the $80,000 in sanctions that Municipal Court Judge Argento imposed on him pursuant to Code of Civil Procedure section 128.5, because respondent had appealed the sanctions order. However, we rejected that claim in *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867. The duty to report sanctions timely pursuant to section 6068, subdivision (o)(3) is not excused solely because of the pendency of an appeal. (*Ibid.*) We uphold and adopt the hearing judge's culpability conclusion.[10]

We cannot find merit in the procedural contentions respondent advances. He first claims that the

10. Because the municipal court judge's nearly 100 page order for sanctions was admitted only for limited purposes, we have not considered the merits of its contents in reviewing this record. However, we consider the judge's order as evidence that that judge deemed that he had abundant cause for his sanctions order.

findings supporting the disbarment recommendation were not adequately reflected in the charges. Yet, respondent's only specific detail of this claim is in the Pennington matter. In that matter, the hearing judge found respondent culpable of only one count of misconduct, which was expressly and adequately charged. Other findings of fact made by the hearing judge in the Pennington matter were in the nature of background facts regarding the charged misconduct and were well established by the evidence.

[3] Similarly unavailing is respondent's objection that the hearing judge erred by admitting evidence under Evidence Code section 1223, the so-called "coconspirator's exception" to the hearsay rule. Respondent's prime objection to the hearing judge's use of the coconspirator exception to the hearsay rule is his claim that no conspiracy was proven. While the respective parties did spend time proving or defending the existence of a conspiracy between respondent and Eggleston and while the hearing judge observed that such a conspiracy existed, it is not necessary for us to affirm that finding either to uphold the hearing judge's use of the hearsay exception or to find respondent culpable of the grievous misconduct charged in the Notice of Disciplinary Charges. We agree with the State Bar that the law supporting use of the coconspirator exception to the hearsay rule does not require "absolute" proof of such a conspiracy, but only that there be independent evidence to establish prima facie the existence of a conspiracy and other preliminary facts. (See *People v. Hardy* (1992) 2 Cal.4th 86, 139.)[11] Those requirements were adequately met here based on the testimony of Fedorow and Kempka who were present at meetings at which respondent, Eggleston, and others discussed and planned their acts.

[4] In addition, many of the statements to which Fedorow and Kempka testified were not hearsay because they could have been offered not to prove the truth of the matter stated, but for the purpose of showing that they were made in respondent's presence to disprove respondent's claim of lack of knowledge. (Evid. Code, §1200, subdivision (a).) Accordingly, in the absence of an objection and a request, made in accordance with Evidence Code section 355, that the use of those statements be admitted into evidence for the limited purpose of proving whether the statements were made in respondent's presence in accordance with Evidence Code section 355, any error in their admission was waived. (Evid. Code, §353, subd. (a).) Respondent does not contend that he made any such objection or request. In any case, we agree with the State Bar that the testimony of Kempka concerning respondent's use of false declarations in the lawsuits in the Zwiebel matters was admissible under the adoptive admissions exception to the hearsay rule. (Evid. Code, §1221; see *Bowles v. State Bar* (1989) 48 Cal.3d 100, 108 [failure of accused attorney to respond when charges would ordinarily call for a response warranted use of adoptive admission exception to hearsay rule].)

B. Discipline.

Respondent objects to the weighing by the hearing judge of the factors in mitigation and aggravation. Our review of the record shows that the hearing judge balanced appropriately all relevant factors, consistent with decisional law to that effect. (See, e.g., *Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) The hearing judge correctly decided that the aggravating circumstances proved outweighed considerably the mitigating evidence. Not only were respondent's offenses most serious, involving deceit and harm to the victims and the administration of justice, they evidenced multiple acts of misconduct and covered many of the basic ethical violations which respondent's long practice at the bar should have served to avoid.

The hearing judge also determined correctly that the relevant standard calls for disbarment based on the severity of the offense and other appropriate factors. Most of the decisions deemed guiding by the

11. The other preliminary facts required by *Hardy* and its cited authority are: (1) that the declarant was participating in the conspiracy when making the statement; (2) that the statement furthered the conspiracy's objective; and (3) that, at the time of the statement, the party against whom the evidence is offered was participating in or would later participate in the conspiracy. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

hearing judge were in conviction referral matters. Had this matter arisen from conviction of a serious crime, there would be little doubt that disbarment would be the appropriate recommendation. (Compare *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679; see also *In re Schwartz* (1982) 31 Cal.3d 395.) Indeed, if respondent had been convicted of a crime involving moral turpitude subject to the provisions of section 6102, subdivision (c), he would have been subject to a recommendation of summary disbarment. However, although this is not a conviction referral matter, discipline must still be adequate to protect the public, courts and the legal profession. (Std. 1.3; *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1307.)

Respondent asserts that our decision in *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, calls on us to weigh more heavily his lack of prior discipline. However, there are several key distinctions between *Lilly* and this case, most notably the far less serious misconduct found in *Lilly*. Similarly incomparable is another case relied on by respondent, *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297. In *Hultman*, the found misconduct was limited to an attorney's improper borrowing from two trusts in which he acted as trustee, aggravated by a false account to the probate court and reckless failure to provide services.

[5a] The State Bar has not cited any cases on the appropriate degree of discipline which we deem comparable, and we are unaware of any case decided by the Supreme Court similar to this case in its facts. However, we are aware that "[m]ultiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment. (Citations.)" (*Lebbos v. State Bar*, *supra*, 53 Cal.3d at p. 45; see also std. 2.3.)

[**5b**] This case presents serious acts of dishonesty which served to defraud two sellers of valuable real estate. Respondent's many ethical violations in the Zwiebel matter featured his harm to the Zwiebels and the honest administration of justice. Offenses concerning the administration of justice have been considered as very serious by the Supreme Court. (See *Sands v. State Bar*, *supra*, 49 Cal.3d at p. 930.)

[5c] A recent case decided by us, *In the Matter of Priamos*, *supra*, 3 Cal. State Bar Ct. Rptr. 824, offers some guidance. In that matter, the attorney had served as counsel to a client who had experienced emotional difficulties. The client asked Priamos to manage her investments and he agreed. He engaged in a practice of self-dealing with her investments, failed to keep adequate records and violated the ethical rules regarding entry into business transactions with a client. He showed indifference to rectifying the harm he caused and a lack of insight into his misconduct. Unlike the present case, Priamos had a prior imposition of discipline. We recommended disbarment, and the Supreme Court imposed that discipline.

[5d] It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. (See, e.g., *Jones v. State Bar* (1989) 49 Cal.3d 273; *Chang v. State Bar* (1989) 49 Cal.3d 114; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612.) A most significant factor to the hearing judge, and to us as well, is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened and only seeks to blame others. Respondent's position would not be considered aggravating if it stemmed from an honest, but mistaken belief in his innocence (see *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932); but the sizable record we have reviewed does not give respondent any plausible basis for such a belief. An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness has been considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101; *Tarver v. State Bar* (1984) 37 Cal.3d 122, 134.) This factor makes disbarment appropriate despite the fact that respondent presented some mitigating evidence. Even if we were to credit respondent's explanation that he surrendered too much control to Eggleston, it serves as a grave risk to others who might be inclined to trust that such an experienced member of the bar would honestly discharge fiduciary duties. Respondent's repeated failure to discharge those duties on this record entitles the public to be protected by a formal reinstatement proceeding should he again seek to be licensed as an attorney.

C. Inactive Enrollment.

In his decision recommending respondent's disbarment, the hearing judge included an order involuntarily enrolling respondent as an inactive member of the State Bar in accordance with section 6007, subdivision (c)(4) as amended effective January 1, 1997, and rule 220(b) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings. However, we recently held in *In the Matter of Phillips* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 47, that section 6007, subdivision (c)(4) as amended effective January 1, 1997, may not be applied in cases in which the notice to show cause (or the notice of disciplinary charges) was filed before January 1, 1997. In the present consolidated proceeding, both of the notices to show cause were filed before January 1, 1997. Accordingly, we shall reverse the hearing judge's order enrolling respondent inactive.

III. RECOMMENDATION.

For the foregoing reasons, we adopt the decision of the hearing judge and his recommendation that respondent Robert H. Wyshak 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 respondent 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 and that such costs be payable in accordance with section 6140.7, as amended effective January 1, 1997.

IV. ORDER

We reverse the hearing judge's February 27, 1998, order involuntarily enrolling respondent Robert H. Wyshak as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (c)(4) and order respondent's inactive enrollment under section 6007, subdivision (c)(4) terminated forthwith. This order is without prejudice to respondent's inactive enrollment, if warranted, under former section 6007, subdivision (c)(4) after appropriate notice and hearing.

We concur:
OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Respondent Z

A Member of the State Bar

No. 96-O-02321

Filed December 2, 1999

SUMMARY

The State Bar sought summary review of the hearing judge's decision imposing a private reproval, contending that rule 290, Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, mandates that the State Bar Court include in the imposition of each public or private reproval a requirement that the disciplined attorney attend the State Bar Ethics School, unless the attorney has attended that school within the preceding two years. The State Bar asserted that the hearing judge's failure to include such a requirement was either an error of law or abuse of discretion. The review department disagreed, concluding that rule 290 does not apply to proceedings in which the discipline imposed is a public or private reproval.

COUNSEL FOR PARTIES

For State Bar: David C. Carr

For Respondent: Kevin Gerry

HEADNOTES

[1 a-d] 135.60 Division VI, Dispositions and Costs (rules 250-284)
173 Discipline–Ethics Exam/Ethics School

The State Bar is correct that a private reproval is a sanction that constitutes discipline. And the State Bar is also correct that the plain and unambiguous language of rule 290(a), Rules of Procedure mandates that except as provided by order of the Supreme Court, a member shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years. However, rule 956(a) of the California Rules of Court authorizes the attachment of conditions to reprovals. And that rule expressly requires that conditions attached to reprovals be based upon a finding that the protection of the public and the interests of the attorney will be served thereby. In fact, it is error to attach a condition to a reproval in the absence of such an express finding.

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.

Moreover, rule 271, Rules of Procedure, explicitly directs that any conditions attached to reprovals must be attached in the manner authorized by California Rules of Court rule 956. Accordingly, the review department held that the mandatory directive in rule 290 to impose ethics school is not applicable in proceedings in which the discipline imposed is a reproval. To conclude otherwise would strip all meaning from the requirement in rule 956(a) that conditions attached shall be based on a finding that the interests of the public and attorney will be served thereby. In addition, to conclude otherwise would render a portion of rule 271 surplusage.

Additional Analysis

Discipline

Probation

1051 Private Reproval–With Conditions

OPINION:

OBRIEN, P.J.:

In a matter of first impression, we decide whether rule 290, Rules of Procedure of the State Bar, title II, State Bar Court Proceedings[1] mandates a condition that the attorney attend and satisfactorily complete the State Bar Ethics School in all reprovals. The State Bar contends that, under rule 290, the State Bar Court is required to include in the imposition of each public or private reproval a requirement that the disciplined attorney attend the State Bar Ethics School in every case, unless the attorney has attended that school within the preceding two years. The State Bar asserts that the hearing judge's failure to include such a requirement in the matter before us was either an error of law or abuse of discretion. We disagree and affirm the decision of the hearing judge.

PROCEDURAL BACKGROUND

The State Bar seeks summary review, under the provisions of rule 308, of the decision of a hearing judge imposing a private reproval on respondent Z[2] without requiring his attendance at the State Bar Ethics School. On April 29, 1999, we provisionally granted summary review. Following our consideration of the positions of the parties we affirm that provisional ruling and consider this matter under the authority of rule 308.

THE STATE BAR'S POSITION

As noted above the State Bar contends that the hearing judge committed an error of law or abused her discretion by not attaching to the private reproval she imposed on respondent a condition requiring respondent to attend and satisfactorily complete the State Bar's Ethics School. To support its contention, the State Bar first argues that "[a] private reproval is a sanction that constitutes discipline. [Citations.]" Next, the State Bar argues that, because a private reproval is discipline, the hearing judge was required, under the clear and unambiguous language of rule 290, to attach a condition to respondent's private reproval requiring him to complete ethics school.

Other than the omission of an ethics school condition for respondent's private reproval, the State Bar does not challenge the degree of discipline imposed on respondent by the hearing judge. (See, generally, rule 308(a)(2) [authorizing summary review of "disagreement as the appropriate disposition or degree of discipline"].) Furthermore, the State Bar does not argue that the facts and circumstances of respondent's misconduct necessitate the attachment of an ethics school condition 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 (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111). We need not review the misconduct found by the hearing judge in order to dispose of the State Bar's arguments.

[1a] The State Bar is correct that "[a] private reproval is a sanction that constitutes discipline." (Bus. & Prof. Code, § 6078.) And the State Bar is also correct that the plain and unambiguous language of rule 290(a) mandates that "[e]xcept as provided by order of the Supreme Court, a member shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years." Moreover, there is no question that rule 290 was adopted by the State Bar's Board of Governors under its statutory authority for promulgating rules of procedure, which is set forth in Business and Professions Code sections 6086 and 6086.5. Were we to end our inquiry here, we would agree with the State Bar that the hearing judge erred as a matter of law in not attaching an ethics school condition to respondent's private reproval.

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1. Except where otherwise indicated, all further references to rules are to the Rules of procedure of the State Bar of California, title II, State Bar Court Proceedings.

2. The ordered discipline in the matter before us is a private reproval. As a consequence we do not affirmatively disclose the attorney's identity. (Rule 270(c).)

[1b] However, on further analysis, each of the State Bar's arguments fail because we conclude that rule 290 is not applicable to proceedings in which the discipline imposed is a reproval, public or private.

RULE 290 DOES NOT APPLY TO CASES INVOLVING REPROVALS

[1c] Section 6078 of the Business and Professions Code expressly authorizes the State Bar Court to discipline attorneys by reproval, public or private.[3] However, section 6078 does not authorize the State Bar Court to attach conditions to reprovals. It is rule 956(a) of the California Rules of Court that authorizes the attachment of conditions to reprovals. And that rule expressly requires that conditions attached to reprovals be, *inter alia*, based upon a finding that the protection of the public and the interests of the attorney will be served thereby. In fact, it is error to attach a condition to a reproval in the absence of such an express finding. (*In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929, 934, 935.) That is because, when the Supreme Court adopts a rule of court in accordance with its inherent authority, under article VI, section 1 of the California Constitution, to regulate the practice of law in this state (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337), the rule of court has the "force of positive law" and is, therefore, binding on the State Bar Court and the parties as a procedural statute (cf. *Brooks v. Union Trust Etc. Co.* (1905) 146 Cal. 134, 138-139 [rules of court adopted by the Supreme Court in accordance with its rule making authority under former art. VI, §4, Cal. Const., as amended Nov. 8, 1904, had "force of positive law" and to be strictly enforced]; see also *Cantillon v. Superior Court* (1957) 150 Cal.App.2d 184, 187 [rules of court adopted by the Judicial Council under former art. VI, §1a, Cal. Const. (now art. VI, §6) also have "force of positive law"]; accord Cal. Rules of Court, Intro. Statement (adopted Jan. 1, 1992) ["All the California Rules of Court have the force of law."]).

[1d] Moreover, rule 271, which the State Bar failed to address either in its memorandums on summary review or at oral argument, explicitly directs that any conditions attached to reprovals must be attached "*in the manner authorized by California Rules of Court rule 956.*" (Rule 271, emphasis added.) Accordingly, we hold that the mandatory directive in rule 290 to impose ethics school is not applicable in proceedings in which the discipline imposed is a reproval. To conclude otherwise would strip all meaning from the requirement in rule 956(a) that conditions attached shall be based on a "finding" that the interests of the public and attorney will be served thereby. In addition, to conclude otherwise would render the first portion of rule 271 surplusage.

Respondent was found culpable of one count of violating rule 4-100(B)(3), Rules of Professional Conduct of the State Bar of California, requiring an attorney to maintain proper trust account records.[4] That finding is not challenged by respondent in this review.

Respondent represented a mother and her adult daughter, each of whom was injured in a single automobile accident. On February 16, 1994, the daughter's claim was settled for $9,000 with the insurance carrier of the driver of the other auto involved in the accident. On March 23, 1994, a check in that amount was received by respondent from the insurance carrier with a covering letter mentioning a release, but no release was enclosed. Between March 24, 1994, and April 25, 1994, respondent disbursed the settlement funds to the daughter, paid various medical claims on behalf of the client and reimbursed his attorney's fees.

On April 18, 1994, respondent received the release from the insurance carrier. That release included a requirement that evidence of the injuries suffered by the daughter could not be used in any action brought by the mother. Such a provision had not been negotiated, and on respondent's advice the

3. Even though the text of section 6078 refers to "the board" (i.e., the State Bar's Board of Governors), section 6086.5 of the Business and Professions Code makes it clear that the power to impose reprovals is now vested solely in the State Bar Court.

4. On three additional counts respondent was found not culpable. In its request for review, the State Bar does not challenge these findings, and we do not further discuss them.

daughter refused to sign the release. On the day of the receipt of the release, respondent notified the insurance carrier of his objections to the provision restricting the use of that evidence in the claim of the mother. The insurance carrier demanded a refund of the $9,000.

Respondent requested, and received, a refund on the various medical claims he had paid, redeposited those funds in his trust account, and on learning that the daughter was unable to return her share of the settlement respondent agreed to advance the repayment of her share of the settlement proceeds in order to repay the insurance carrier. On August 10, 1994, respondent wrote a trust account check to the insurance carrier refunding the $9,000. However, respondent had failed to redeposit the attorney's fees he collected from the proceeds and had failed to advance, to the trust account, the sum paid to the daughter.

These oversights were not discovered until October 1995, and then only when his bank notified respondent that they had paid a trust account check against insufficient funds. During that same month, respondent issued another insufficiently funded check on his trust account, although that check was also honored by the bank. In order to avoid similar problems in the future, respondent set up a separate ledger for each client.

In mitigation the hearing judge found the following; respondent had a discipline free record in approximately nine years of practice prior to the misconduct (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [practicing law for over 10 years without misconduct, entitled to significant weight]); he promptly corrected the trust account problem by initiating the maintenance of proper trust account records (Rules of Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(viii)); he was candid and cooperative in both the investigation and court proceedings in this matter (std. 1.2(e)(v).) and he acted in good faith in both the client matter and the current disciplinary proceedings (std. 1.2(e)(ii)).

These findings are not challenged in this summary review, and we accept them as found by the hearing judge.

As a condition of the private reproval, the hearing judge ordered respondent to attend the State Bar Client Trust Account Record-Keeping Course. In issuing her order, on a motion for reconsideration by the State Bar seeking an order compelling respondent to attend the State Bar's Ethics School, the hearing judge noted: "The Court ordered Respondent to attend [the trust account record-keeping course] because, in the Court's view, Respondent's misconduct stemmed directly from his failure to keep adequate client trust account records.... ¶In this Court's view, attendance at the [trust account course] is more appropriate and attendance at both courses is unnecessary."

DISCUSSION

The State Bar argues that rule 290 mandates that the State Bar Court attach as a condition of each reproval, a requirement that the attorney attend the State Bar's Ethics School, as distinguished from the State Bar's Client Trust Account Record-keeping Course. The State Bar argues that a private reproval is a sanction that constitutes discipline. We agree that a reproval is a disciplinary sanction. (Bus. Prof. Code, § 6078.)[5]

Rule 290(a) provides: "Except as provided by order of the Supreme Court, a member shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years."

For our purposes we give particular attention to the phrase: "Except as provided by order of the Supreme Court." In general all disciplinary orders are made by the Supreme Court following a recommendation from the State Bar Court. (§6078.) However, that section also authorizes the State Bar

5. Except as otherwise noted, all references to sections are to the Business and Professions code.

Court to dispose of a disciplinary proceeding by imposing reprovals, public or private, without making a recommendation to the Supreme Court.

The only authority we find for permitting conditions to be attached to either public or private reprovals is rule 956 (a), California Rules of Court. In pertinent part, that rule states; "The State Bar may attach conditions, effective for a reasonable time, to a public or private reproval administered upon a member of the State Bar. Conditions so attached shall be based upon a finding by the State Bar that protection of the public and interests of the attorney will be served thereby."

It is clear that the California Rules of Court, rule 956(a) does not give blanket authority to the State Bar to impose a given condition on all reprovals, but, rather, there must be an affirmative finding that the protection of the public and the interests of the attorney will be served thereby. As we have noted, to hold otherwise would strip all meaning from the requirement in rule 956(a) that conditions imposed shall be based on a "finding" that the public interest and interest of the attorney will be served. Rule 271 further confirms the requirement that conditions attached to reprovals be in the manner authorized by rule 956 of the California Rules of Court.

We do not find any inconsistency between rule 290 and rule 956(a), of the California Rules of Court. Rule 290 excepts from its mandatory language those cases where there is a contrary order of the Supreme Court. Rule 956(a) of the California Rules of Court constitutes such a contrary "order" by the Supreme Court in that such rules have the force of law. "All California Rules of Court have the force of law." (Cal. Rules of Court, Intro. Statement (adopted Jan. 1, 1992).)

The statutory scheme, the California Rules of Court, and the Rules of Procedure of the State Bar make clear that the Supreme Court has not delegated the authority to impose conditions on reprovals, public or private, except on a finding by the State Bar that the protection of the public and the interests of the attorney will be served. It is fundamental that the State Bar Court stands in the position of the State Bar in making this determination. (§6086.5.)

The hearing judge, in all respects, complied with the requirements of rule 956 of the California Rules of Court and rules 290 and 271. On her finding that attendance at the State Bar's Ethics School was not necessary, and in compliance with rule 956 of the California Rules of Court, she declined to impose the condition, all as required by the exception that limits the mandate of rule 290(a): "Except as provided by order of the Supreme Court . . . ." and as authorized by rule 270.

Even though it was not raised by the parties, we sua sponte modify the hearing judge's decision to provide notice to respondent, as required by rule 956(a) of the California Rules of Court, that his failure to comply with the condition attached to his reproval may subject him to further discipline. (See, generally, Rules Prof. Conduct of State Bar, rule 1-110 [attorneys must comply with all conditions attached to reprovals].) Except as modified hereinabove, the decision of the hearing judge, which was filed on December 21, 1998, remains the final decision of the State Bar Court in this proceeding. (Rule 220(a); *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 696.)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Robert A. Sheppard

A Petitioner for Reinstatement

No. 98-R-03198

Filed December 17, 1999

SUMMARY

The State Bar filed a motion to dismiss petition for reinstatement on the sole ground that petitioner failed to show that he had passed a professional responsibility examination (PRE) within the year before he filed his petition. The State Bar contended that the Rules of Procedure dealing with reinstatement required petitioner to pass a PRE as a condition precedent to his filing a petition. Petitioner contended that passage of a PRE was not a condition precedent to his filing a petition, but only a condition precedent to his being reinstated.

The hearing judge found that the Rules of Procedure required only former attorneys who resigned from the State Bar with disciplinary charges pending to take and pass a PRE and that petitioner had not resigned from the State Bar with charges pending. Accordingly, the hearing judge concluded that petitioner was not required to take and pass a PRE and, therefore, denied the State Bar's motion on that ground. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought interlocutory review. The review department held that the hearing judge erred as a matter of law when he found that the Rules of Procedure required only former attorneys who resigned from the State Bar with disciplinary charges pending to take and pass a PRE and when he found that petitioner had not resigned from the State Bar with charges pending. But the review department further held that the Rules of Procedure did not require petitioners for reinstatement to prove passage of a PRE as condition precedent to their filing petitions, but only that they prove passage as precondition to the State Bar Court recommending that they be reinstatement. Accordingly, the review department concluded that, even though the hearing judge denied the State Bar's motion to dismiss on erroneous grounds, his ruling denying the motion was nonetheless correct. Thus, the review department denied the State Bar's request to reverse the hearing judge.

COUNSEL FOR PARTIES

For State Bar: David C. Carr

For Respondent: Robert A. Sheppard, 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-e] **130 Procedure–Procedure on Review**
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers
135.87 Revised Rules of Procedure–Reinstatement
139 Procedure–Miscellaneous
165 Adequacy of Hearing Decision
169 Standard of Proof or Review–Miscellaneous
2509 Reinstatement–Procedural Issues
2590 Reinstatement–Miscellaneous

Issues raised in State Bar's petition for interlocutory review as to (1) whether Rules of Procedure required petitioner for reinstatement to provide proof, at time he presented his petition for filing, that he had passed a professional responsibility examination within last year (i.e., one before filing of petition) and (2) whether hearing judge erred in finding that petitioner had not previously resigned from State Bar with disciplinary charges pending were proper for interlocutory review because they could determine outcome of proceeding and determine whether petitioner's rehabilitation was an issue in proceeding.

[2] **130 Procedure–Procedure on Review**
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers
165 Adequacy of Hearing Decision
2509 Reinstatement–Procedural Issues
2590 Reinstatement–Miscellaneons

Where hearing judge did not issue written ruling on his denial of State Bar's motion to dismiss former attorney's petition for reinstatement, review department determined hearing judge's reasoning from written transcript of hearing on motion, which was included in appendix to State Bar's petition for interlocutory review.

[3 a-d] **135 Procedure–Rules of Procedure**
135.02 Procedure–Comparison to Former Transitional Rules of Procedure
135.87 Revised Rules of Procedure–Reinstatement
159 Evidence–Miscellaneous
165 Adequacy of Hearing Decision
169 Standard or Proof of Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
199 General Issues–Miscellaneous
2509 Reinstatement–Procednral Issues
2590 Reinstatement–Miscellaneous

Hearing judge erred as a matter of law in finding that petitioner for reinstatement had not previously resigned from State Bar with disciplinary charges pending where petitioner's resignation was entitled "resignation with charges pending;" stated that charges were pending against him; was in form prescribed by California Rule of Court 960; was accepted by Supreme Court without prejudice to further proceedings; and where petitioner stated in his petition for reinstatement that, at time he resigned from State Bar, no formal charges were filed against him by State Bar, but only a number of minor client complaints that he had responded to, taken adequate measures to deal with, and answered State Bar in writing denying any misconduct.

[4] **135.09 Revised Rules of Procedure–Other Issues**
139 Procedure–Miscellaneous
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous

Even though Rules of Procedure adopted by State Bar's Board of Governors are not legislative acts, it is appropriate to construe them using rules for statutory interpretation/construction.

[5] **135.09 Revised Rules of Procedure–Other Issues**
135.87 Revised Rules of Procedure–Reinstatement
139 Procedure–Miscellaneous
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous
2509 Reinstatement–Procedural Issues
2590 Reinstatement–Miscellaneous

State Bar Court must interpret State Bar Rule of Procedure 665(a) that requires all petitioners for reinstatement to take and pass professional responsibility examination within frame work of California Rule of Court 951(f) dealing with reinstatement because State Bar's rule making authority is subject to Supreme Court's inherent authority over attorney regulatory matters. And State Bar Court should endeavor to construe State Bar rule as consistent Rules of Court.

[6 a-b] **135.87 Revised Rules of Procedure–Reinstatement**
139 Procedure–Miscellaneous
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous
2509 Reinstatement–Procedural Issues
2590 Reinstatement–Miscellaneous

Applying rules of statutory interpretation to language of State Bar Rule of Procedure 665(a) requiring all petitioners for reinstatement to take and pass professional responsibility examination, review department held (1) that rule sets the earliest time to pass examination at one year before filing of petition, but does not set latest time to pass examination and (2) that rule does not require proof of passage as condition precedent to filing petition, but only as condition to precedent to State Bar Court recommendation of reinstatement.

Additional Analysis

Other

106.90 Proceeding–Pleadings–Other Issues
119 Procedure–Other Pretrial Matters

OPINION:

OBRIEN, P.J:

The State Bar seeks interlocutory review of a hearing judge's denial of its motion to dismiss Robert A. Sheppard's petition for reinstatement. [1a] In a matter of first impression, we consider whether an attorney who resigned from the State Bar of California is prohibited from filing a petition for reinstatement unless he or she can show the passage of a professional responsibility examination (PRE) within one year prior to that filing. In this case and the companion case of *In the Matter of Irving*, which we also decide today, we must interpret rule 665(a) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings.[1] We conclude that, under rule 665(a), passage of a PRE is not a condition precedent to a former attorney's filing of a petition for reinstatement.[2]

[1b] An additional issue raised is whether disciplinary charges were pending against Sheppard at the time of his resignation from the State Bar. We conclude that charges were pending against Sheppard at the time of his resignation. Therefore, to obtain reinstatement, he must not only pass a PRE, but he must also demonstrate, by clear and convincing evidence, his (1) rehabilitation, (2) present moral qualifications for reinstatement, and (3) present ability and learning in the general law. (Cal. Rules of Court, rule 951(f); rule 665(a) & (b).)

INTERLOCUTORY REVIEW IS PROPER

[1c] Rule 300(a) allows a party to petition for interlocutory review with respect to, among other things, significant issues (1) that require intervention of the review department before the completion of the proceeding in the hearing department and (2) that are not readily remediable after trial. In our view the two issues presented in the State Bar's petition for interlocutory review meet those requirements. We therefore granted the petition and invited the response of Sheppard, which has been filed.

[1d] In his response Sheppard contends that interlocutory review of the hearing judge's order denying the State Bar's motion to dismiss is inappropriate. According to Sheppard, interlocutory review of the hearing judge's order is premature. Sheppard argues that this matter should proceed to hearing so that the hearing judge could make his final ruling on Sheppard's petition and that the entire matter could be considered by the review department on plenary review under rule 301.

[1e] We reject Sheppard's position. The two issues raised by the State Bar's petition for interlocutory review could determine the outcome of the proceeding as well as whether Sheppard's rehabilitation is in issue under his petition for reinstatement. Interlocutory review is therefore appropriate.

STANDARD OF REVIEW

Rule 300(j) directs that the standard of review on interlocutory review is "abuse of discretion" or "error of law." Accordingly, we apply those standards.

STATE BAR'S MOTION AND HEARING JUDGE'S RULING

In its motion to dismiss Sheppard's petition for reinstatement, the State Bar sought the dismissal of Sheppard's petition on the sole ground that Sheppard failed to show proof of passage of a PRE. According to the State Bar, proof of passage of a PRE is, under rule 665(a), a condition precedent to the filing of petition for reinstatement.

[2] Because the hearing judge did not issue a written ruling in the present proceeding, we determine his reasoning from the written transcript of the

1. Unless otherwise indicated all further references to "rules" are to the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings.

2. Rule 665(a) states: "In order to be eligible for reinstatement, a petitioner shall, with any petition for reinstatement, show proof of passage of a professional responsibility examination after the effective date of the petitioner's disbarment or resignation but not more than one year before the filing of the petition for reinstatement."

hearing on the State Bar's motion to dismiss, which is contained in the appendix to the State Bar's petition for interlocutory review. Our review of that transcript discloses that the hearing judge denied the State Bar's motion because he concluded (1) that Sheppard did not resign from the State Bar with disciplinary charges pending and (2) that the PRE requirement in rule 665(a) applies only to petitioners who resigned with charges pending. The hearing judge opined that the term "charges pending" means that formal disciplinary charges have been filed and are pending against the attorney in the State Bar Court.

As discussed below Sheppard resigned with charges pending and the PRE requirement in rule 665(a) applies to petitioners who resigned with or without charges pending or who were disbarred.

POSITIONS OF THE PARTIES

On interlocutory review the State Bar seeks (1) reversal of the hearing judge's order denying its motion to dismiss Sheppard's petition for reinstatement and (2) remand with instructions to grant the motion to dismiss. To support its requested relief, the State Bar argues that the hearing judge either abused his discretion or committed an error of law when he denied the motion to dismiss (1) because disciplinary charges were pending against Sheppard when he resigned from the State Bar and (2) because rule 665(a) mandates that petitioners for reinstatement must pass and show proof of passage of a PRE within one year as a precondition to the *filing* of the petition and because Sheppard did not allege the passage of a such an examination in his petition.[3]

Sheppard contends that the hearing judge correctly denied the State Bar's motion to dismiss. In support of his contention, Sheppard argues: (1) that, by order of the Supreme Court accepting his resignation, he is not required to pass a PRE as a condition to reinstatement; (2) that no charges were pending against him at the time he resigned from the State Bar; and (3) that, in any event, rule 665(a) does not preclude the passage of a PRE *after* the filing of a petition for reinstatement.

In support of his third argument, Sheppard asserts that rule 665 "is a measure of the burden of proof affecting what must be shown in evidence to establish eligibility for reinstatement," and does not deal with the question of eligibility to file a petition for reinstatement. According to Sheppard, he should be given time to take the PRE during the course of these proceedings or that, if his petition is dismissed, he should be permitted to immediately refile his petition once he passes a PRE without the payment of additional filing fees. Sheppard recites that he is presently a resident of Beijing, China, and that the requirement of refiling and commencing a new 120 day investigation period under rule 663(a) would result in a great hardship on him in terms of travel and delay.

SHEPPARD IS REQUIRED TO PASS A PRE AS A CONDITION OF REINSTATEMENT

[3a] There is, in the record before us, a copy of Sheppard's February 24, 1993, resignation, which is titled: "Resignation With Charges Pending." Also, in the record before us, is a copy of the Supreme Court order filed May 6, 1993, accepting that resignation "without prejudice to further proceedings in any disciplinary proceeding pending against him." Contrary to Sheppard's assertion, that order does not contain an exemption allowing Sheppard to be reinstated without passing a PRE. Sheppard has not proffered evidence of any other Supreme Court order granting him an exemption from the PRE requirement, which is set forth both in rule 951(f) of the California Rules of Court and rule 665(a). Accordingly, we reject as meritless Sheppard's first argument that the Supreme Court exempted him from the PRE requirement.

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3. Sheppard has since affirmatively alleged that he took the PRE on August 13 of this year. However, Sheppard did not appear at oral arguments or otherwise inform us of whether he passed that examination.

DISCIPLINARY CHARGES WERE PENDING AGAINST SHEPPARD WHEN HE RESIGNED

[3b] We agree with the State Bar's first argument that disciplinary charges were pending against Sheppard when he resigned from the State Bar and reject as meritless Sheppard's argument to the contrary. As we noted above, Sheppard's resignation is titled: "Resignation with Charges Pending." In addition, it is in the form prescribed, by rule 960(b) of the California Rules of Court, for attorney resignations with disciplinary charges pending. Rule 960 of the California Rules of Court was, at the time of Sheppard's resignation, and is now the exclusive method for an attorney with charges pending to voluntarily resign from membership in the State Bar and relinquish the right to practice law. (Accord rule 650.)

[3c] In accordance with rule 960(b) of the California Rules of Court, Sheppard recites in his resignation that "I, Robert A. Sheppard, against whom *charges are pending*, hereby resign as a member of the State Bar of California . . . ." (Emphasis added.) Having acknowledged his resignation was with charges pending, in a document relied upon by the Supreme Court, Sheppard is in no position to deny the contents of that document. (Cf. *Capital National Bank v. Smith* (1944) 62 Cal.App.2d 328, 343; see also *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 177 [an admission in a pleading in one action is admissible against the pleader in a subsequent proceeding even if it is proffered by a stranger to the former action].)

[3d] Moreover, at the time Sheppard filed his resignation, rule 650 of the former Transitional Rules of Procedure of the State Bar (effective August 19, 1989, to January 1, 1995) (former transitional rules) (now rule 650[4]), defined the term "charges are pending" as "when the member is the subject of a staff investigation, or a formal proceeding or when the member is the subject of a criminal charge or investigation, or has been convicted of a felony or misdemeanor." In his petition for reinstatement Sheppard includes the following statement: "At [the time of my resignation] there were no charges filed against me by the State Bar, but only a number of client complaints on minor matters . . . . I had responded to all the complaints and taken adequate measures to deal with their concerns and answer in writing to the State Bar denying any misconduct." That statement is an admission by Sheppard that he was the subject of a State Bar staff investigation at the time he resigned. That admission alone establishes that charges were pending against him at the time of his resignation.

Furthermore, we note that rule 660 states that the rules dealing with proceedings for reinstatement pertain regardless of whether the resignation was with *or* without charges pending. Thus, whether or not there were charges pending against Sheppard at the time of his resignation, he is required to comply with the PRE requirement set forth in rule 665(a) to gain reinstatement to the bar. However, we note that, in the absence of charges pending, Sheppard would have been able to gain reinstatement without a separate showing of rehabilitation. (Rule 665(c).)

PASSAGE OF A PRE IS NOT A CONDITION PRECEDENT TO FILING A PETITION FOR REINSTATEMENT

We reject the State Bar's argument that passage and proof of passage of a PRE is condition precedent to filing a petition for reinstatement and agree with Sheppard's argument that he may pass and prove passage of a PRE after the filing of his petition. In order to address these arguments, we first review rule 665(a). In that regard, we take a brief look at a partial history of the reinstatement process and the PRE as it relates to that process. (See, generally, *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 794-796.)

4. Rule 650 is substantially identical to former transitional rule 650. Rule 650 provides, in part: "Charges are pending when the member is the subject of an investigation by the Office of Investigations, or a disciplinary proceeding under these rules, or when the member is the subject of a criminal charge or investigation, or has been convicted of a felony or misdemeanor."

PARTIAL HISTORY OF PRE

For more than 75 years, the Supreme Court has held that "[t]he 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 burdens upon them." (*In re Stevens* (1925) 197 Cal. 408, 424; see also *Resner v. State Bar* (1967) 67 Cal.2d 799, 811; *Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.)

In *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, the Supreme Court mandated that following suspension from practice, whether actual or stayed, and as a condition of resuming or continuing practice an attorney shall pass a PRE. The purpose is "to demonstrate that [the attorney] knows, understands, and can apply the principles of legal ethics." This supplanted the prior practice of requiring that a disciplined attorney "read" the State Bar Act and the Rules of Professional Conduct. (*Ibid.*)

The Supreme Court first imposed the PRE condition on petitioners for reinstatement under the amendments effective January 1, 1976, to rule 952(d) of the California Rules of Court (which rule was first adopted April 20, 1943, and repealed December 1, 1990). After the Supreme Court repealed former rule 952(d), it carried forward to Rule 951(f) of the California Rules of Court the requirement that petitioners for reinstatement pass a PRE.

The time period in which a petitioner was required to pass the PRE was originally set forth in former transitional rule 667. Under that rule, the State Bar Court was authorized to grant a petitioner who had not passed a PRE by the conclusion of the hearing on his or her petition for reinstatement an additional two years within which to pass the PRE. However, the State Bar Court's authority to grant a petitioner up to an additional two years in which to pass the PRE was terminated effective January 1, 1995, when the former transitional rules were superseded by the current rules of procedure.

The time period in which a petitioner for reinstatement must pass the PRE under the current rules of procedure is set forth in rule 665(a). As discussed in further detail below, rule 665(a) provides that a petitioner must pass a PRE "not more than one year before the filing of the petition for reinstatement."

The present official petition for reinstatement form required and used by Sheppard has been in use since 1987 when it was adopted by the Executive Committee of the State Bar Court. The State Bar has never objected to its use. That form makes no reference to a requirement that a petitioner shall have passed a PRE prior to filing such a petition.

INTERPRETATION OF RULE 665(A)

Under rule 665(a), "[i]n order to be eligible for reinstatement, a petitioner shall, with any petition for reinstatement, show proof of passage of a [PRE] after the effective date of the petitioner's disbarment or resignation . . . but not more than one year before the filing of the petition for reinstatement."

To interpret that rule we follow the fundamental rules of statutory interpretation as established by the case law.[5] [4 - see fn. 5] In *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239, the court sets forth a three step process in statutory interpretation. As the first step, the actual language of the statute or rule must be examined. "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. [Citations.]" (*Id.* at p. 1239.) Of course, "a statutory provision must be read and construed in context." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 16 disapproved on another point in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.) It is only if the meaning is not clear "courts must take the second step and refer to the legislative history. [Citations.]" (*Halbert's Lumber, supra*, 6 Cal.App.4th at p. 1239.) The final step, to be applied only if the first two steps fail to reveal a clear meaning, "is to apply reason, practicality, and common sense to

5. [4] It is clear rules of procedure adopted by the Board of Governors are not legislative acts. However, we deem it appropriate to apply the rules for statutory interpretation to such rules.

the language at hand." (*Ibid.*; see also 7 Witkin, Summary of Cal. Law (9th ed., 1999 supp.) Constitutional Law, § 94, pp. 42-45.)

[5] However, we must interpret rule 665(a) within the frame work of rule 951(f) of the California Rules of Court because, as the concurring opinion notes, the State Bar's rule making authority is subject to the inherent authority of the Supreme Court in attorney regulatory matters. (Cal. Rules of Court, rule 951(g).) In addition, when possible, we should endeavor to interpret rule 665(a) as consistent with rule 951(f) of the California Rules of Court. (Cf. *Clare v. State Bd. of Accountancy* (1992) 10 Cal.App. 4th 294, 303 [statute interpreted in favor of constitutionality].)

[6a] With these limitations in mind, we look first to the language of rule 665(a). A petitioner "to be eligible for reinstatement," is required to pass a PRE "not more than one year before filing of the petition for reinstatement." The quoted language does not purport to restrict the passage of a PRE following the filing for reinstatement, nor does it require a petitioner to pass a PRE to be eligible to file a petition for reinstatement. This language clearly addresses the issue of petitioner showing recent familiarity with the ethical standards of practice of law. It sets the earliest time to pass a PRE, but not the latest.

Rule 665(a) further requires a petitioner, "with any petition for reinstatement, show proof of passage of a [PRE] . . . ." The State Bar argues that the plain meaning of this provision is that such proof must be shown *with the filing* of the petition, while petitioner argues that the rule establishes a burden of evidence that a petitioner must show to establish eligibility for reinstatement.

The language of the rule does not explicitly require the proof of passage of a PRE be shown *with the filing* of the petition for reinstatement, but only that it be shown *with* any petition for reinstatement.[6] Whether the language of the rule means passage of a PRE must be shown as a precondition to filing a petition for reinstatement or that such passage may be shown during the course of hearing on the petition is not clear. The ambiguity in the meaning of the latter phrase requires that we go further in our efforts to ascertain the intention of the Board of Governors in adopting the rule.

We take the second step as suggested in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, *supra*, 6 Cal.App.4th at p. 1239, and look to the legislative history. The "legislative history" of the adoption of rule 665(a) by the Board of Governors of the State Bar shows that the emphasis of the discussion during March through June of 1994 was to establish a requirement that a petitioner for reinstatement recently pass a PRE and to insure the petitioner was currently acquainted with the ethical standards required to practice law.[7] Rule 665(a) as initially proposed, called for passage of a PRE not more than three years before the filing of the petition for reinstatement. As finally adopted, effective January 1, 1995, the rule reduced the period from three years to one year, clearly reflecting a need for petitioners to show a current understanding of the ethical obligations of attorneys in California.

As late as August 1994, there remained under discussion a rule that would have required a petitioner to serve a copy of a purposed petition for reinstatement on the Office of Chief Trial Counsel at least 90 days prior to even filing a petition or pay only a filing fee.[8]

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6. In contrast, the Board of Governors, in adopting rule 662(d), required attorneys seeking reinstatement to pass the Attorney Bar Examination "prior to filing of a petition for reinstatement." We note operation of rule 662(d) has been suspended by directive of the Supreme Court. (See State Bar Note re Rule 662, Rules Proc. of State Bar (Jan. 1998 ed.).)

7. Following notice to the parties, in accordance with Evidence Code section 459, subdivision (d), we take judicial notice of the reports of the Discipline Committee of the State Bar's Board of Governors regarding rule 665(a) and the statements of counsel made at the time the Board of Governors adopted rule 665(a).

8. See letter dated August 22, 1994, to Board of Governors, et al., from Joint Rules Committee of the Discipline and Client Assistance Committee and Legal Committee, and the attachment to that letter.

The net result of our review of the legislative history is to conclude that it sheds little light on the intention of the Board of Governors in adopting rule 665(a), with respect to the issue before us other than to say that the principal purpose for the rule was to insure a current familiarity with the ethical obligations on the part of petitioners for reinstatement. The comments contained in the various reports reflect dissenting views on each of the committees that considered the rules and provide little aid in interpreting the rule under consideration.[9]

Under these circumstances we next look to reason, practicality and common sense. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, *supra*, 6 Cal.App.4th at p. 1239.) And we do so in a manner that will result in "a reasonable and common sense interpretation consistent with the apparent purpose. . . which upon application will result in wise policy rather than mischief or absurdity. [Citations.]" (*DeYoung v. San Diego*, *supra*, 147 Cal.App.3d at p. 18; see also 7 Witkin, Summary of Cal. Law (9th ed. 1999 supp.) Constitutional Law, § 94, pp. 42-45.)

In addition to requiring a showing of rehabilitation and present moral qualifications along with present ability and learning in the law, rule 951(f) of the California Rules of Court requires that petitioners pass a PRE. There is no suggestion that the California Rules of Court require proof of passage of a PRE as a condition precedent to the filing of a petition for reinstatement, but only as a condition precedent to a State Bar Court recommendation of reinstatement and possibly to a Supreme Court order of reinstatement. (Cf. *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673-674 [applying former transitional rule 667].)

Rule 661, adopted at the same time as rule 665, sets forth the requirements for filing a petition for reinstatement. Nowhere in that "requirements" rule is there any mention of passage of a PRE.

Rule 665 is captioned "Burden of Proof," suggesting that it is dealing with evidentiary matters rather than requirements for filing. This would suggest that proof of passage of a PRE could be produced during the course of a reinstatement hearing. The initial phrase of rule 665, "In order to be eligible for reinstatement," appears to define the purpose of rule 665. Looking at that phrase alone, the rule is not dealing with eligibility to file for reinstatement, but rather the more substantive "eligible for reinstatement." That eligibility is conditioned upon a petitioner passing a PRE "not more than one year before filing of the petition for reinstatement". As we have noted, this language sets the earliest time a petitioner may pass a PRE, but not the latest. The quoted language does not purport to restrict the passage of a PRE following the filing of a petition. The language clearly addresses the issue of a petitioner showing recent familiarity with the ethical standards of the practice of law and not the filing of a petition for reinstatement.

Rule 665(a) further requires a petitioner, "with any petition for reinstatement, show proof of passage of a [PRE] . . . ." This language must be read with the purpose of the rule, which is to define eligibility for reinstatement, not eligibility to *file* for reinstatement. Since the rule deals with the requirements for "reinstatement" and not the filing of a petition for reinstatement, the meaning of the phrase "show proof of passage of a [PRE] with any petition for reinstatement" is to require that proof be shown during the petition process, or hearing before the hearing department of the State Bar Court.

This interpretation does not add to the burdens of an applicant for reinstatement as established by rule 951(f) of the California Rules of Court and Supreme Court case law, whereas the interpretation of rule 665(a) urged by the State Bar would make petitions for reinstatement more restrictive than the California Rules of Court. It would require passage and proof

9. We note, that in a letter from the Chief Court Counsel addressed to "Persons receiving public comment package on proposed revised State Bar Court Rules of Procedure and Rules of Practice" dated March 15, 1994, the author notes that applicants for reinstatement may fulfill the PRE requirements "by passing the PRE at any time up to three years before filing the petition for reinstatement." However, this does not shed any light on the intention of the Board of Governors in adopting the later modified rule.

of passage of a PRE as a condition precedent to even the filing of a petition for reinstatement for purely administrative reasons without regard to the ultimate issue of protection of the courts, the public, and the profession. Those basic issues must be addressed during the course of a hearing on the petition and no detriment is demonstrated to the course of that process by permitting the filing of a petition for reinstatement without proof of prior passage of a PRE. As quoted above "[t]he 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 burdens upon them." (*In re Stevens*, *supra*, 197 Cal. at p. 424; see also *Resner v. State Bar*, *supra*, 67 Cal.2d at p. 811; *Pacheco v. State Bar*, *supra*, 43 Cal.3d at p. 1058.)

The State Bar asserts that, as matter of policy, to permit the filing of a petition for reinstatement without proof of passage of a PRE would require the entire proceeding be put on hold until a petitioner is able to provide proof of passage of such an examination and that the resources of the State Bar would be expended in investigation, interviewing witness and procuring records, to determine if opposition to the petition is appropriate. It further argues that such effort and the efforts of the State Bar Court may be wasted if a petitioner is unable to show proof of passage of a PRE during the course of the hearing of his or her petition. We do not share the State Bar's concerns over these issues, particularly in light of the fact that the State Bar does not explain why these "issues" were not critical or disruptive to the many reinstatement proceedings conducted under former transitional rule 667, which as noted above permitted the State Bar Court to grant a petitioner an additional two-year period *after* the hearing on his or her petition for reinstatement in which to pass a PRE.

Moreover, to permit the filing of a petition without passage and proof of passage of a PRE is not in any way inconsistent with the overall scheme for processing petitions for reinstatement. Rule 663(a) requires the State Bar's Office of Chief Trial Counsel to devote a 120-day time period following the filing of a petition for reinstatement to investigate whether the petition will be opposed by the State Bar. The State Bar Court is authorized to extend that period of investigation for good cause. (Rule 663(a).) No discovery may be conducted during that investigative period and all times for trial preparation are measured from the end of the investigation period. (Rule 663(b).) A substantial filing fee is charged the petitioner. (Rule 660.) That fee is currently $900.

An applicant filing a petition seeking reinstatement, absent the prior passage of a PRE, takes a calculated risk. The absence of passage and proof of passage of such an examination during the course of the hearing on the petition mandates an adverse decision on the petition. (Cal. Rules of Court, rule 951(f); rule 665(a); cf. *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 673-674 [former transitional rule 667 interpreted to require successful passage of a PRE as a condition precedent to a State Bar Court recommendation of reinstatement].) Following an adverse decision on a petition for reinstatement, a subsequent petition generally may not be filed within a two year period. (Rule 662(e).) Presumably, an applicant unable to show proof of passage of a PRE during the hearing for reinstatement would be barred from filing a further petition for reinstatement for an additional two-year period measured from the resulting adverse decision. (*Ibid.*)

Under these circumstances we reject the State Bar argument that policy requires a holding that rule 665(a) mandates passage and proof of passage of PRE as a condition precedent to filing a petition for reinstatement. A petitioner for reinstatement has the choice of delaying the filing of a petition until proof of passage of a PRE is in hand or taking the risk of a two-year delay in the event of an adverse decision, and again incurring the $900 fee for filing a petition for reinstatement. These factors are certainly a deterrent to frivolous petitions. Any unreasonable delay in providing proof of passage of a PRE can be dealt with on a case-by-case basis.

CONCLUSION

In sum, we conclude that disciplinary charges were pending against Sheppard at the time he resigned from the State Bar. In addition, we conclude that the PRE requirement set forth in rule 665(a) applies to all petitioners for reinstatement regardless of whether they resigned with or without charges pending or were disbarred. **[6b]** Moreover, we

conclude that, under rule 665(a), passage or proof of passage of a PRE is not a condition precedent to the filing of a petition for reinstatement in the State Bar Court. We are unaware of any rule, statute, or law that imposes passage or proof of a PRE as a condition precedent to filing a reinstatement petition. Accordingly, even though the hearing judge based his denial of the State Bar's motion to dismiss on his erroneous conclusions (1) that Sheppard did not resign from the State Bar with disciplinary charges pending and (2) that the PRE requirement in rule 665(a) applies only to petitioners who resigned with charges pending, the hearing judge's denial of the State Bar's motion to dismiss is nonetheless correct.

Thus, the State Bar has not established an abuse of discretion or error of law. We deny the State Bar's request to reverse the hearing judge's order denying its motion to dismiss Robert A. Sheppard's petition for reinstatement.

I concur:

NORIAN, J.

CONCURRING OPINION OF STOVITZ, J.

I join the majority's holding that respondent resigned with disciplinary charges pending and was not required to prove passage of a professional responsibility examination (PRE) at the time of filing his petition for reinstatement. However, my key reason for joining in the majority holding is not any ambiguity in rule 665(a) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings (Rules of Procedure for State Bar Court Proceedings) but rather that the pertinent requirement of that rule is inconsistent with and must therefore fall to the Supreme Court authorities discussed by the majority, notably rule 951(f) of the California Rules of Court and the other cited authorities collectively showing that, while the standards for reinstatement are very high, the law ought not to put unnecessary burdens on those seeking reinstatement. (Maj. opn., *ante*, pp. __ [typed maj. opn., pp. 9, 11-12, 15-17].)

Rule 665(a) of the Rules of Procedure for State Bar Court Proceedings requires that proof of passage of the PRE be shown "with" the petition for reinstatement. Whether that rule is ambiguous here turns on the meaning of the word "with." The ordinary meaning of that word as used in the rule is "a) alongside of; near to b) in the company of . . . ." (Webster's New World Dict. (3d college ed. 1988) p. 1534.) Under this definition, the petitioner for reinstatement need not submit proof of PRE passage with the filing of the petition, but at the least, would have to submit that proof "near" to the time of that filing.

However, I conclude that, when measured against the Supreme Court authorities discussed by the majority, the pertinent requirement of rule 665(a) may not be construed to require proof of passage of the PRE as a precondition to the filing of a petition for reinstatement or a hearing on the petition.

The State Bar Board of Governors has statutory authority to adopt the mode of procedure in attorney regulatory matters. (Bus. & Prof. Code, §§ 6086; 6086.5.) That authority, like any resting on a legislative act, is always subject to the inherent authority of the Supreme Court in attorney regulatory matters. (Cal. Rules of Court, rule 951(g); *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 593-607; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 299-301.)

Rule 951(f) of the California Rules of Court is the Supreme Court's general "codification" of reinstatement requirements. As the majority points out, that rule does not require proof of passage of the PRE prior to or with the filing of the petition. The Supreme Court has never required that a petitioner pass the PRE prior to the State Bar Court hearing on the petition for reinstatement. Given that the reinstatement process typically spans at least 9 months, including a required 120-day investigation period, and that the PRE is given 3 times per year, it is reasonable to assume that a petitioner who has not earlier passed the PRE may plan to do so during the pendency of the reinstatement proceeding.[10]

10. Of course, a petitioner who waits too long in the proceedings to pass the PRE runs a risk that failure of that test may pose serious adverse consequences in case the petitioner meets all other requirements for reinstatement. (See, generally, rule 665(d), Rules Proc. for State Bar Court Proceedings [discussed, post].)

This approach is bolstered by the Supreme Court's treatment of the seemingly more difficult requirement in some cases of establishing learning and ability in the general law. Rule 951(f) of the California Rules of Court provides that, if a petitioner fails to make, at the hearing on his or her petition for reinstatement, the affirmative required showing of present ability and learning in the general law, the petitioner may be required to take and pass one of the same general bar examinations required of applicants for admission to establish his or her ability and learning. The State Bar Board of Governors has correctly interpreted the Supreme Court's requirement allowing for the issue of ability and learning to be decided after the State Bar Court's hearing on the reinstatement petition by the petitioner's passage of one of the general bar examinations. (Rules Proc. for State Bar Court Proceedings, rule 665(d).) When the Board of Governors later sought to require, in rule 662(d) of the Rules of Procedure for State Bar Court Proceedings, that all petitioners pass a general bar examination prior to filing the petition for reinstatement, the Supreme Court suspended operation of that rule. (See State Bar note re Rule 662, Rules Proc. of State Bar (Jan. 1998 ed.).)

The State Bar's attempt to rely on rule 665(a) of the Rules of Procedure for State Bar Court Proceedings to prevent petitioners for reinstatement from proceeding to a hearing on their qualifications merely for failure to prove prior passage of the PRE conflicts with the proper interpretation of rule 951(f) of the California Rules of Court and must therefore fail. For that reason, I concur in the majority's decision to deny the relief that the State Bar seeks in its petition for interlocutory review.

STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN OWEN STANSBURY

A Member of the State Bar

No. 98-H-02633

Filed February 24, 2000; as modified, March 21, 2000

SUMMARY

The State Bar sought plenary review of a hearing judge's decision in a default matter that respondent be suspended from the practice of law until he (1) pays specified restitution, (2) attends Ethics School, (3) provides proof of passage of the Professional Responsibility Examination, and (4) makes a motion to the State Bar Court pursuant to rule 205 of the Rules of Procedure and that motion is granted. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The Review Department held that to extend an attorney's recommended actual suspension until he or she moves the State Bar Court to terminate that suspension under rule 205 of the Rules of Procedure there must be a stated, defined and measurable period of actual suspension recommended, and if appropriate, a period of stayed suspension. Finding that the hearing judge's discipline recommendation did not provide for a specific, definite, or measurable period of actual suspension within the meaning of rule 205(a), and based on the found misconduct, the Review Department modified the hearing judge's discipline recommendation to include a two-year stayed suspension, with an actual suspension of 90 days and until the respondent complies with some, but not all, of the specified conditions recommended by the hearing judge.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: No Appearance

HEADNOTES

[1 a-h] 135.50 Procedure–Revised Rules of Procedure–Division IV, Subpoenas and Discovery
165 Adequacy of Hearing Decision
1099 Substantive Issues re Discipline–Admonition

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.

Where the State Bar Court recommends that an attorney who has defaulted in a disciplinary proceeding be placed on actual suspension, rule 205(a) of the Rules of Procedure requires that the discipline recommendation contain two elements: (1) a specific period of actual suspension; and (2) a statement that the attorney's actual suspension shall continue unless the State Bar Court grants a motion to terminate the actual suspension at the conclusion of the specific period of actual suspension or upon such later date ordered by the court. In the present case the hearing judge recommended that respondent be actually suspended until he accomplishes certain tasks (i.e., provide evidence of reimbursement to his former client, attend Ethics School, pass the professional responsibility examination, and make a motion to the State Bar Court to terminate the actual suspension). This recommendation does not meet the requirement of rule 205(a) that the recommended discipline include a specific period of actual suspension. At best, the hearing judge's recommendation will result in an indefinite, as distinguished from a specific, period of actual suspension. To extend an attorney's recommended actual suspension until he or she moves the State Bar Court to terminate that suspension under rule 205 there must be a stated, defined and measurable period of actual suspension recommended.

[2 a, b] **135.50 Procedure–Revised Rules of Procedure–Division IV, Subpoenas and Discovery**
179 Discipline Conditions–Miscellaneous
1099 Substantive Issues re Discipline–Admonition

While rule 205 of the Rules of Procedure does not specifically preclude a hearing judge in a default matter from recommending a period of actual suspension be imposed as a condition of probation along with appropriate additional conditions of probation, the rule clearly contemplates that probation and its attendant conditions be imposed at the time the defaulting attorney brings a motion under rule 205(c) to terminate his or her actual suspension. The entire purpose of rule 205 is to eliminate the necessity of multiple proceedings against an attorney who is unwilling to participate in the disciplinary process and evidences no interest in maintaining his or her membership in the bar. Under rule 205 the burden is placed on a defaulting attorney to bring forward to the State Bar Court his or her interest in continuing the right to practice. The appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding. It is only at that time that the court has before it an attorney who evidences a willingness to comply with conditions of probation and a full understanding of the reasons for the attorney's failure to participate in the disciplinary process.

[3] **135.50 Procedure–Revised Rules of Procedure–Division IV, Subpoenas and Discovery**
179 Discipline Conditions–Miscellaneous
1099 Substantive Issues re Discipline–Admonition

Attendant to a recommendation of suspension, the State Bar Court lacks the authority to impose conditions of probation without the prior approval of the Supreme Court. Therefore, it is appropriate, in any decision or opinion made under rule 205 of the Rules of Procedure recommending the actual suspension of an attorney, to recommend to the Supreme Court that the disciplined attorney be ordered to comply with the conditions of probation, if any, reasonably related to the found misconduct that the State Bar Court may impose as conditions of probation attendant on terminating the actual suspension of that attorney.

[4 a, b] **135.50 Procedure–Revised Rules of Procedure–Division IV, Subpoenas and Discovery**
179 Discipline Conditions–Miscellaneous
1099 Substantive Issues re Discipline–Admonition

Attorney discipline is under the control of the Supreme Court and the State Bar Court may only recommend such discipline for the approval of the Supreme Court. As a consequence the clear parameters of any proposed discipline must be included in the State Bar Court's recommendation to the Supreme Court. Both stayed and actual suspension are discipline within the context of attorney discipline. It follows that in any recommendation for discipline made to the Supreme Court under rule 205 of the Rules of Procedure must include, if appropriate, a period of stayed suspension.

[5 a, b] **135.50 Procedure–Revised Rules of Procedure–Division IV, Subpoenas and Discovery**
171 Discipline–Restitution
173 Discipline–Ethics Exam/Ethics School
179 Discipline Conditions–Miscellaneous
1099 Substantive Issues re Discipline–Admonition

There is nothing in rule 205 of the Rules of Procedure that expressly precludes the State Bar Court from recommending appropriate preconditions to a defaulting and disciplined attorney bringing a motion to terminate his or her actual suspension under rule 205, such as recommended in this matter by the hearing judge, requiring respondent to make restitution and attend Ethics School. However, the requirement that respondent take and pass the Professional Responsibility Examination prior to bringing a motion for relief from suspension is in conflict with Supreme Court case law requiring that a disciplined attorney be given a minimum of one year within which to pass the examination.

ADDITIONAL ANALYSIS

Culpability
Found
251.11 Rule 1-110 (former 9-101)
Not Found
220.05 Section 6103, clause 1
Aggravation
Found
511 Prior Record
621 Lack of Remorse
Standards
805.10 Effect of Prior Discipline
Discipline
1013.08 Stayed Suspension–2 years
1015.03 Actual Suspension–3 months
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1029 Other Probation Conditions
1030 Standard 1.4(c)(ii)

OPINION

OBRIEN, P.J.:

The State Bar seeks review of a decision and recommendation that, following his default, John Owen Stansbury be actually suspended from the practice of law until he provides, *inter alia*, proof of restitution to a former client, provides proof of attendance of the State Bar Ethics School and makes a motion before the State Bar Court to terminate actual suspension under recently enacted rule 205 of the Rules of Procedure of the State Bar, title II, State Bar Proceedings.[1] In that decision the hearing judge recommended that, if the actual suspension exceeded ninety days, Stansbury be ordered to comply with the provisions of subdivisions (a) and (c) of rule 955, California Rules of Court and that, if the period of actual suspension exceeds two years, the Supreme Court order Stansbury to remain suspended until he makes the required showing of rehabilitation, present fitness to practice and present learning and ability in the general law as required by Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct (standards), standard 1.4(c)(ii). The hearing judge, *sua sponte*, modified that decision by adding a requirement that Stansbury provide proof of passage of the Multistate Professional Responsibility Examination (PRE) prior to making a motion to terminate the actual suspension. Other than as recited, the bearing judge recommended no period of stated (i.e. definite) actual suspension, nor did she recommend a period of stayed suspension

[1a] We hold that to extend an attorney's recommended actual suspension until he or she moves the State Bar Court to terminate that suspension under rule 205[2] there must be a stated, defined and measurable period of actual suspension recommended, and if appropriate, a period of stayed suspension.

The entire record is before us. Because we have the authority and obligation to conduct a de novo review, including the recommended discipline (Rule 305 (a); *In re Morse* (1995) 11 Cal. 4th 184, 207 ; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403), we modify the recommended discipline.

BACKGROUND

The State Bar seeks plenary review, under rule 301, of a hearing judge's decision and recommendation in a default matter. In a prior proceeding (*Stansbury I*), in which Stansbury[3] also defaulted, he was publicly reproved based upon his failure to return unearned fees to a client. That reproval contained conditions that Stansbury (1) make restitution to his former client in the sum of $750 plus interest thereon at the rate of ten per cent per annum from February 28, 1996, until paid and provide proof of that payment to the Probation Unit of the Office of the Chief Trial Counsel of the State Bar of California (Probation Unit) within 30 days of that payment and (2) attend the State Bar of California's Ethics School (Ethics School) by March 7, 1999.

The Notice of Disciplinary Charges (NDC) in the present matter included specific allegations of the violation of both these conditions and was served in accordance with Business and Professions Code section 6002.1, subdivision (c)[4] and rule 60. No response to the NDC was filed. A Notice of Motion and Motion for Default were filed and properly served on Stansbury in accordance with rule 200 and were signed for by Stansbury. There has been no appearance by Stansbury. As found by the hearing judge, Stansbury had both statutory (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186) and actual notice of the present proceeding.

1. All further references to "rules" are to these rules of procedure unless otherwise stated.

2. Rule 205 was adopted effective March 15, 1999, and remains in effect until June 30, 2000, unless a later enacted amendment deletes or extends that date.

3. He was admitted to the Bar on January 9, 1969, and has been a member since that time.

4. All further references to section are to the Business and Professions Code unless otherwise indicated.

The hearing judge properly found the factual allegations of the NDC to be admitted. (Rule 200(d)(1)(A).) She concluded that it made no sense to place Stansbury on probation unless he evidenced a willingness to abide by terms of probation and recommended that Stansbury be suspended from the practice of law until he (1) pays restitution to his former client in the amount of $750, plus interest at the rate of ten percent per annum from February 28, 1996, and reports that payment to the Probation Unit, (2) attends Ethics School and provides proof of his attendance to the Probation Unit, and (3) makes a motion to the State Bar Court pursuant to rule 205[5] and that motion is granted.

The hearing judge further recommended that, if the period of actual suspension exceeds ninety days, the Supreme Court order respondent to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court and that, if the actual suspension exceeds two years, Stansbury remain suspended until he makes the required showing of rehabilitation, present fitness to practice, and present learning and ability in the general law as required by standard 1.4(c)(ii).

Thereafter, in her Order Modifying Decision, the hearing judge, *sua sponte*, modified her decision to provide that Stansbury further remain suspended until he provides proof of passage of the PRE.

THE EFFECT OF RULE 205(A)

[1b] The State Bar agrees with each of the facts as found by the hearing judge, but argues that where actual suspension is recommended, the plain language of rule 205(a) requires a defined minimum period of actual suspension. We agree.

[1c] Where the State Bar Court recommends that an attorney who has defaulted in a disciplinary proceeding be placed on actual suspension, rule 205(a) requires that recommendation contain two elements: "(1) a specific period of actual suspension; and (2) a statement that the [attorney's] actual suspension shall continue unless the [State Bar Court] grants a motion to terminate the actual suspension at the conclusion of the specific period of actual suspension or upon such later date ordered by the court."

[1d] In interpreting rule 205(a) we first look to the plain language of that rule. "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. [citations.]" (*Halbert's Lumber Inc. v. Lucky Stores Inc.* (1992) 6 Cal. App. 4th 1233, 1239; see also 7 Witkin Summary of Cal. Law (9th ed. 1999 supp.) Constitutional Law, section 94, pp. 42-45.) The rule requires "a specific period of actual suspension." We conclude that that phrase is without ambiguity, doubt, or uncertainty and that the language of rule 205(a) controls. "Specific" is defined as designating a defined thing, explicit, specific duties. (Black's Law Dict. (7th ed. 1999) p. 1406, col. 2.)[6]

[1e] In the present case the hearing judge recommended that Stansbury be actually suspended until he accomplishes certain tasks (i.e., provide evidence of reimbursement to his former client, attend Ethics School, pass the PRE, and make a motion to the State Bar Court to terminate the actual suspension). It is possible that Stansbury could accomplish each of these tasks before the Supreme Court issues an order imposing actual suspension.[7]

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5. Rule 205 (a) provides "in a matter in which a member's default has been entered and the Court recommends that the member be placed on actual suspension, the Court's recommendation shall include both (1) a specific period of actual suspension; and (2) a statement that the member's actual suspension shall continue unless the Court grants a motion to terminate the actual suspension at the conclusion of the specific period of actual suspension or upon such later date ordered by the court."

6. We find no ambiguity in rule 205 (a), and we do not consider the legislative history in interpreting subdivision (a) of rule 205. (See *Halbert's Lumber Inc. v. Lucky Stores, Inc.*, *supra*, 6 Cal. App. 4th at pp. 1238-1239 [If the meaning is without ambiguity, doubt, or uncertainty, then the language controls."].) However, we do grant the State Bar's motion to consider the "legislative" history of rule 205 to aid in our interpretation of the purpose of rule 205, as discussed *post*.

7. That likelihood is greatly increased where there is a delay in a matter reaching the Supreme Court, either through review in the Review Department of the State Bar Court or for other reasons.

Under such circumstances the Supreme Court would have before it no recommendation for actual suspension. That recommendation would fail to meet the express requirements of rule 205(a) in that it would fail to contain a recommendation for actual suspension.

[1f] It is true that the hearing judge could refuse to grant a motion to terminate the actual suspension until after the Supreme Court acted, but that still does not meet the requirement of rule 205(a) that the recommended discipline include a specific period of actual suspension. At best, the hearing judge's decision and recommendation will result in an indefinite, as distinguished from a specific, recommendation for actual suspension. That entire recommendation for actual suspension is based on the occurrence of future events which cannot be known at the time the recommendation is made. In our judgement this does not meet the requirement of "a specific recommendation of actual suspension."

[1g] As the State Bar points out, if the recommendation of the hearing judge is followed by the Supreme Court and if Stansbury has complied with each of the tasks required of him by the hearing judge's order, there will be no actual suspension specified by the Supreme Court, nor will there be a recommendation for actual suspension from practice as required by rule 205(a).

This position is consistent with the obligation of the State Bar to give notice to a non-responding attorney in disciplinary matters in its motion for the entry of default. Among the items required to be included in the notice of motion for the entry of default is the following: ". . . IF THE DISCIPLINE IMPOSED BY THE SUPREME COURT IN THIS PROCEEDING INCLUDES A PERIOD OF ACTUAL SUSPENSION, YOU WILL REMAIN SUSPENDED FROM THE PRACTICE OF LAW FOR AT LEAST THE PERIOD OF TIME SPECIFIED BY THE SUPREME COURT." (Rule 200(c)[original emphasis].)

[1h] We find that the decision and recommendation of the hearing judge is not specific, definite, or measurable within the meaning of rule 205(a).

The hearing judge expressed her concern about placing Stansbury on probation when there is no indication that he accepts the obligations of probation, as evidenced by his failure to participate in the two disciplinary proceedings against him. We share that concern. (But see *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 300.) However, we know of no restriction to recommending the placing of a defaulting attorney, deserving of actual suspension on a specific and measurable period of actual suspension, and continuing that suspension until the attorney complies with proper conditions.

This matter is before us on plenary review pursuant to rule 301. Although limited, because of Stansbury's default, the entire record is before us. As a consequence we are obligated to conduct de novo review of the entire matter, including the recommended discipline. (Rule 305(a).)

As found by the hearing judge, Stansbury had actual and statutory notice of this disciplinary proceeding under Business and Professions Code section 6002.1, subdivision (c). He was charged in count one with violation of rule 1-110 of the Rules of Professional Conduct, requiring an attorney to comply with conditions of reproval and in count two with a violation of section 6103, requiring an attorney to comply with court orders.

The hearing judge found that Stansbury wilfully failed to comply with the conditions of his reproval in violation of rule 1-110, Rules of Professional Conduct and that he failed to comply with a court order in violation of section 6103. As to the violation of section 6103, she found that it was based on the identical facts relied on in finding a violation of rule 1-110, Rules of Professional Conduct, and would have no effect on the recommended discipline.

We agree with and adopt the hearing judge's finding that respondent is culpable of violating rule 1-110, Rules of Professional Conduct, but reject her finding that Stansbury was also culpable of violating section 6103. Because the section 6103 charge was duplicative of the found rule 1-110, Rules of Professional Conduct violation, we dismissed it with prejudice.

APPROPRIATE DISCIPLINE

The determination of discipline involves several considerations, including the protection of the public, promotion of confidence in the legal profession and the maintenance of high professional standards. (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 804-805.) In measuring that discipline, we look to both aggravating and mitigating circumstances. (*Segal v. State Bar* (1988) 44 Cal.3d 1077, 1089.)

Due to Stansbury's failure to participate in these disciplinary proceedings, there are before us no mitigating circumstances. Stansbury, admitted to practice in 1969, has a prior record of discipline: that being the public reproval in *Stansbury I*, which required that he make restitution to his former client and attend Ethics School. "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline . . ., the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding . . . ." (Std. 1.7(a).)

To aid in our determination of recommended discipline we look to like cases in order to impose like discipline. We find two cases that lend aid to our determination of discipline: *Conroy v. State Bar*, *supra*, 51 Cal.3d 799 and *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697.

In *Conroy* the attorney received a private reproval based upon three incidents of misconduct. A condition of the reproval was that Conroy take and pass a PRE within one year of the effective date of the reproval. Conroy failed to take the examination and, in a subsequent proceeding, in which he was charged with that failure, he defaulted before the State Bar Court. He, belatedly, passed the PRE and thereafter appeared in the Supreme Court. The Supreme Court accepted the State Bar Court's recommended sixty day's actual suspension as a condition of a stayed one-year suspension.

In the Matter of Meyer, *supra*, 3 Cal. State Bar Ct. Rptr. 697 (*Meyer III*), the respondent was subject to two prior disciplinary orders. *In Meyer I* he had been given a private reproval by the State Bar Court, including a one-year probationary period requiring respondent to (1) file quarterly probation reports and (2) complete the State Bar's Ethics School. In *Meyer II*, he was charged with failure to comply with the conditions imposed in *Meyer I*. In *Meyer II*, the respondent was again given a reproval, placed on probation for a period of two years and required to (1) file quarterly probation reports and (2) provide proof of completion of six hours of continuing legal education within one year. In *Meyer III*, the respondent was charged with failing to comply with the reproval conditions imposed on him in *Meyer II*. Meyer initially appeared in *Meyer III*, but failed to appear at trial. Meyer was placed on two years' stayed suspension and three years' probation, conditioned, *inter alia*, upon actual suspension for the first ninety days.

We agree that Stansbury's underlying misconduct was more serious than that of either Meyer or Conroy. However, we are not measuring discipline for that underlying misconduct, which discipline was measured in Stansbury's initial proceeding. Rather, we measure appropriate discipline for the similar offence of Stansbury's failure to comply with conditions in a reproval.

The condition requiring Stansbury to make restitution to his former client is more substantive than the prophylactic reporting and educational measures set forth in both *Conroy* and *Meyer*. Nonetheless, the obligation of an attorney subject to conditions attached to a reproval is identical in *Conroy*, *Meyer III*, and the present proceeding. (Rule 1-110.)

The distinction we note is that Meyer had a record of two prior disciplinary matters at the time of the ninety days actual suspension imposed in *Meyer III*, and *Conroy* had a single prior disciplinary matter at the time the Supreme Court ordered his actual suspension for sixty days. Stansbury has a single prior record of discipline; however, he participated in neither that prior disciplinary matter nor the current proceeding. Stansbury's failure to file an answer and thereby allow his default to be entered in this proceeding is serious aggravation because it establishes that he does not comprehend the duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar*, *supra*, 53 Cal.3d at pp. 507-08.) It is well established that such a contemptuous

attitude towards disciplinary proceedings is highly relevant to the determination of the appropriate level of discipline. (*Ibid.*)

On balance we find Stansbury's misconduct more nearly parallels that of Meyer, and we shall recommend that his discipline include an actual suspension of ninety days.

EFFECT OF RULE 205 ON RECOMMENDED DISCIPLINE

[2a] While rule 205 does not specifically preclude a hearing judge in a default matter from recommending a period of actual suspension be imposed as a condition of probation along with appropriate additional conditions of probation, the rule clearly contemplates that probation and its attendant conditions be imposed at the time the defaulting attorney brings a motion under rule 205(c) to terminate his or her actual suspension[8]. The entire purpose of rule 205, as derived from the legislative history, is to eliminate the necessity of multiple proceedings against an attorney who is unwilling to participate in the disciplinary process and evidences no interest in maintaining his or her membership in the bar.[9] Under rule 205 the burden is placed on a defaulting attorney to bring forward to the State Bar Court his or her interest in continuing the right to practice.

[2b] It is our judgment that the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding. It is only at that time that the court has before it an attorney who evidences a willingness to comply with conditions of probation (rule 205 (c)(4)) and a full understanding of the reasons for the attorney's failure to participate in the disciplinary process (rule 205 (c) (3).)

[3] We do note, however, that attendant to a recommendation of suspension, this court lacks the authority to impose conditions of probation without the prior approval of the Supreme Court. (See *In the Matter of Respondent Z* (Review Dept. 1999) 4 State Bar Ct. Rptr. 85.) Therefore, it is appropriate, in any decision or opinion made under Rule 205 recommending the actual suspension of an attorney, to recommend to the Supreme Court that the disciplined attorney be ordered to comply with the conditions of probation, if any, reasonably related to the found misconduct that the State Bar Court may impose as conditions of probation attendant on terminating the actual suspension of that attorney.

[4a] However, it is important to recall that attorney discipline is under the control of the Supreme Court and that the State Bar Court may only recommend such discipline for the approval of the Supreme Court. (Section 6087; rule 954(b) of the California Rules of Court.) As a consequence the clear parameters of any proposed discipline must be included in the State Bar Court's recommendation to the Supreme Court. Both stayed and actual suspension are discipline within the context of attorney discipline. It follows that any recommendation for discipline made to the Supreme Court, under rule 205 must include any appropriate and measurable period of actual suspension and, if appropriate, a period of stayed suspension.

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8. Rule 205(g) states: "If the Court grants the motion to terminate the [attorney's] actual suspension, the Court may place the member on probation for a specified period of time and may impose such conditions of probation as the Court deems necessary or appropriate." Rule 205(c)(3) requires the attorney seeking to end his or her suspension to state the reasons for the failure to respond to the disciplinary charges "in order to assist the Court in ascertaining any appropriate probation conditions to be imposed." Subdivision (c)(4) of that same rule requires the attorney to state "whether the member is willing to fully comply with such probation conditions as are reasonably related to the proceeding."

9. The frequent scenario of a defaulting attorney in a case not involving serious misconduct, prior to the adoption of rule 205, was suspended suspension conditioned on the attorney complying with modest conditions of probation. Upon the attorney's failure to comply with those conditions of probation, a second separate proceeding based on the failure to comply with the conditions of probation frequently resulted in discipline requiring actual suspension and a requirement that the disciplined attorney notify his or her clients of that discipline under rule 955 of the California Rules of Court. Upon the attorney's failure to comply with rule 955, a third additional separate proceeding commenced, frequently resulting in disbarment for that failure.

[4b] To impose a period of stayed suspension, not approved by the Supreme Court, as a condition of granting a motion for termination of actual suspension under rule 205(c) would amount to the imposition of additional discipline without an order of the Supreme Court in violation of section 6087 and rule 954(b) of the California Rules of Court. In any discipline recommended under the provisions of rule 205(a), to the extent stayed suspension is appropriate, it must be included in the recommended discipline submitted to the Supreme Court. In this way the Supreme Court retains its proper control over the proposed discipline.

Rule 205 (c) (6) makes clear that the provisions of rule 955 of the California Rules of Court are applicable if the disciplined attorney's actual suspension exceeds ninety days and, in the event that suspension exceeds two years, the provisions of standard 1.4(c)(ii), requiring the attorney to establish his or her rehabilitation, fitness to practice, and learning in the law, apply. (Rule 205 (b).)

[5a] There is nothing in rule 205 that expressly precludes the State Bar Court from recommending appropriate preconditions to a defaulting and disciplined attorney bringing a motion to terminate his or her actual suspension under rule 205, such as recommended in this matter by the hearing judge, requiring Stansbury to make restitution and attend Ethics School.

[5b] However, the requirement that Stansbury take and pass the PRE prior to bringing a motion for relief from suspension is in conflict with *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, footnote 8, requiring that a disciplined attorney be given a minimum of one year within which to pass the PRE.

RECOMMENDED DISCIPLINE

For the forgoing reasons, we recommend that respondent John Owen Stansbury be suspended for a period of two years, execution of which be stayed. We further recommend that he be actually suspended from the practice of law for a period of ninety days and until:

(1) he makes restitution to his former client John Frankinhouse in the sum of $750 plus interest thereon at the rate of ten percent per annum from February 28, 1996, until paid and provides proof of that payment to the Probation Unit of the Office of the Chief Trial Counsel of the State Bar; and

(2) he complies with rule 955 of the California Rules of Court, and

(3) the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205; and

(4) he attends and satisfactoryily completes the State Bar Ethics School and provides satisfactory proof of his completion to the Probation Unit.

We further recommend that he be ordered to comply with rule 955 of the California Rules of Court and to perform the acts described in subdivisions (a) and (c) of rule 955 within thirty days and forty days respectively, after the effective date of the Supreme Court order in this proceeding.

We also recommend that respondent be ordered to comply with such probation conditions as are reasonably related to this proceeding that hereinafter may be imposed by the State Bar Court as a condition for terminating his actual suspension. If respondent is actually suspended for two years or more, we further recommend that respondent remain actually suspended until he provides 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.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and to furnish proof thereof to the Probation Unit of the Office of the Chief Trial Counsel of the State Bar within one year after the effective date of the Supreme Court's order or during the period of his actual suspension, whichever is longer.

Finally, we recommend that costs be awarded to the State Bar 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 effective January 1, 1997.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RONALD E. LAIS

A Member of the State Bar

Nos. 93-O-16308 et al.

Filed April 17, 2000

SUMMARY

In a marital settlement dispute, respondent filed a patently frivolous appeal and in a child custody dispute, he lied to law enforcement officers when apprehended and misled a superior court judge in a complaint. The hearing judge recommended that respondent be suspended for three years, stayed, placed on probation for three years and be actually suspended for one year. (Hon. Carlos E. Velarde, Hearing Judge.)

Both parties sought review. Respondent's experience as a certified family law specialist and a State Bar investigation referee should have aided him to avoid the misconduct. The review department affirmed each of the hearing judge's culpability determinations, found respondent culpable of two additional charges of bad faith actions and increased the recommended discipline to include a two-year actual suspension.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal and Terry St. Bernard

For Respondent: David A. Clare

HEADNOTES

[1 a-d] **147 Evidence–Presumptions**
159 Evidence–Miscellaneous
162.20 Proof–Respondent's Burden
162.90 Quantum of Proof–Miscellaneous
165 Adequacy of Hearing Decision
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings

The hearing judge erred when he held that the record lacked clear and convincing evidence that respondent filed a frivolous appeal. The general rule is that civil findings are not, by themselves,

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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.

dispositive of the issues in a disciplinary case. Often the issues in the civil case may be either broader or narrower than the operative issues in a disciplinary proceeding. However, civil findings made under a preponderance of the evidence standard are entitled to a strong presumption of validity in the State Bar Court if supported by substantial evidence. In order to hold that an appeal is frivolous, the law requires an extremely high showing, so that zealous but good faith appeals having any merit are neither deterred nor sanctioned. Accordingly, the court of appeal's decision finding that respondent's appeal of a case was frivolous and pursued in bad faith was, at the very least, a prima facie determination of such. Respondent failed to adduce evidence that overcame that determination.

[2] **159 Evidence–Miscellaneous**
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
194 Statues Outside State Bar Act

Unless civil sanctions issues arising under section 128.5 of the Code of Civil Procedure are adequately litigated before the sanctioning court, it would appear inappropriate to apply collateral estoppel in the State Bar Court to the sanction order.

[3] **213.30 State Bar Act–Section 6068(c)**
271.00 Rule 3-200 (former 2-110)

Respondent's frivolous appeal was a violation of section 6068 subdivision (c) of the Business and Professions Code and rule 3-200(A) of the Rules of Professional Conduct. However, since the rule 3-200(A) violation is essentially redundant, for purposes of assessing degree of discipline, the review department found respondent culpable of only the section 6068 subdivision (c) violation.

[4] **221.00 State Bar Act–Section 6106**

Respondent's contention that he should not be found culpable of failing to use truthful means in a civil complaint he filed because his statements contained in an initial pleading were rejected. The State Bar Act makes any act of dishonesty or misleading of a court to be disciplinable.

[5 a-d] **1091 Substantive Issues re Discipline–Proportionality**
1093 Substantive Issues re Discipline–Inadequacy

The review department found respondent culpable of serious misconduct which burdened parties to litigation and the trial and appellate courts to adjudicate two matters. This included a patently frivolous appeal, dishonesty to law enforcement officers and misleading a court. Of special concern was that respondent's background as a certified family law specialist for much of his practice and his activity in bar work failed to serve him to avoid the misconduct in this record. Respondent's misdeeds cannot be ascribed to inexperience or simple zealousness. Moreover, there is nothing in the record which could ascribe this misconduct to any health or similar, singular condition. Respondent's lack of insight and failure to appreciate the wrongfulness of his misconduct does not bode well for respondent avoiding similar misconduct in the future. Anytime respondent lost on the merits of an issue, he would not accept the court's adverse judicial determination and would attempt to blame the ruling on the court's lack of understanding of the issues. Balancing all relevant factors and seeking to protect the public, courts and the legal profession, the review department increased the actual suspension from one year to two years.

ADDITIONAL ANALYSIS

Culpability
Found
213.31 Section 6068(c)
213.41 Section 6068(d)
221.11 Section 6106–Deliberate Dishonesty/Fraud
Not Found
214.55 Section 6068(o)
271.05 Rule 3-200 (former 2-110)
Aggravation
Found
521 Multiple Acts
611 Lack of Candor–Bar
621 Lack of Remorse
745.10 Remorse/Restitution
Found but Discounted
710.30 Long Practice with no prior discipline record
765.30 Pro Bono Work
Discipline
1013.09 Stayed Suspension–3 years
1015.08 Actual Suspension–2 years
Probation Conditions
1017.09 Probation–3 years
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, Acting P.J.:

We act on requests by both Respondent Ronald E. Lais and the State Bar's Office of Chief Trial Counsel (State Bar) to review this attorney discipline case. A hearing judge had found respondent culpable of some, but not all charged misconduct and recommended that respondent be suspended for three years, stayed on conditions of a one-year actual suspension. Respondent has been disciplined previously (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907 (*Lais I*)), but since *Lais I* was not final until after the trial of the present matter and the misconduct arose at about the same time as in the present matter, its weight for discipline purposes was considerably lessened by the hearing judge.

Respondent urges us to exonerate him of all charged misconduct; and, in any case, to reduce the discipline to, at most, a 30 or 60-day actual suspension. The State Bar argues that we should find respondent culpable of charges which the hearing judge dismissed and recommends disbarment. We agree with the State Bar's arguments on culpability but determine that the appropriate discipline is a three-year stayed suspension on conditions of probation including a two-year actual suspension and until respondent provides the proof required by standard 1.4(c)(ii), of the Standards for Attorney Sanctions for Professional Misconduct (Standards).

I. CULPABILITY FINDINGS AND DISCUSSION.

A. The Walker Matter.

1. Facts and findings.

William F. Walker (Husband), chief financial officer of a health care firm and a certified public accountant, had received valuable stock options (options) from his employer while he was married to Deanna Walker (Wife). In 1987, the parties dissolved their marriage. Husband sold some stock after the couple separated but 60,000 options remained unexercised. A key dispute in the family law trial was the value of Husband's stock options and their proper division as part of the community property. In 1988 the Orange County Superior Court valued the options as of the date of the family law trial, determined the amount of community assets represented by the value and awarded these assets to the parties. Husband objected to this decision and appealed it in propria persona.

In 1989, the court of appeal modified the superior court judgment because of the trial court's error in option valuation, but otherwise affirmed. (*In re Marriage of Walker* (1989) 216 Cal. App.3d 644 (*Walker I*).) Rehearing was denied and the Supreme Court denied review.

When Husband failed to tender the value of the options as ordered by the court of appeal, Wife pursued an order to show cause in 1991 in Superior Court. Husband hired respondent to represent him. This was respondent's first appearance in the case. Respondent opposed Wife's request, claiming that she should receive nothing. Relying on *Walker I*, the superior court ordered Husband to pay Wife $564,189. Husband, represented by respondent, appealed. (*In re Marriage of Walker* (Dec. 16, 1992) G011333/G011681 [nonpub. opn.] (*Walker II.*)[1] The appeal was assigned to the same appellate court division which filed *Walker I*. In Husband's 47-page opening brief, respondent acknowledged that *Walker I* "was the law in this case," but urged the Court of Appeal to revisit *Walker I* because it was based on error. Most of the other issues respondent raised in *Walker II* also attacked the valuation of the stock options.

Wife opposed respondent's appeal in *Walker II*, in part urging that the appeal was frivolous. She sought sanctions.

1. Although this opinion was not certified for publication, it may be cited in this disciplinary proceeding. (Cal. Rules of Ct., rule 977(b).)

In 1992, the court of appeal filed its opinion in *Walker II*. That opinion began by characterizing in one sentence the seven issues respondent raised: "Still refusing to accept *Walker [I]*, he wants it redecided." (*Walker II*, typed opn., at p. 3.) The court then discussed each of respondent's issues and pointed out that they were part of the issues decided previously or that respondent's client was obligated to have presented the evidence earlier so that the pertinent issues could have been determined in *Walker I*. Regarding respondent's attempt to convince the court to redivide the stock, the court held that his citation to Civil Code section 4810 was "ludicrous" in that it did not allow any redetermination of a previously issued appellate decision. (*Id.* typed opn. at p.3, fn.2.) The court of appeal continued by pointing out the well-settled doctrine of the law of the case which bound trial and appellate courts throughout the subsequent phases of a case even if the court may believe that the former decision is erroneous. (*Id.*, typed opn. at pp. 4-5, citing *Kowis v. Howard* (1992) 3 Cal. 4th. 888, 893.)

Finally, the court of appeal in *Walker II* reviewed the key authorities surrounding the awarding of sanctions for pursuing frivolous appeals. The court cited to the leading case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, observing that courts had articulated two standards, subjective and objective. After reviewing these standards, the court held that respondent's appeal was frivolous under either of them, that the matter was prosecuted for an improper motive and that any reasonable attorney would agree that the appeal was devoid of merit. The court also criticized respondent for imposing on the court's time by including multiple volumes of clerk's and reporter's transcripts containing papers "entirely irrelevant to the present appeal," by inapt citations and by arguing evidentiary issues never presented in *Walker I*. (*Walker II* typed opn. at pp. 10-11.) The court discussed the harm caused by frivolous appeals, both to the opposing litigant who is delayed in receiving the assets to which she is entitled, to the courts burdened by increased costs of pointless review and to many other litigants in other appeals who are prejudiced while the court is distracted by reweighing matters which had earlier become final.

The court in *Walker II* summed up the essence of respondent's appeal: "In *Walker [I]*, we told [Husband] what to do. We explained what stock [Wife] was to receive and at what value. [Husband] chose to ignore its mandates, and when [Wife] was compelled to file an order to show cause to receive that to which she was already entitled, he responded that she should *receive nothing*. When the trial court reminded him it was bound by our decision, he appealed. 'Certainly the judgment was appealable. However, no reasonable attorney could have concluded the trial court did not follow the directions of this court...' (Citation)" (*Walker II* typed opn. at p. 11 [original emphasis].)

The court of appeal imposed sanctions of $3,662 against Husband and an equal amount against respondent.[2] In doing so, the court cited Business and Professions Code section 6068 subdivision (c)[3], rejecting respondent's claim that, as an attorney, he should not be held responsible for merely advocating the position of his client.

In early 1993, the court of appeal denied rehearing, and in April 1993, the Supreme Court denied review.

The State Bar charged respondent with violating section 6068 subdivision (c) and rule 3-200(A), Rules of Professional Conduct of the State Bar[4] and with

2. The $3,662 was composed of $2,500 payable to the Wife and $1,162 payable to the court of appeal, which the court of appeal determined to be a conservative figure representing each assessee's share of the estimate of the cost to taxpayers to process the average civil appeal, excluding overhead such as rent and materials.

3. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code. Section 6068 subdivision (c) requires an attorney to "counsel or maintain such actions... only as appear to him or her legal or just, except the defense of a person charged with a public offense."

4. Rule 3-200(A) proscribes, in part, bringing an action or taking an appeal "without probable cause and for the purpose of harassing or maliciously injuring" another.

failing promptly to report to the State Bar the sanctions ordered (section 6068(o)(3)). Prior to trial, the parties stipulated to the background facts set forth above and that the failure to report sanctions charge be dismissed. The hearing judge made factual findings in conformity with that dismissal.

However, the hearing judge found a lack of clear and convincing proof that respondent violated either section 6068 subdivision (c) or rule 3-200(A) of the Rules of Professional Conduct. The hearing judge determined that the civil appeal in *Walker II* was decided on a "preponderance of the evidence" standard and that he must therefore independently assess the evidence before him. When doing so, he decided that it failed to meet the clear and convincing standard required for culpability.

2. Discussion of culpability.

The State Bar has appealed this determination in the *Walker* matter. It contends that the standards used by the court of appeal in determining that respondent's appeal was frivolous are so high that they bring the case well within the clear-and-convincing standard and that the hearing judge should have used principles of collateral estoppel to preclude respondent from disputing that the appeal was frivolous. On our independent review of the record (see, e.g., *In re Morse* (1995) 11 Cal.4th 184, 207; Rules Proc. State Bar, title II, State Bar Court Proceedings, rule 305(a)), we hold that clear and convincing evidence shows that respondent is culpable of the charged misconduct as contended by the State Bar. We also affirm the hearing judge's decision on stipulated facts that respondent is not culpable of failing to timely report the sanctions.

[1a] In our view, the hearing judge erred when he held that the record lacked clear and convincing evidence that respondent filed a frivolous appeal which violated section 6068(c) or rule 3-200(A).

[1b] A key aspect of the record is the opinion of the Court of Appeal in *Walker II* which held that respondent's appeal was frivolous. That opinion was preceded by notice to respondent that sanctions were sought by the opposing party.

[1c] At the outset, we agree with the hearing judge's citation to the general rule that civil findings are not, by themselves, dispositive of the issues in a disciplinary case (See, e.g., *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 348) There are sound reasons for this rule. Often the issues in a civil case may be either broader or narrower than the operative issues in this disciplinary proceeding. For example, a civil proceeding may decide only whether an attorney used ordinary care in representing a client or whether a client gave adequate consideration to support an attorney-client fee agreement and not whether the attorney breached disciplinary standards of conduct. The purposes of a disciplinary proceeding are quite different from those of a civil proceeding (see, e.g., *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327), and the body of law is accordingly different. However, civil matters do arise which bear a strong similarity, if not identity, to the charged disciplinary conduct. As the hearing judge correctly observed, the Supreme Court has also held that even civil findings made under a preponderance of the evidence test are entitled to a strong presumption of validity before the State Bar Court if supported by substantial evidence. (*Id.* at p. 325.)

The Supreme Court has noted in several cases, the importance to be given appellate court decisions. For example, in *In re Morse, supra*, 11 Cal.4th 184, the court cited repeatedly to *People v. Morse* (1993) 21 Cal. App.4th 259, a court of appeal opinion to which the attorney was a party. That court of appeal opinion determined that the attorney's mass mailing of homestead exemption materials to prospective clients was misleading under state law governing homestead filing services. In *Lee v. State Bar* (1968) 2 Cal.3d 927, 940-941, the court took judicial notice of a court of appeal opinion to which the attorney was a party. (*Lee v. Joseph* (1970) 267 Cal. App.2d 30.) Although noting, as in the present case, that the evidence of the attorney's culpability rested on independent evidence of misconduct, the Supreme Court also stated that the court of appeal opinion was a conclusive legal determination that the attorney gave no consideration for a promissory note.

[1d] Here virtually the entire focus of the court of appeal's opinion in *Walker II* was on the issue of whether that appeal was frivolous. The appellate court cited and applied the correct law and found that it was a frivolous appeal, giving detailed reasons for reaching that conclusion. As the State Bar correctly observes, in order to hold that an appeal is frivolous, the law requires an extremely high showing. This is only sound, so that zealous but good faith appeals having any merit are neither deterred nor sanctioned. The *Walker II* opinion itself cited and applied this law and its decision became final. Accordingly, the court of appeal's decision in *Walker II*, was, at the very least, a prima facie determination that respondent's appeal in that case was frivolous and that it was pursued in bad faith. Faced with disciplinary charges and with the opportunity for a trial, respondent failed to adduce evidence that overcame the strength of the evidence presented by the State Bar.

Before us, respondent contends that the pertinent doctrine of *In re Marriage of Flaherty supra*, relied on by the court in *Walker II* was tempered by *San Bernardino Community Hospital v. Meeks* (1986) 187 Cal. App.3d 457. Respondent is incorrect. Nothing in the latter case alters the relevant doctrine of *Flaherty* and the other authorities relied on by the *Walker II* court in finding respondent's appeal frivolous.

[2] On this record, we need not decide whether the judge should have applied principles of collateral estoppel to preclude the testimonial evidence he considered in addition to the record in *Walker II*. Indeed the case of *Wright v. Ripley* (1998) 65 Cal. App.4th 1189, decided after the disciplinary trial below, guides that unless sanctions issues arising under section 128.5 of the Code of Civil Procedure are adequately litigated before the sanctioning court, it would appear inappropriate to apply collateral estoppel to the sanction order.[5] Although we cite *Wright v. Ripley*, we note the detailed findings of the court in *Walker II* and discussion of respondent's conduct, compared to the most brief sanctions denial order reviewed in *Wright*.

[3] We must decide whether respondent's frivolous appeal was a violation of section 6068 subdivision (c) or rule 3-200(A) of the Rules of Professional Conduct. In our view it was a violation of both of those charged authorities. In *Sorenson v. State Bar* (1991) 52 Cal.3d 1036, the court applied section 6068 subdivision (c) to an attorney's conduct culminating in the filing of a municipal court fraud action seeking exemplary damages to redress a basic $45 billing dispute. The principles of *Sorenson* apply to respondent's wasteful, expensive relitigation of what respondent knew had been finally established as the law in *Walker I*. However, since the rule 3-200(A) violation is essentially redundant, for purposes of assessing degree of discipline (see *post*), we shall find respondent culpable in this matter of only the section 6068 subdivision (c) violation. (Cf. *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *Heavey v. State Bar* (1976) 17 Cal.3d 553, 559-560.)

B. The Van Essen Matter - Minnesota.

1. Facts and findings.

In 1992 Rodney (Husband) and Lisa Van Essen (Wife) were involved in a dissolution of marriage action pending in Los Angeles County Superior Court. The parties contested sharply custody of their two young children. At this time, respondent had not yet appeared in the case. As of Summer 1992, custody was awarded jointly but physical custody was awarded to Wife with visitation rights to Husband. The custody order was temporary but effective until further court order.

5. *Wright v. Ripley, supra*, raised the issue of whether a superior court's denial of a sanction order collaterally estopped proof in a separate tort action of the absence of malice. Although the court dealt with a denial of sanctions order, its discussion is of interest to this case: ". . . The majority of sanctions motions can be resolved summarily, and the party seeking sanctions should be encouraged to pursue that option rather than pushed into seeking a full evidentiary hearing. . . . Moreover, if collateral estoppel effect were given to the denial of such motions, it would also have to be given when they are granted. It is difficult to imagine the extent to which judicial economy would be compromised if every lawyer against whom sanctions were sought understood that such an award would constitute a binding adjudication on issues of his or her professional conduct. Regular court business would grind to a halt while lawyers exercised their full due process rights to fight the charges." (*Id.* at pp. 1194-1195.)

Because of evidence Husband presented about Wife's contact with another individual who had access to the children, Husband obtained an emergency order in late 1992 for custody. After the dissolution trial in Summer 1993, a custody order was made reinstating joint custody with physical custody to Wife. In October 1993, Husband successfully obtained physical custody of the children. At about this time, Wife retained respondent to represent her.

A hearing was set for a custody order on November 9, 1993. Since respondent recently became Wife's counsel, he asked for a continuance. This was granted to December 13 but on the condition that Husband receive temporary primary physical custody, that he be allowed to take the children to his home, a farm in Minnesota, and that Wife have reasonable visitation rights on reasonable notice to Husband, including a weekend visit with the children if Wife were in Minnesota. Respondent unsuccessfully moved for a stay of the order and unsuccessfully sought extraordinary writ relief from the court of appeal.

On December 16, 1993, after a three day hearing at which respondent represented Wife, Superior Court Commissioner Taylor awarded primary physical custody to Husband in Minnesota; but upon reasonable notice to Husband, Wife was allowed a weekend visit with the children if she were in Minnesota. Respondent unsuccessfully sought a stay of this order which took effect on December 16.

Wife had visited the children in Minnesota over the Thanksgiving 1993 weekend. After the December 16 order, she expressed her interest in returning to Minnesota to visit the children between Christmas Day and New Year's Day. She spoke to Husband several times between December 16 and 22 about her plan. Husband wanted the visit details worked out between their attorneys. On December 21, respondent sent a letter to Husband's counsel by telefacsimile (fax) informing of Wife's plans to visit the children between the afternoon of December 25 and the afternoon of January 1. Respondent requested that Husband's counsel forward the information to her client so that he would have ample notice of Wife's planned visit. On December 22, respondent sent by fax another letter to Husband's counsel asking whether Husband would allow some visitation when Wife was to be in Minnesota next week. Respondent also told Husband's counsel that his vacation started today but he would be available by phone and that he would "like to resolve the visitation issue before Saturday" so Wife can know what to expect on her arrival in Minnesota.

Although Husband's counsel received the letter the same day it was faxed, she believed that she had extra time to finalize the visitation details. However, without any notice to Husband's counsel, respondent and Wife flew to Minnesota on December 22, arriving late in the evening. A few hours later, they drove in a car respondent had rented to Husband's farm, arriving just before 5:00 a.m. on December 23. The weather was ten degrees below zero, with five to ten inches of snow on the ground. Wife, having previously observed Husband's farming routine, knew that at this time, Husband would be away from the house in a nearby barn milking the cows. Respondent let Wife out of the car near the house and then drove just off Husband's property to wait for Wife and the children. Wife went into the house and led the children outside. The children were wearing only tee shirts. They did not have on any socks or shoes, despite the snow and freezing temperatures. Husband and his father heard the commotion and detained Wife. They also called the sheriff. Husband found respondent in his car and asked him what we was doing. He replied that he had a court order with him awarding custody to Wife. He produced no such order and had none with him. He knew that the current order in effect placed primary physical custody with Husband.

Sheriff's deputies who responded to the call placed respondent and wife under arrest. Respondent was arrested for burglary and depriving Husband of his parental rights. Criminal charges against respondent were later dismissed.[6] On December 23,

6. Respondent testified that the reason for dismissal was that a Minnesota judge did not want to become enmeshed in resolving California custody orders. The record indicates no other facts about the outcome of the criminal charges.

sheriff's deputies interviewed respondent. He showed them a July 1992 stipulation providing for custody per conciliation efforts but failed to show the deputies the current orders respondent knew placed custody in Husband. Respondent also gave a written statement to the sheriff's department on December 23, representing that Wife had legal and physical custody as a result of a July 1992 order and that there was no superseding custody order. On December 23, Husband was able to reach his counsel who went to the courthouse and sent a copy of the current custody order by fax to the Minnesota sheriff.

On January 13, 1994, the superior court issued a judgment of dissolution of marriage. Joint legal custody of the children was awarded with primary physical custody remaining in Husband in Minnesota. Wife was authorized to visit on reasonable notice to Husband.

Respondent and Wife each testified that their decision to go to Minnesota early was sudden, arising after Wife was unable to reach Husband on December 22 because Husband's phone had been disconnected. Respondent agreed to accompany wife to Minnesota without fee in return for Wife's payment of his airfare. Respondent thought it might be necessary to retain local counsel for court action to regain custody of the children if Husband refused visitation or had left the farm with the children. Although respondent may have consulted with local family law counsel, that counsel's services were never utilized.

The State Bar charged respondent with committing moral turpitude in violation of section 6106 by assisting and advising his client to violate the court's December 13, 1992 custody order. The hearing judge discussed the evidence at length in his decision and found respondent culpable.

2. Discussion of culpability.

The State Bar agrees with the hearing judge's findings. Respondent however contends that Wife did not intend to abduct the children from Husband's farm on December 23; and, even if she did, the record is devoid of evidence that respondent either knew that she would or that he acted unlawfully. Respondent has taken issue with the manner in which the hearing judge weighed the credibility of witnesses and used that weight to conclude that respondent was culpable. Respondent has posited his own version of the events of December 23 to show that they are more plausible than the State Bar's. However, even if we credit respondent's attack on some of the testimony, it does not warrant reversing the hearing judge's conclusion that he was culpable. The undisputed chronology of court orders and the barest details of the events at Hushand's Minnesota farm on December 23, 1993, amply establish respondent's culpability.

At all times, respondent was aware of the chain of custody orders. He knew that the December 16 superior court order provided for physical custody to remain with Husband. Even assuming that Wife devised the plan on her own to visit her children in Minnesota two days early, respondent knew that such precipitous visitation was not authorized either by his letters that he had faxed to Husband's counsel or the outstanding court order which required reasonable notice prior to visitation. If Wife was worried that her Husband's disconnected phone was a sign he might refuse her visit, respondent never let opposing counsel know that he was flying to Minnesota with Wife on December 22. His personal presence in driving Wife to the farm aids in the moral turpitude conclusion, for respondent knew that Wife had planned to leave with the children on December 23, as she had packed bags of clothes for them and had reservations at a resort in Minnesota. Even if we were to credit respondent's claim, that the December 23 visit to the farm was solely Wife's idea, and respondent was an innocent escort, he was fully as culpable as a principal in this unfortunate escapade. Even if respondent's acts and motive were pure, however, by acting as he did in Minnesota, he placed his client and the children at great risk. It was entirely foreseeable that in dark, winter conditions, harm might occur to the children, Wife or Husband, if an altercation developed. That apparently no one was harmed was fortuitous. (Cf. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 60-61.)

This case represents a classic one for applying the well-established rule that we give great weight to findings of the hearing judge resting on determination of witness credibility. (Rules Proc. State Bar, title II,

State Bar Court Proceedings, rule 305(a); *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 citing *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056.) The judge saw and heard all witnesses over a four day trial and was in the appropriate position to and did appropriately assess the credibility of witnesses. Twelve pages of his decision are devoted to a thorough assessment of the credibility of respondent with many reasons for finding respondent not credible as a witness. We are given no good reason in the record to overturn that determination and we uphold it.

Moreover, a very serious matter which is hardly disputed by respondent on review, was his practice of deceit to Husband and the Minnesota sheriffs deputies as to the custody order in effect. Husband's counsel was required to hurry to the courthouse, obtain a copy of the order and fax it to the sheriff in Minnesota in order to give an accurate view of the current custody order. Respondent's attack on the hearing judge's findings is limited to his dispute over whether he made a written misstatement to the sheriff.

We hold that, clear and convincing evidence supports the hearing judge's determination that respondent engaged in moral turpitude in violation of section 6106 in this count.

C. The Van Essen Matter - Riverside County Superior Court Action.

1. Facts and findings.

This matter can be stated briefly. On January 19, 1994, respondent filed for Wife a civil complaint in Riverside County Superior Court against Husband and others. The suit sought remedies for Husband's alleged interference with child custody, with causing emotional distress and other torts. When respondent filed this suit, he was aware of the determinations made by the Los Angeles Superior Court in the family law proceeding. Yet in the Riverside County civil complaint, respondent alleged facts without stating that the facts had been the subject of findings in the Los Angeles County dissolution of marriage proceeding. In the Riverside action, respondent stated those facts in a way that would mislead that court as to the facts found. Respondent made this omission in three separate areas of his complaint, concerning whether Wife exposed her children to contact by someone who was dangerous to them, whether Husband refused to give up custody, and whether Husband improperly videotaped Wife and children.

In May 1994, the Riverside court found in a two-page, single-spaced minute order that the three areas were the subject of judicial determinations in Los Angeles adverse to respondent's allegations and that respondent was aware of them. The Riverside Court concluded that respondent's complaint was not grounded in fact and was filed to harass, an improper purpose proscribed by section 447 of the Code of Civil Procedure.[7] That court sanctioned respondent under section 128.5 of the Code of Civil Procedure and ordered him to pay $14,675 in attorney fees, finding that respondent's action was frivolous, in bad faith and that thereby, the opposing party incurred expenses including substantial attorney fees. In September 1994, respondent moved for reconsideration of the sanctions order and the court reduced sanctions to $10,000. Respondent did not pay the sanctions and discharged this obligation in bankruptcy.

The State Bar charged respondent with violating: section 6068 subdivision (d) by failing to employ truthful means in maintaining causes confided to him and by seeking to mislead the judge by an artifice or false statement of fact or law (counts five, seven and nine); section 6106 by committing moral turpitude (counts six, eight and ten); section 6068 subdivision (c) and rule 3-200(A), Rules of Professional Conduct by filing unjust action (counts eleven and twelve); and section 6068 subdivision (o)(3) by failing to timely report the Riverside Court's imposition of sanctions. The hearing judge found respondent culpable of moral turpitude in counts six and eight and of failing to use truthful means in counts five, seven and nine,

7. Section 447 was subsequently repealed in 1994. However, its proscription of filing a complaint for the purpose of harassment was carried forward to Code of Civil Procedure section 128.7.

dismissed the moral turpitude charge in count ten as duplicative; and failed to find sufficient clear and convincing evidence to support the section 6068 subdivision (c), section 6068 subdivision (o)(3) and rule 3-200(A) charges.

2. Discussion of culpability.

Respondent contends that he should be exonerated of all culpability found as to the Riverside civil complaint. He contends that the findings of the Los Angeles court in the marriage dissolution were not material facts in the Riverside complaint and; in any case, respondent had no intent to mislead. The State Bar supports the hearing judge's conclusions of culpability and urges that we also find respondent culpable of the unjust action charges prohibited by section 6068 subdivision (c) and rule 3-200(A). Upon our independent review, we uphold the hearing judge's findings and find clear and convincing evidence that respondent is also culpable of wilfully violating section 6068 (c) by maintaining an unjust action.

Respondent's claim that the facts he alleged or omitted were not material in the Riverside action is simply incredible and gives further support to the way in which the hearing judge has weighed respondent's credibility. The key facts respondent misstated went to the very heart of the Riverside action. Even respondent agreed in his testimony that the issue of custody orders was important.

[4] Respondent also contends that he should not be found culpable because his statements were in an initial pleading. His claim is without any merit as the State Bar Act makes any act of dishonesty or misleading of a court to be disciplinable (See, e.g., §§ 6068 subd. (d); 6106.) Moreover, similar arguments in defense to those respondent has made here were rejected by the Supreme Court in *Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240 [false statements in a verified answer]. We conclude that clear and convincing evidence exists that respondent failed to use truthful means and committed moral turpitude as found by the hearing judge.

The Riverside Court made a detailed determination, after hearing respondent, that he had breached the standards of section 128.5, of the Code of Civil Procedure by acting in bad faith and that his omissions and allegations were false and misled the court. As we concluded in the Walker matter *ante*, we need not decide whether principles of collateral estoppel should be applied as the hearing judge considered other evidence, including respondent's own testimony concerning the events. On our independent review of the record, we conclude that clear and convincing evidence exists that respondent's bad faith actions in litigating the Riverside civil action violated section 6068 subdivision (c) and subjected him to discipline.

We uphold and adopt the hearing judge's dismissal of the charge under section 6068 subdivision (o)(3) that respondent failed to timely report the sanctions order.

II. DEGREE OF DISCIPLINE EVIDENCE, FINDINGS AND DISCUSSION.

A. Mitigation.

The hearing judge considered in mitigation, respondent's practice of law for many years without discipline and his many bar, community service and charitable activities and that respondent made efforts to correct the problems surrounding the disciplinary matters. Much of this evidence was also presented by respondent and considered as mitigating in *Lais I*. As we held in *Lais I*, respondent's experience and his many public-service activities are indeed mitigating. However, respondent's experience as a family law specialist and his State Bar investigation referee experience should have aided him to avoid misconduct in these matters.

B. Aggravation.

The hearing judge found that at the time he filed his decision, the discipline in *Lais I* was before us for review. The hearing judge correctly cited *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619 for guidance in weighing the prior discipline (in *Lais I*) which arose at about the same time as that in the present record. However, it appears that the hearing judge did not apply *Sklar*, as he ultimately decided that this proceeding and *Lais I* should not be considered as one.

In *Lais I*, we found respondent culpable of misconduct in five client matters. Collectively, this misconduct involved failing to promptly refund unearned fees in two matters, failing to properly communicate with two clients, recklessly failing to provide competent legal services, failing to promptly pay settlement funds on request, breach of the trust account rules and improper withdrawal from a case. After making some changes in the hearing judge's findings, we considered mitigating circumstances, including favorable character evidence and extensive public service activities performed by respondent. We also considered aggravating circumstances of multiple acts of wrongdoing and failure to show rectification of misconduct and attempted interference with the disciplinary investigation in one matter. We recommended 90 days of actual suspension incident to a two-year stayed suspension, a greater actual suspension than recommended by the hearing judge.[8] The Supreme Court imposed our recommended discipline by order filed on August 13, 1999, in case number S075593. Respondent is currently on probation in *Lais I*.

Also considered aggravating by the hearing judge in the present proceeding was respondent's multiple acts of misconduct, that he demonstrated a lack of insight into his misconduct, that he failed to timely comply with discovery requests of the State Bar, failed to timely file his pretrial statement and that he presented misleading evidence in mitigation, by presenting a resume which misled his services as counsel for a well-known party. We agree with and adopt the hearing judge's findings in aggravation.

C. Discussion of Recommended Discipline.

[5a] Despite respondent's positive evidence of mitigation, we have found him culpable of serious misconduct which burdened parties to litigation and the trial and appellate courts to adjudicate two matters. This included a patently frivolous appeal in the *Walker* matter, dishonesty in the Van Essen matter when apprehended by Minnesota law enforcement officers and misleading the Riverside Superior court of what was found in the Los Angeles family law action. Respondent's conduct in accompanying his client to the farm in Minnesota in the pre-dawn of December 23 exposed his client to the risk of physical harm if Husband or others at the farm had thought that Wife and respondent were intruders and had sought to defend themselves. At the least it appeared to put the imprimatur of respondent, as an attorney, on Wife's attempted taking of the children and amounted to aiding and counseling of his client contrary to court orders he knew were in effect. Of special concern is that respondent's background as a certified family law specialist for much of his practice and his activity in bar work, failed to serve him to avoid the misconduct in this record.

[5b] The similarity of misconduct in the two matters is also of concern. Respondent's misdeeds cannot be ascribed to inexperience or simple zealousness. Moreover, there is nothing in the record which could ascribe this misconduct to any health or similar, singular condition.

Respondent's urges that, if we find culpability here, we should not recommend more than an additional 30 or 60 days of actual suspension beyond what the Supreme Court imposed in *Lais I*. In support of his argument, he cites *Chefsky v. State Bar* (1984) 36 Cal.3d 116 and *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509. Neither of those cases are persuasive here, although we noted in *Lais I* that *Kaplan* was instructive on the type of misconduct involved in the prior record. We also noted that *Kaplan* involved neither moral turpitude nor serious misconduct, both of which we find in the present matter. *Chefsky* is also dissimilar in that there was no dishonesty to officials or courts or violation of a court order.

The State Bar concedes that there is no case similar in facts to this one on issues of degree of discipline, but cites cases such as *Rosenthal v. State Bar*, *supra*, 43 Cal.3d 612 and *In the Matter of*

8. The hearing judge in *Lais I* was not the same hearing judge whose recommendation we now review.

Varakin (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179. We consider those cases to reflect more serious misconduct and more aggravating or less mitigating circumstances than in the present case.

The hearing judge consulted the Standards for Attorney Sanctions for Professional Misconduct (Standards) for guidance and appropriately concluded that they supported a recommendation of disbarment or suspension, depending upon defined factors. (See stds. 2.3; 2.6.) Ultimately, as the hearing judge observed correctly, the informed recommendation of discipline arises from a balanced consideration of all relevant factors. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.) The hearing judge was guided by *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767 in which a one-year actual suspension was ordered as part of a longer stayed suspension. Fandey was disciplined for aiding and abetting his client's departure from the state to avoid complying with a child support order. The hearing judge in the present case properly observed that the misconduct in this case was more serious than in Fandey; and, although respondent had more mitigation than Fandey, Fandey had no prior discipline. Significantly, however, we have found respondent culpable of more misconduct than the hearing judge did.

[5c] If we follow the principle of *In the Matter of Sklar*, *supra*, we determine the appropriate discipline as if all matters in *Lais I* and this matter were consolidated in one proceeding. We share the hearing judge's concern over respondent's lack of insight and failure to appreciate the wrongfulness of his misconduct. This does not bode well for respondent avoiding similar misconduct in the future. Nor is a positive factor the hearing judge's observation, which we find well supported, that "anytime [r]espondent lost on the merits of an issue, he could not accept the court's adverse judicial determination and would attempt to blame the ruling on the court's lack of understanding of the issues."

[5d] Balancing all relevant factors, and seeking to protect the public, courts and the legal profession (std. 1.3; see also *Young v. State Bar* (1990) 50 Cal.3d 1204, 1215), we shall recommend that respondent be suspended from practice for three years, stayed on conditions including a two year actual suspension continuing until respondent has made the required showing under standard 1.4 (c)(ii).

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent Ronald E. Lais be suspended from the practice of law in the State of California for three years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; that execution of the three-year suspension be stayed; and that respondent be placed on probation for three years on all the conditions recommended by the hearing judge in his decision except: (1) that respondent shall be actually suspended from practice of law in California during the first two (2) years of the period of probation and until he has shown proof satisfactory to the State Bar Court of his 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; and (2) that the time period in which respondent is required to attend and pass the State Bar's Ethics School shall be extended from one year until the period of respondent's actual suspension.

We further 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.

We do not recommend that respondent be required to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners as he is required to do so in *Lais I*.

Finally, we recommend to the Supreme Court 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 section 6140.7 of that Code.

I concur:
NORIAN, J.

DISSENTING OPINION OF BROTT, J.

In my view the appropriate discipline in this matter, including for respondent's filing of the frivolous appeal in the Walker matter and frivolous action in the Van Essen matter, is an eighteen-month actual suspension and a requirement that respondent provide the proof required by Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

BROTT, J*[9]

9*. Hon. Eugene E. Brott, Judge of the State Bar Court Hearing Department, sitting by designation pursuant to the provisions of rule 305 (e), of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS E. LANTZ

A Member of the State Bar

Nos. 90-O-17749, et al.

Filed April 24, 2000

SUMMARY

The hearing department found respondent culpable of professional misconduct in four matters involving misappropriation of funds through gross neglect, withholding an illegal fee, recklessly incompetent performance of services, failure to return promptly unearned fees and failure to render an appropriate accounting; and recommended that he be suspended for two years and until he proves rehabilitation, that his suspension be stayed, and that he be placed on two years probation on conditions including actual suspension for one year and until he makes restitution to one client. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The review department upheld the hearing judge's culpability findings and concluded that the hearing judge appropriately weighed and balanced mitigating and aggravating circumstances. Accordingly, the review department adopted the discipline recommendation after modifying two of the recommended conditions of probation.

COUNSEL FOR PARTIES

For State Bar: Andrea Wachter

For Respondent: Thomas E. Lantz

HEADNOTES

[1] **104 Procedure–Disqualifications–Counsel and Others**
117 Procedure–Dismissal

The review department found no merit to respondent's argument that the culpability findings must be reversed based on his claim of conflict of interest. Respondent failed to demonstrate how the investigation and prosecution of his former counsel demonstrated any conflict of interest or unfairness toward him. At trial, respondent was represented by other counsel who advanced his

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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.

interests vigorously. Moreover, respondent failed to support his claim by any citation of legal authority.

[2 a-c] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)**
277.40 Rule 3-700(C) [former 2-111(C)]

Respondent was found culpable of violating rule 3-110(A) of the Rules of Professional Conduct. Even if his client could not decide which remedy to pursue or even if his client was unable to provide respondent with needed information, respondent could not simply let the months pass with no action. Respondent's choice was to either pursue remedies warranted by the facts and law based on effective investigation and research or to withdraw from employment if and as appropriate under rule 3-700(C) of the Rules of Professional Conduct.

[3] **221.00 State Bar Act–Section 6106**
290.00 Rule 4-200 [former 2-107]

Respondent failed to seek approval for his fees in a workers' compensation matter as required by the Labor Code and withheld it for a two-year period. Respondent was thus culpable of charging an illegal fee in violation of rule 4-200(A) of the Rules of Professional Conduct. Given the length of the rule 4-200(A) violation, the review department also found that such conduct was at least gross negligence and therefore involved moral turpitude.

[4a, b] **194 Statutes Outside State Bar Act**
220.00 State Bar Act–Section 6103, clause 1

Finding that an order of a worker's compensation judge was an order of a court within the meaning of Business and Professions Code section 6103, the review department found respondent culpable of violating section 6103 by disregarding such an order.

Additional Analysis

Culpability

Found

221.12 Section 6106–Gross Negligence
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

Not Found

213.95 Section 6068(i)
214.35 Section 6068(m)
220.05 Section 6103, clause 1
221.12 Section 6106–Gross Negligence
221.50 Section 6106–Moral turpitude, corruption, dishonesty
270.35 Rule 3-510 (former 5-105)
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Aggravation

Found

521 Multiple Acts
541 Bad Faith, Dishonesty

551 Overreaching
582.10 Harm to Client
591 Indifference
611 Lack of Candor–Bar

Mitigation

Found

740.10 Good Character
765.10 Pro Bono Work

Found but Discounted

710.33 No Prior Record

Discipline

1013.08 Stayed Suspension–2 years
1015.06 Actual Suspension–1 year

Probation Conditions

1017.08 Probation–2 years
1021 Restitution
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

We review this attorney discipline case at the request of Respondent Thomas E. Lantz. A hearing judge found respondent culpable of professional misconduct in four matters and recommended that he be suspended for two years and until he proves rehabilitation, that this suspension be stayed and that he be placed on two years probation on conditions including actual suspension for one year and until respondent makes restitution of $8,000 to one client.

Respondent urges that the findings of his culpability are procedurally flawed, not established and, in any case, a private reproval is adequate discipline. Although the State Bar's Office of Chief Trial Counsel (State Bar) did not seek review, it urges in its reply brief, as it did below, that respondent be disbarred.

Independently reviewing the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's culpability findings. We have also concluded that the judge appropriately weighed and balanced mitigating and aggravating circumstances. We shall adopt her disciplinary recommendation after modifying two of her recommended conditions of probation.

The record shows that although respondent presented positive character evidence and apparently served many clients satisfactorily, he committed a variety of ethical violations over several years, covering many law practice areas. These offenses involved misappropriation of funds through gross neglect, withholding an illegal fee, recklessly incompetent performance of services, failure to return promptly unearned fees and failure to render an appropriate accounting. Accordingly, the suspension recommended by the hearing judge is appropriate.

I. STATEMENT OF THE CASE.

Most of the background facts and many of the key facts were established by the parties' stipulation or are otherwise not disputed. On review, the State Bar accepts the hearing judge's conclusions. Although we shall summarize the findings in the order contained in the decision below, we limit our discussion to those ultimate findings or conclusions which respondent disputes.

Respondent was admitted to practice law in California in December 1981 and has no prior discipline.

A. The Black Matter.

Richard Black had been convicted of two felonies and sentenced to prison. In February 1990, Black's father and sister hired respondent to represent Black in appealing the convictions. They paid respondent half of his $13,000 fee in February and completed payments by September 1990. It is undisputed that respondent never filed an opening brief and that Black's appeal was dismissed in May 1990 pursuant to rule 17(a) of the California Rules of Court.

According to respondent, he prepared a draft of the appellate brief and gave it to Black's sister, but Black denied ever seeing it. Respondent advised Black that the appeal was unlikely to succeed, that a writ of habeas corpus might be a better remedy and that respondent would refund the fees should Black not wish to pursue the appeal. Respondent testified that Black could not decide what to do and that, in an October 1990 meeting with Black at Soledad prison, Black could not provide respondent with evidence respondent needed to proceed. Respondent never filed a habeas petition for Black.

In January 1991, Black's father told respondent that Black wished to terminate his employment and recover his files and unearned fees. It is undisputed that in May 1991, respondent offered to refund the entire $13,000 and tendered a $500 check on account. Black did not cash that check as he wanted the entire refund in one check. Respondent informed Black of his right to arbitrate this fee dispute (Bus. & Prof. Code, § 6200 et seq.)[1] and Black pursued this

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

remedy. In November 1991 respondent offered to stipulate to an arbitration award against him of $13,000. The resulting award called for monthly installments of $1,000 to start on June 21, 1992, until the $13,000 plus interest was paid in full. Respondent did not make any payments until December 30, 1992, when he paid this full amount to his former counsel, Tom Low, with directions to pay it to Black. However, Black never received any of the award from either Low or respondent, but did receive it from the State Bar's Client Security Fund. (See § 6140.5.) The record shows no refund by Low or respondent to the Client Security Fund.

From the foregoing findings, the hearing judge found no clear and convincing evidence that respondent failed to respond promptly to Black's reasonable status inquiries (§ 6068, subd. (m)), that respondent engaged in any acts of moral turpitude (§ 6106), or that respondent failed to participate or cooperate in the State Bar investigation of Black's complaint (§ 6068, subd. (i)). Nor did the hearing judge find that respondent wilfully failed to return Black's transcripts or other papers after he was discharged. The State Bar does not take issue with these findings. On review we uphold them.

The hearing judge concluded that respondent wilfully violated rule 3-110 (A), Rules of Professional Conduct of the State Bar[2] by recklessly failing to either file an appellant's opening brief for Black or take any significant step for him. Finally, the hearing judge concluded that respondent wilfully violated rule 3-700 (D) by failing to promptly refund to Black unearned fees. Respondent disputes these two conclusions of his culpability and we shall discuss them *post*.

B. The Arenas/Waxman Matter.

In October 1989, Maria Arenas suffered injuries in an auto accident. She had a workers' compensation case as well as a personal injury claim arising out of the same incident. She retained respondent in November 1989. To pursue the personal injury action, respondent filed a civil action for Arenas in San Francisco Superior Court. Respondent did not have experience in workers' compensation cases, and in March 1991, he asked Joseph Waxman, a State Bar certified specialist in those matters, to associate with him to pursue Arenas's workers' compensation claim. Waxman filed the necessary application to protect that claim.

In June 1992, without contacting Waxman, respondent settled both of Arenas's claims for over $400,000 and for an agreement from the workers' compensation carrier to waive significant sums it had advanced Arenas for medical payments and disability. Respondent failed to inform Waxman about the settlement negotiations and Waxman later learned that the Arenas personal injury case had been settled. Moreover, respondent never presented the compromise and release to the California Workers' Compensation Appeals Board (Board) as required by the Labor Code.

Respondent promptly deposited the settlement funds in his trust account and disbursed to Arenas $196,342 as her share of the personal injury claim. He kept $162,626 as his fees in the personal injury claim and kept in trust an additional $29,466 as fees in the workers' compensation claim. Although respondent was inexperienced in workers' compensation matters, he had received some general advice from an attorney other than Waxman who regularly practiced in that area, and respondent learned that workers' compensation fees were generally 12 percent of the recovery.

In late 1992 and early 1993, Waxman tried without success to learn from respondent the status of the workers' compensation matter. Arenas went to Waxman in early 1993 to find out the status of her workers' compensation matter. When it appeared that respondent had withheld attorney fees for the workers' compensation matter, Waxman filed an action before the Board to resolve the attorney fee

2. Unless noted otherwise, all references to rules are to the provisions of the Rules of Professional Conduct of the State Bar.

issues. The Board investigated, and in June 1993, the Board directed respondent to keep the $29,466 amount in trust pending further order.

In February and March 1994, a workers' compensation judge requested information from respondent regarding his fee but respondent did not reply. In 1994, the Board ordered that respondent was not entitled to any fees in the workers' compensation matter and directed him to refund the $29,466 to the insurance carrier. The carrier was ordered to disburse $8,000 of the $29,466 to Waxman as his fee and the rest to Arenas. This resulted in a loss to Arenas as the $8,000 payment to Waxman should have come from the attorney fee respondent collected in the personal injury matter. The Board was aware of this, but since respondent had filed a bankruptcy petition, the Board apparently considered it futile to seek to make respondent pay the $8,000 to Waxman.

Respondent did not promptly refund the $29,466, and starting in May 1994, Waxman again resorted to the Board. In November 1994, respondent sent the $29,466 to the Board's Deputy Commissioner, ascribing the delay to a misplaced check.

The hearing judge concluded that respondent committed moral turpitude proscribed by section 6106 by failing to get Board approval prior to executing the compromise and release and withholding for over two years the $29,466 fee in the workers' compensation matter. The judge also concluded that respondent's actions in failing to get the statutorily required approval for the $29,466 fee made it an illegal fee, proscribed by rule 4-200 (A). Finally, the hearing judge concluded that respondent violated section 6103 by failing to promptly comply with the Board's order to return the $29,466. The hearing judge did not find clear and convincing evidence that respondent wilfully violated rule 3-110(A) in dealing with Waxman nor that respondent violated section 6103 in failing to reply to the workers' compensation judge's requests in early 1994 for information since no court order was violated. The State Bar does not take issue with these latter two conclusions in respondent's favor and we uphold them. Respondent disputes the conclusions of his culpability, and we discuss them *post*.

C. The Rodrigues Matter.

In July 1985, David Rodrigues hired respondent to represent him in a personal injury case. The hearing judge found that respondent's attorney fee was one-third of the recovery. Between November 1986 and sometime in 1993, Rodrigues was jailed for a felony conviction. Shortly after he was jailed, in December 1986, his personal injury case settled for $80,000. Respondent's fee was $26,667 and Rodrigues was entitled to $53,333 less costs and sums advanced earlier. Rodrigues instructed respondent to hold his recovery in trust, but to disburse sums from time to time to his mother and girlfriend. Respondent and the State Bar stipulated that the payments respondent made to or on behalf of Rodrigues totaled at least $49,430.56.

Respondent testified that he overpaid Rodrigues, but the only evidence deemed credible by the hearing judge showed that respondent failed to remit the remaining balance of $3,903 to Rodrigues. On February 23, 1989, respondent's trust account balance fell below that sum. One week later, that balance was only $614.45, and by February 13, 1990, the account was overdrawn.

The hearing judge also found that respondent did not maintain or give Rodrigues an adequate accounting of disbursements at the time that they were made. Although respondent testified that a bookkeeper reconstructed check and register records, he could not offer evidence to show how the bookkeeper did this.

From these findings, the hearing judge concluded that respondent misappropriated $3,903 from Rodrigues's trust funds and wilfully committed moral turpitude proscribed by section 6106. The hearing judge also concluded that respondent wilfully violated rule 4-100(B)(3) and its predecessor rule, 8-101 (B)(3), by failing to provide complete records and disbursements of trust funds and by failing to render an appropriate accounting. Respondent disputes these conclusions and we shall discuss them *post*.

D. The Thomas Matter.

Although this matter is referred to in the record as the Maidenberg matter, we find it more appropriate to refer to it as the Thomas matter.

In June 1991, Bryant Thomas hired respondent to represent him in a personal injury matter. That same month, respondent filed a civil action on behalf of Thomas. In December 1991, Thomas retained new counsel, Ronald Maidenberg, to represent him. A substitution of attorney was filed in the suit at the end of March 1992.

In May 1993, respondent filed a notice of lien, claiming $3,844 as fees and costs.

In August 1993, the Thomas case settled for $10,000. On August 27, 1993, Maidenberg sent respondent the insurance company's draft for endorsement and return but Maidenberg never received it back from respondent despite sending a follow-up letter. Respondent testified that he endorsed the draft, but was extremely displeased because Maidenberg wanted respondent to reduce his fee to 25% of the total amount of attorney fees. According to respondent, he forwarded the endorsed draft to his counsel, Tom Low.

Thomas died in November 1993 and although his case had been settled two months earlier, because of respondent's delay in handling the matter and Low's apparent failure to return the draft to Maidenberg, the settlement could not be paid to Thomas or his heirs.

When Maidenberg failed to receive the 1993 draft, he had to undertake a lengthy effort with the insurer to issue a new draft. The insurer sent a new draft to Maidenberg in May 1995. On June 28, 1995, Maidenberg sent this draft to respondent but respondent did not return it until nearly a month later. At that time, he demanded to share equally in the attorney fees with Maidenberg. To resolve the dispute, Maidenberg asked respondent to account for his services and cost expenditures. Respondent failed to provide this information. Maidenberg then resorted to a declaratory relief action on behalf of Thomas's beneficiary against respondent to try to settle the matter. On January 2, 1996, a default judgment was entered in the declaratory relief action against respondent that he receive nothing.

The hearing judge found that respondent had wilfully violated rule 3-110 (A) by recklessly failing to return the 1993 settlement draft to Maidenberg. Respondent disputes this finding and we shall discuss it *post*.

II. DISCUSSION.

A. Procedural claims.

[1] At the outset, respondent urges that we must reverse the findings of culpability based on his claim of conflict of interest. He asserts that the State Bar started disciplinary proceedings against the attorney who represented him in the early stage of these proceedings and that the State Bar assigned the prosecution of that attorney to an attorney outside the Office of Trial Counsel. He contends that the State Bar is disqualified from prosecuting the case against respondent and that it "bears the appearance of impropriety." Assuming for discussion that respondent's chronology is correct, his claim is without any merit. Respondent utterly fails to demonstrate how the investigation and prosecution of his former counsel demonstrated any conflict of interest or unfairness toward him. At trial, respondent was represented by other counsel who advanced his interests vigorously. Moreover, respondent fails to support his claim by any citation of legal authority.

Respondent also argues that he was deprived of adequate notice in the Black matter concerning the charge that he wilfully violated rule 3-110. Respondent's sole argument of this point is a quotation from our decision in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171, in which we stated the general charging requirements for alleging a violation of the predecessor to rule 3-110. Although the notice did not comply literally with our *Glasser* decision, it put respondent on notice that he was charged with a competency violation and alleged specific services which respondent did not perform. On our independent review of the record, we conclude that respondent was given adequate notice of this charged rule violation.

B. Culpability.

1. Black Matter.

[2a] In the Black matter, respondent stresses the efforts he claims he expended for Black; attacks

Black's credibility; asserts he earned his full fee, but as a pro bono gesture, agreed to and did give a refund to respondent's former counsel, Low, to give to Black. Respondent concludes that he cannot be culpable of the rule 3-110 (A) and rule 3-700 (D)(2) charges. We disagree with respondent and adopt the hearing judge's findings of these violations.

[2b] Respondent knew that, when he accepted Black's criminal appeal, Black's previous counsel was under a time deadline under rule 17 (a) of the California Rules of Court. Yet the record is undisputed that respondent failed to file an opening brief. Moreover, the record contains no drafts of any briefs. If, as respondent claims, Black agreed that habeas corpus was a better remedy than appeal, the record does not show that nor does it show any writ petition filed by respondent. All the record shows on this point is that respondent accepted $13,000 from Black's family, respondent agreed to adequately represent Black, respondent failed to perfect any remedy for Black and that Black only received a refund from the Client Security Fund.

[2c] Even if Black could not decide, as respondent contends, which remedy to pursue or if Black was unable to provide respondent with needed information, respondent could not simply let the months pass with no action. Respondent's choice was to either pursue remedies warranted by the facts and law based on effective investigation and research or to withdraw from Black's employment if and as appropriate under rule 3-700(C). (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 379, citing *Fitzpatrick v. State Bar* (1977) 20 Cal.3d 73, 85.)

Respondent's prompt promise to Black's relative of a full return of fees if Black chose not to pursue an appeal, followed by his agreement in November 1991 to refund all fees, followed by his later stipulation to a $13,000 arbitration award against him belie his claim of having earned the full fees.

The essence of respondent's argument is that we should reweigh the evidence and prefer his version of the facts. Although we review the record independently (see *ante*), we must give great weight to the findings of the hearing judge which resolve witness credibility. (Rule 305(a), Rules Proc. State Bar, title II, State Bar Court Proceedings; see e.g., *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 774.) The hearing judge's findings are appropriate and we adopt them.

2. Arenas/Waxman Matter.

In this matter, respondent argues that he is innocent of the conclusions that he engaged in moral turpitude, violated the Rules of Professional Conduct by charging and withholding an attorney fee for a workers' compensation claim without Board approval, and that he violated section 6103 by disobeying the workers' compensation judge's order. We agree with the hearing judge's culpability conclusions.

As in the Black matter, the undisputed facts aid the hearing judge's conclusions. It is undisputed that respondent failed to seek Board approval for the fees he withheld from Arenas's settlement as required under the Labor Code. Even assuming that respondent was inexperienced in workers' compensation matters, the evidence shows that he charged an illegal fee in violation of rule 4-200 (A) and withheld it for a two-year period. Respondent had ample expertise available to him to learn the requirements of workers' compensation fee approval. His associated counsel, Waxman, was a certified specialist in workers' compensation and the evidence is undisputed that, while representing Arenas, respondent consulted informally another attorney experienced in these matters about the general nature of workers' compensation cases. The record shows that, had respondent communicated adequately with Waxman, he might have avoided some of the misconduct found. Given the length of the rule 4-200(A) violation, we also agree with the hearing judge that it involved moral turpitude. We need not decide whether or not respondent's conduct in charging and withholding the $29,466 workers' compensation fee was deliberate as it was at the least grossly negligent. Gross negligence in discharge of fiduciary duties is sufficient to sustain a conclusion of moral turpitude. (*In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478, and cases there cited.)

[4a] Turning to the charge that respondent violated section 6103 by disobeying the workers' compensation judge's order, we must decide at the

outset whether the workers' compensation judge's order was "an order of the court" within section 6103, for that section makes it a disciplinable offense to disobey or violate "an order of the court." (Cf. *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.)[3]

[4b] The workers' compensation provision of the California Constitution expressly vests the Legislature with plenary power to create and enforce a complete system of workers' compensation. (Cal. Const., art. XIV, § 4 (formerly art. XX, § 21).) That authority includes the power (1) to create tribunals to resolve workers' compensation disputes and (2) to fix and control the mode of trial of those disputes, the rules of evidence, and manner of review of the tribunals' decisions, provided that all such decisions are reviewable in the appellate courts of the state. (*Ibid.*) California courts have termed the Workers' Compensation Appeals Board a "constitutional court and its decisions have res judicata effect. [Citations.]" (*Hand Rehabilitation Center v. Workers' Comp. Appeals Board* (1995) 34 Cal. App.4th 1204, 1214.) Courts have also stated that the Board exercises some of the judicial powers of the state and "in legal effect is a court". (*Bankers Indem. Ins. Co. v. Industrial Acc. Com.* (1935) 4 Cal.2d 89, 97; *Fremont Indemnity Co. v. Workers' Comp. Appeals Board* (1984) 153 Cal. App.3d 965, 974.) Accordingly, we hold that the order of the workers' compensation judge is an order of a court within the meaning of section 6103. By disregarding the workers' compensation judge's order, respondent violated section 6103.

3. Rodrigues Matter.

Respondent first contends that the offense that he misappropriated the $3,903 of Rodrigues' funds under section 6106 was not properly charged because there was no indication of moral turpitude or corruption. Respondent errs. So long as he was given reasonable notice of the charge (see § 6085), the State Bar was entitled to charge this matter as a violation under section 6106. Here, respondent had ample notice of the misappropriation charge. Moreover, the State Bar also charged respondent with violating two provisions of the trust account rules.

Our review of the hearing judge's decision shows that she applied the correct law to this transaction and discussed it appropriately on pages 15 through 17 of her decision. We need not repeat that discussion of misappropriation except to conclude that is the correct legal result applicable to this record. Respondent may have indeed been influenced by a motive of friendship and service to Rodrigues whose incarceration prevented his access to his personal injury recovery. Yet respondent's failure to keep proper records of the receipt and numerous disbursements of funds led to the conclusion that, rather than overpaying Rodrigues, as respondent maintains, he misappropriated $3,903 of his funds. Although respondent's actions were grossly neglectful by repeatedly failing to properly record and account for the many disbursements he made on behalf of Rodrigues, they still violated section 6106. (*In the Matter of Rubens, supra*, 3 Cal. State Bar Ct. Rptr. at p. 478 and cases there cited.)

Respondent asserts that he offered appropriate accountings to Rodrigues and therefore he did not violate rule 4-100 (B)(3) or its predecessor rule 8-101 (B)(3). We disagree and agree with the hearing judge who concluded that respondent did commit a wilful violation. Since it was clear that respondent did not keep complete records of Rodrigues' funds (see, e.g., *Dixon v. State Bar* (1985) 39 Cal.3d 335, 344) and only performed a limited reconciliation of check disbursements long after requested, his culpability is established by clear and convincing evidence.

4. Thomas Matter.

Although respondent takes issue with the hearing judge's conclusion that he wilfully violated rule 3-110 (A) in the Thomas matter, his attack is limited to defending his failure to promptly turn over to attorney Maidenberg the first insurance draft. Respondent contends that since he gave it to his former

3. Prior to oral argument before us, we notified the parties that we were considering this issue, neither side having briefed it. We invited both parties to submit post-argument briefs on the question.

counsel, Low, respondent should not be held culpable. We disagree, noting that, even if respondent's defense is credited, it does not excuse his delay after the insurer reissued the draft in 1995.

The record shows that respondent's dispute with attorney Maidenberg over their relative shares of the attorney fees of this case unduly delayed the distribution of Thomas's funds until long after his death. It also put Thomas's subsequent counsel to considerable extra effort, including resort to litigation to recover the funds Thomas's estate was due. There was never a dispute between either attorney and Thomas at the time of the settlement as to Thomas's share of proceeds. The record shows respondent's repeated failure to reply to Maidenberg's communications, even two years after Thomas's death. When Maidenberg saw the need to resort to litigation to finally settle this protracted fee dispute, respondent defaulted. Reviewing the evidence in the record as to the entire unfortunate history of this case, we readily agree with the hearing judge that respondent recklessly failed to act competently in violation of rule 3-110 (A), even if he had entrusted Low with the first settlement draft.

C. Discipline.

1. Mitigation.

We agree with the type and weight of mitigating evidence considered by the hearing judge. (See Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct (standards), standard 1.2(e).) She took into account the testimony of many witnesses who were attorneys, judges or clients. Although few could show that they were reasonably aware of the full extent of the tentative findings against respondent, they held strong beliefs about respondent's most favorable character, his positive reputation in the legal community and willingness to help his clients. This evidence was properly given positive weight by the hearing judge in mitigation.

We also agree with the hearing judge's very limited weight to respondent's lack of prior discipline over a relatively short period of time, seven years, prior to the onset of his misconduct. (See, e.g., *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658.)

Finally, we adopt the view of the hearing judge which gave mitigating weight to respondent's unintentional misappropriation in the Rodrigues matter, ascribing it more to gross carelessness in accounting for the funds rather than to intentional dishonesty.

Although not found by the hearing judge, we also consider mitigating, some evidence that respondent has engaged in pro bono work during his practice.

2. Aggravation.

The hearing judge correctly assigned a number of aggravating factors surrounding respondent's misconduct. They consisted of multiple acts of misconduct, they significantly harmed his clients, his misconduct in the *Arenas/Waxman* matter was surrounded by overreaching and bad faith when he failed to promptly honor his promises in three of the matters, he demonstrated indifference to rectifying or atoning for the consequences of his misconduct and displayed a lack of candor in testimony that was nonresponsive and argumentative. (See Std. 1.2 (b).)

3. The Appropriate Degree of Discipline.

Below, the State Bar recommended disbarment. Although it did not seek review, it repeated its disbarment position in its brief on review. Respondent believes a private reproval would suffice if he is found culpable of any misconduct. The hearing judge carefully considered the lengthy trial record and guiding decisions and recommended suspension.

Respondent would have us give increased weight to his good faith to clients, to his favorable character evidence and to pressures caused by two of his clients who filed civil actions against him and another who threatened him. We decline to do so. Respondent's good faith claims were countered by his failure to establish that he had performed any services for Black and his extreme carelessness and delay in allowing the Arenas/Waxman, Rodrigues and Thomas matters to go unresolved for such a long time. Especially unfortunate was respondent's intransigence in the Thomas matter which put Maidenberg to considerable effort to resolve a fee dispute solely among two attorneys. Had respondent resolved the matters more timely, civil suits against him might have

been unnecessary. Moreover, Arenas is still owed $8,000.

Some of respondent's misconduct may not have been deliberate but a result of gross carelessness as in the Rodrigues matter. Yet his misconduct spanned several years and covered many aspects of law practice, involving misappropriation of funds, withholding an illegal fee, recklessly incompetent performance of services, failure to return promptly unearned fees and failure to render an appropriate accounting. We agree with the hearing judge that respondent did not demonstrate sufficient regret or adequate insight into his responsibility for the misconduct to justify lesser discipline.

Although acknowledging factual differences, the State Bar cites *Warner v. State Bar* (1983) 34 Cal.3d 36 as influential in support of disbarment. We disagree that *Warner* supports its recommendation. *Warner* involved more serious misconduct: intentional deceit, dishonest misappropriation and charging of an unconscionable fee. None of those violations are involved here. As the Supreme Court observed in *Warner*, that attorney had shown a "persistent inability" to adhere to the duties of an attorney. (*Id.*, at p. 48.)

We agree with the calibration performed by the hearing judge. She deemed this case less serious than the misconduct found in *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 (two year actual suspension for wilful misappropriation of funds), but more serious than that found in *Waysman v. State Bar* (1986) 41 Cal.3d 452 (no actual suspension for single incident of commingling and misappropriation of $24,000 arising largely from neglect). She found it comparable to the misconduct and mitigating and aggravating factors found in *Murray v. State Bar* (1985) 40 Cal.3d 575 (one-year actual suspension). For the reasons given by the hearing judge, we also find *Murray* guiding. Although all of Murray's misconduct was committed while performing legal services in one estate matter, it was of a type comparable to some in the present record. Murray had no prior record of discipline and had not made restitution in one count, factors similar to those in this record. In addition, the balance of mitigating and aggravating circumstances are somewhat comparable in the two cases.

Our own research reveals *Kelly v. State Bar* (1991) 53 Cal.3d 509, which supports the hearing judge's suspension recommendation. In that case only two instances of misconduct were involved. The first was Kelly's failure to deposit trust funds into the proper account, commingling those funds with personal funds and failure to promptly pay the funds. In the second matter, Kelly wilfully misappropriated $750 of trust funds and also failed to pay them for two years. The Supreme Court decided that a one-year actual suspension recommendation was excessive for several reasons including the lack of clear evidence of either serious injury to Kelly's clients or wrongful intent and Kelly's 13 years of practice without prior discipline. An actual suspension of four months was deemed appropriate in *Kelly*. In this record, we have additional matters of misconduct, greater harm to clients and only about half the discipline-free practice as in *Kelly*.

III. RECOMMENDATION.

For the foregoing reasons, we adopt the recommendation of the hearing judge, and recommend that respondent Thomas E. Lantz be suspended for a period of two years and until respondent shows proof satisfactory to the State Bar Court of his 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; that execution of the two-year period of suspension be stayed and that respondent be placed on probation for a period of two years on conditions one through ten contained in the hearing judge's decision filed on August 8, 1997, except that we modify conditions one and six to provide as follows:

1. Respondent shall be actually suspended from the practice of law during the first year of his probation and until he (1) makes restitution to Maria Arenas or the Client Security Fund if it has paid, in the sum of $8,000 plus interest thereon at the rate of 10% per annum from July 31, 1992, until paid; (2) provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles; and (3) if the period of respondent's actual suspension extends for two or more years, shows proof satisfactory to the State Bar Court of his 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.

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 certifying:

(a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction;

(b) whether respondent has, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name of such client,

(b) the date, amount, and source of all funds received on behalf of such client,

(c) the date, amount, payee, and purpose of each disbursement made on behalf of such client, and

(d) the current balance for such client;

(2) a written journal for each bank account that sets forth:

(a) the name of such account,

(b) the date, amount, and client affected by each debit and credit, and

(c) the current balance in such account;

(3) all bank statements and cancelled checks for each bank account, and

(4) each monthly reconciliation (balancing) of (1), (2), and (3); and

(c) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintained a written journal that specifies:

(1) each item of security and property held,

(2) the person on whose behalf the security or property is held,

(3) the date of receipt of the security or property,

(4) the date of distribution of the security or property, and

(5) person to whom the security or property was distributed.

We further 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 in this matter.

We also recommend that respondent be required to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court's order or during the period of his actual suspension, whichever is longer, and to furnish satisfactory proof of passage to the State Bar's Probation Unit in Los Angeles.

Finally, we recommend to the Supreme Court 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 section 6140.7 of that Code.

We concur:
OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FELIX TORRES, JR.

A Member of the State Bar

No. 96-O-04035

Filed March 7, 2000

SUMMARY

The hearing department recommended respondent's disbarment after finding him culpable with respect to a single client of (1) engaging in three acts involving moral turpitude in violation of Business and Professions Code section 6106; (2) improperly advancing facts prejudicial to the client's honor in violation of Business and Professions Code section 6068, subdivision (f); and (3) misleading the client with respect to the ramifications of a settlement offer in violation of Business and Professions Code section 6068, subdivision (m). (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

Respondent sought review primarily contending that the hearing judge erroneously (1) applied principles of collateral estoppel to bind him to prior civil findings that he harassed and intentionally inflicted emotional distress on a client; (2) rejected respondent's testimony in the State Bar Court; and (3) accepted the testimony of the client he was found to have harassed and upon he inflicted emotional distress.

The review department held that principles of collateral estoppel were properly applied in determining that respondent harassed and intentionally inflicted emotional distress on a client; adopted the hearing judge's findings that respondent committed two acts involving moral turpitude; but rejected the hearing judge's remaining culpability findings. The review department recommended that respondent be suspended for five years, stayed, with five years probation, subject to conditions including actual suspension of three years and until he establishes his rehabilitation, present fitness to practice and present learning in the law. Since the disbarment recommendation was rejected, respondent's inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (c)(4) was ordered terminated and it was recommended that respondent be given credit for the period of inactive enrollment toward the period of actual suspension.

COUNSEL FOR PARTIES

For State Bar: Donald Steedman

For Respondent: Felix Torres, Jr.

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

HEADNOTES

[1] **139 Procedure–Miscellaneous**
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

Principles of collateral estoppel may be applied to preclude a respondent from relitigating an issue that was actually litigated and resolved against him in a prior civil proceeding. In State Bar Court proceedings, principles of collateral estoppel may be applied with respect to an adverse prior civil finding if (1) the issue resulting in the civil finding is substantially identical to that in the State Bar Court proceeding, (2) the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) the respondent was a party to the civil proceeding, (4) there is a final judgment on the merits in the civil proceeding, and (5) the respondent does not establish that it would be unfair to bind him to the prior adverse civil finding.

[2 a, b, c] **139 Procedure–Miscellaneous**
148 Evidence–Witnesses
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

Where the only evidence presented in the hearing department to support the contention that it would be unfair to prohibit relitigation of harassment and emotional distress claims was respondent's own testimony without corroborating evidence, respondent's reiteration of his testimony on review does not provide a basis to disturb the hearing judge's rejection of respondent 's testimony. The review department gives great weight to hearing judges' factual findings resolving issues pertaining to credibility of witnesses.

[3] **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
1099 Substantive Issues re Discipline–Miscellaneous

Introducing into evidence the pleadings and exhibits from a civil matter without also introducing the trial transcript from the civil proceeding provides little evidence as to the nature and extent of respondent's conduct underlying the adverse civil findings of harassment and intentional infliction of emotional distress on a client or the resulting harm to the client. Such evidence may have had a material effect on the measure of the appropriate level of discipline.

[4 a - b] **162.11 Proof–State Bar's Burden–Clear and Convincing**

213.65 Substantive Issues re Discipline–State Bar Violations–Section 6068(f)
221.50 Substantive Issues re Discipline–State Bar Violations–Section 6106

In the context of an emotional and adversarial lawsuit, propounding discovery that falsely intimated that respondent and the plaintiff, respondent's former client, had a sexual relationship and that the plaintiff was sexually promiscuous is not clear and convincing evidence of acts of moral turpitude in violation of Business and Professions Code section 6106. Further, it is unclear that Business and Professions Code section 6068, subdivision (f), which prohibits the advancing of prejudicial facts to the honor or reputation of a party or witness, proscribes the use of such intimations.

[5 a - b] **106.30 Procedure–Pleadings–Duplicative Charges**
213.65 Substantive Issues re Discipline–State Bar Violations–Section 6068(f)
221.50 Substantive Issues re Discipline–State Bar Violations–Section 6106

Because the plaintiff in a civil lawsuit, who was respondent's former client, introduced into evidence respondent's offensive discovery requests, it is presumed, in the absence of any jury instruction to the contrary, that the jury relied on them in finding by clear and convincing evidence that respondent acted with oppression or malice when he harassed or intentionally inflicted emotional harm on the plaintiff. Therefore, to find a Business and Professions Code section 6106 moral turpitude violation on this basis would be duplicative of the moral turpitude violations already found based on respondent's harassment and intentional infliction of emotional distress on the plaintiff. For the same reasons, it would also be duplicative to use the offensive discovery to find culpability of Business and Professions Code section 6068, subdivision (f). It is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct.

[6] **106.30 Procedure–Pleadings–Duplicative Charges**
213.65 Substantive Issues re Discipline–State Bar Violations–Section 6068(f)
221.00 State Bar Act–Section 6106

The Business and Professions Code section 6068, subdivision (f) charge based on respondent's offensive discovery requests is duplicative of the Business and Professions Code section 6106 charge based on the same conduct. It is insufficient for culpability that the section 6068, subdivision (f) charge reflects the additional harm that respondent has caused to the administration of justice and to the right of the plaintiff, respondent's former client, to seek redress in the courts. Culpability of misconduct is determined by whether an attorney has violated the Rules of Professional Conduct, a disciplinable provision of the State Bar Act or other disciplinable provision of law. Harm or lack thereof is an aggravating circumstance.

[7 a, b, c] **214.35 Substantive Issues re Discipline–State Bar Violations–Section 6068(m)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)

Culpability of violating Business and Professions Code section 6068, subdivision (m) cannot be sustained by a factual finding based on allegations that respondent gave a client incorrect legal advice. This is addressed by rule 3-110(A) of the Rules of Professional Conduct, which was neither charged nor proved. Negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation.

[8] **171 Discipline–Restitution**
1021 Restitution

It is inappropriate to use restitution as a means of awarding tort damages for harassment and intentional infliction of emotional distress.

[9] **172.50 Discipline–Psychological Treatment**
1023.40 Testing/Treatment–Psychological

It is proper to recommend a probation condition requiring appropriate mental health treatment even though no expert testimony was proffered that respondent suffered from a mental or other problem requiring psychiatric treatment where the record contains other clear evidence that respondent suffers from a mental or other problem requiring medical treatment.

ADDITIONAL ANALYSIS

Culpability
Found
221.10 Section 6106
Not Found
214.35 Section 6068(m)
Aggravation
Found
541 Bad Faith, Dishonesty
582.10 Harm to Client
591 Indifference
Declined to Find
545 Bad Faith, Dishonesty
615 Lack of Candor–Bar
Mitigation
Found
765.10 Pro Bono Work
Standards
833.90 Moral Turpitude–Suspension
Discipline
1013.11 Stayed Suspension–5 years
1015.09 Actual Suspension–3 years
1017.11 Probation–5 years
Probation Conditions
172.11 Discipline–Probation Monitor–Appointed
173 Discipline–Ethics Exam/Ethics School
175 Discipline–Rule 955
176 Discipline–Standard 1.4(c)(ii)
178.10 Costs–Imposed
1022.10 Probation Monitor–Appointed
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)
Other
2319 Section 6007–Inactive Enrollment After Disbarment–Miscellaneous

OPINION

NORIAN, J.:

The record reveals the misconduct of a lawyer who engages in the harassment and infliction of emotional distress upon a client. As a result the client suffers significant harm.

The lawyer, respondent Felix Torres Jr.[1] (respondent), seeks review of a hearing judge's recommendation that he be disbarred from the practice of law in this state. The hearing judge based her disbarment recommendation on the culpability findings that, with respect to a single client, respondent: (1) engaged in three acts involving moral turpitude in violation of Business and Professions Code section 6106;[2] (2) inproperly advanced facts prejudicial to the client's honor in violation of section 6068, subdivision (f); and (3)mislead the client with respect to the ramifications of a settlement offer in violation of section 6068, subdivision (m).[3]

In light of her disbarment recommendation, the hearing judge ordered, in accordance with section 6007, subdivision (c)(4), that respondent be involuntarily enrolled as an inactive member of the State Bar.

On review respondent challenges each of the hearing judge's culpability findings and her disbarment recommendation. More specifically, respondent contends that the evidence is insufficient to support the hearing judge's culpability findings and disbarment recommendation. In his briefs on review, respondent supports this contention primarily by arguing that the hearing judge erroneously: (1) applied principles of collateral estoppel to bind him to prior civil findings that he harassed and intentionally inflicted emotional distress on a client; (2) rejected respondent's testimony in the State Bar Court; and (3) accepted the testimony of the client he was found to have harassed and upon whom he inflicted emotional distress.[4] Respondent does not suggest what an appropriate level of discipline would be if we adopt the hearing judge's culpability determinations.

OCTC disagrees with respondent's contention and urges us to adopt the hearing judge's findings of fact, conclusions of law, and disbarment recommendation.[5]

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 adopt the hearing judge's finding that respondent committed two acts involving moral turpitude in violation of section 6106, but reject her finding as to the third act. Moreover, we reject the hearing judge's findings that respondent improperly advanced facts prejudicial to his client's honor in violation of section 6068, subdivision (f) and that respondent deliberately mislead that client with respect to the ramifications of a settlement offer in violation of section 6068, subdivision (m).

Furthermore, we reject the hearing judge's disbarment recommendation and instead recommend that respondent by suspended from the practice of in this state for five years, that execution of that suspension be stayed, and that respondent be placed on probation for five years on conditions, including that respondent be actually suspended from the practice

1. Respondent was admitted to the practice of law in the State of California on August 26, 1988, and has been a member of the State Bar since that time.

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

3. On the motion of the State Bar's Office of the Chief Trial Counsel (OCTC), the hearing judge dismissed the charge in the notice of disciplinary charges (NDC) alleging that respondent violated the rule of professional conduct regulating the handling of client trust funds. We adopt that dismissal with prejudice.

4. Respondent raises a multitude of other arguments to support his challenges. Any such argument not expressly addressed in this opinion has been considered and rejected.

5. In the hearing department, OCTC did not seek a disbarment recommendation. Instead, it urged the hearing judge to recommend that respondent be put on probation for five years and until he makes restitution to a former client in an amount in excess of $300,000. In addition, OCTC urged, as a condition of respondent's probation, that he be actual suspended for two years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law.

of law for three years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law. Finally, because we reject the hearing judge's disbarment recommendation, we (1) order that respondent's involuntary inactive enrollment under section 6007, subdivision (c)(4) be terminated and (2) recommend that respondent be given credit for the period of his inactive enrollment under section 6007, subdivision (c)(4) towards the three-year period of actual suspension that we recommend be imposed on respondent.

I. FINDINGS OF FACT

We adopt the hearing judge's findings of fact as modified below. In late 1991 or early 1992, Ms. H. Doe[6] hired respondent to represent her in a medical malpractice action she wanted to bring against her plastic surgeon Dr. K. Wahl. Respondent filed a lawsuit against Dr. Wahl for Doe. During March 30, 1993, settlement conference in that lawsuit, Dr. Wahl made a settlement offer in which Dr. Wahl agreed to waive his right to seek costs against Doe if Doe dismissed the lawsuit.

There is no dispute that respondent discussed Dr. Wahl's settlement offer with Doe on March 30, 1993. Respondent, however, incorrectly advised Doe that she would not have any liability to Dr. Wahl for costs if she lost her case.

On March 31, 1993, Dr. Wahl made a written offer to compromise in accordance with Code of Civil Procedure section 998. In that offer Dr. Wahl again offered to waive his claim for costs if Doe dismissed the lawsuit. Respondent discussed Dr. Wahl's offer to compromise with Doe during an April 1993 meeting at Doe's place of employment. Respondent incorrectly told Doe, who was concerned about the possibility of additional costs, that she did not have anything to worry about because Dr. Wahl could only ask for his costs if Doe's case was frivolous and, according to respondent, Doe's case was not frivolous and that any judge would agree. The law is clear: if a defendant makes a section 998 offer to compromise and the plaintiff rejects its and then fails to obtain a more favorable judgment or award at trial, the defendant is entitled to recover from the plaintiff the defendant's costs incurred after the date on which the offer was made. (Code Civ. Proc., § 998, subds. (c) & (e).)

However, the settlement offer must also be made in good faith (i.e., "realistically reasonable under the circumstances of the particular case"). (*Wear v. Calderon* (1981) 121 Cal. App.3d 818, 821.) A token or nominal settlement offer will not ordinarily satisfy the good faith requirement implicit in section 998 unless the plaintiff's lawsuit is meritless or frivolous. (*Ibid.*)

In late April or early May 1993, Doe again expressed her concern to respondent that she might be liable for Dr. Wahl's costs if she lost her case. Respondent assured Doe that there was no threat that she would be liable for Dr. Wahl's costs and told her that she was overreacting just by talking about it again.[7] There is no evidence in the record that suggests that respondent intentionally gave Doe incorrect legal advice with respect to her liability for Dr. Wahl's costs.

Doe's lawsuit against Dr. Wahl went to trial in Summer 1993. The jury rendered a verdict against Doe and in favor of Dr. Wahl. Thereafter, Dr. Wahl sought an award of his costs in accordance with Code of Civil Procedure section 998. Before the hearing on Dr. Wahl's motion for costs, respondent again told Doe that the judge had discretion in whether to award costs to Dr. Wahl. After the hearing, the court

6. In an effort to maintain the client's privacy, we have not used her real name in our opinion. Instead, we have used the pseudonym Ms. H. Doe.

7. Respondent testified, in the State Bar Court, that he told Doe that she would be liable for costs if she lost her lawsuit against Dr. Wahl. The hearing judge, however, rejected respondent's testimony and accepted Doe's testimony to the contrary. As is evident from our statement of the findings of fact set forth above, we adopt the hearing judge's finding that respondent told Doe that Doe would not be liable for costs even if she lost her lawsuit against Dr. Wahl. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a) [review department gives great weight to hearing judges' factual findings resolving issues pertaining to credibility of witnesses].)

awarded Dr. Wahl $9,993.93 in costs in accordance with Code of Civil Procedure section 998, subdivision (e). The court authorized Doe to pay that sum to Dr. Wahl without interest at the rate of $100 per month beginning on October 1, 1993, until paid. As of the date Doe testified in the hearing department, she has made each $100 monthly payment since October 1, 1993.

Respondent attempted to have Dr. Wahl waive his right to costs in exchange for Doe not filing an appeal. Dr. Wahl refused respondent's offer. Respondent informed Doe of this fact in a letter dated October 29, 1993. That same day, respondent signed and approved as to form the "take nothing judgment" issued against Doe and in favor of Dr. Wahl. Sometime thereafter, respondent stopped representing Doe.

In the hearing department, respondent testified that, in August or September 1993, someone began telephoning him at home on his unlisted telephone number and hanging up without leaving a message on his telephone answering machine. According to respondent, he would discover these "hang-up" calls when he would come home at night and check his answering machine for messages. Respondent claims that he believes it was Doe who was making those harassing "hang-up" calls. Respondent opines that Doe was retaliating against him because she was mad at him over the $9,993.93 in costs that were assessed against her in the medical malpractice lawsuit. Thus, according to respondent, he decided to retaliate against Doe by telephoning her late at night and either hanging up or leaving an anonymous message.

Respondent began telephoning Doe in September 1993 while he continued to represent her in the medical malpractice lawsuit. Between September 1993 and April 1994, respondent made more than 100 such telephone calls to Doe. Respondent admits making those numerous late night calls, and his telephone records show that he made them.

Doe testified that she did not telephone respondent's home and hang up without leaving a message as respondent alleged. Doe's home telephone records from September 1993 through June 1994 were reviewed in camera by the court in the lawsuit she filed against respondent, which lawsuit is discussed in detail below, and found not to contain any evidence that Doe telephoned respondent's office or home during that time period. Accordingly, Doe's denial in this proceeding is at least partially corroborated by that prior judicial finding.

OCTC offered into evidence the telephone records from Doe's mother's house to further corroborate Doe's denial. However, for some unstated reason, the hearing judge decided that they were not necessary and declined to admit them into evidence or to review them in camera. Furthermore, OCTC did not offer into evidence the telephone records from Doe's employer to corroborate and further strengthen Doe's denial. (See, generally, Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].)

In November 1993 Doe filed a police report complaining of the calls. In the victim's statement of that report, it states that "*Doe* said that she will prosecute if a suspect is located." (Original emphasis.) Doe claims that she did not know who was making the calls until February 1994 after respondent left a long and slurred message on her answering machine. However, even though Doe admits to knowing, in February 1994, that it was respondent who was making the late night telephone calls, she neither filed charges against respondent with the police nor took any action to against respondent until late April 1994. In late April 1994, Doe obtained legal counsel to contact respondent regarding the telephone calls. Once Doe's new attorney told respondent to stop calling Doe, he stopped.

In May 1994 Doe's new attorney filed a lawsuit against respondent for Doe (*Doe v. Torres*). In that lawsuit, Doe sued respondent for legal malpractice, harassment,[8] intentional infliction of emotional dis-

8. In the original complaint, Doe's claim for "harassment" was incorrectly listed in the caption on the first page as a claim for "sexual harassment." That error, however, was corrected in Doe's first amended complaint, which was filed in June 1994.

tress, and negligent infliction of emotional distress. Respondent appeared in and represented himself in *Doe v. Torres*.

Respondent's primary defense in both *Doe v. Torres* and this State Bar Court proceeding was that his relationship with Doe was more than just an attorney-client relationship. Respondent testified, in the State Bar Court, that he and Doe had a social relationship, went out on two dates, and had discussions that were, at times, sexual in nature. Doe denied respondent's claims. The hearing judge expressly found respondent's contentions to be false and accepted Doe's denials of respondent's contentions. We adopt the hearing judge's implicit findings that respondent did not have a social relationship with Doe, did not go out on two dates with Doe, and did not have discussions with Doe that were, at times, sexual in nature. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a) [review department gives great weight to hearing judges' factual findings resolving issues pertaining to credibility of witnesses].)

In July 1995 respondent served on Doe specially prepared interrogatories (set two), which consists of nine questions that are, at best, described as completely vulgar.[9] Doe answered no to each of the nine questions without objecting to their vulgarity or relevance. Both respondent's second set of interrogatories and Doe's answers to them were admitted into evidence in *Doe v. Torres*.

In July 1995 respondent also served on Doe a demand for inspection of documents and things (set two). Even though that demand listed six categories of documents and things to be produced, three of the "categories" were actually interrogatories (i.e., questions for Doe to answer). Even though respondent requested, in that demand for inspection, that Doe produce very personal items, it was not in the same vulgar vein as respondent's interrogatories.[10] Doe objected to each of the six categories on, among other things, the grounds of relevancy, oppression, invasion of privacy, and harassment. Consistent with her objections, Doe did not produce any of the requested items. Both respondent's second request for inspection of documents and Doe's response to it were admitted into evidence in *Doe v. Torres*.

In October 1995, the jury found in favor of Doe on three of her four causes of action and also awarded her punitive damages. Specifically, the jury: (1) found that respondent committed legal malpractice for which it awarded Doe $28,993.93 in actual damages; (2) found that respondent harassed Doe for which it awarded Doe $149,500.00 in damages; and (3) found that respondent intentionally inflicted emotional distress on Doe for which it awarded Doe $75,000.00. Moreover, the jury found, by clear and convincing evidence, that there was oppression or malice in the facts upon which it found that respondent harassed and intentionally inflicted emotional distress upon Doe. Finally, the jury awarded Doe $50,000.00 in punitive damages against respondent.

In accordance with the jury's verdict, judgement in the amount of $303,493.93 plus $4,573.07 in costs was entered in favor of Doe and against respondent. Respondent did not appeal that judgment, which awarded Doe a total of $308,077.00.

Respondent has not paid Doe anything on that judgement. According to respondent, he is unable to pay anything towards the judgment because he is indigent and lives on public and private disability payments. Respondent testified that, even though he maintains a law office, he has only five or six small cases, which he had been handling for indigent individuals. As discussed below the hearing judge found that respondent's failure to pay Doe anything on the judgment was an aggravating circumstance.

II. CULPABILITY

A. Section 6106 (Moral Turpitude)

In the NDC, OCTC charges that respondent engaged in acts involving moral turpitude in violation

9. For example, the interrogatories inquired, in unnecessarily explicit and graphic language, if Doe: engaged in a telephone sex conversation with respondent; engaged in sexual relations with respondent on two occasions; etc.

10. For example, the demand for inspection requested Doe to produce clothing and other personal items.

of section 6106: (1) by harassing Doe; (2) by intentionally inflicting emotional distress on Doe; and (3) by falsely suggesting, during the proceedings in *Doe v. Torres*, respondent and Doe had a sexual relationship and that Doe engaged in promiscuous sexual conduct. The hearing judge found that respondent committed these three acts and that each of the three acts involved moral turpitude in violation of section 6106.

Respondent contends on review that the evidence is insufficient to support the hearing judge's findings with respect to these three acts. We reject respondent's contention that the evidence is insufficient to support the hearing judge's first two findings that respondent engaged in acts involving moral turpitude in violation of section 6106 when he harassed Doe and inflicted emotional distress on Doe in violation of section 6106 and, accordingly, adopt those two findings. However, we agree with respondent's contention that the evidence is insufficient to support the hearing judge's third finding that respondent made statements, during the proceedings in *Doe v. Torres*, that Doe engaged in promiscuous sexual conduct and, therefore, reject that finding.

1. Harassment and Intentional Infliction of Emotional Distress

[1] The hearing judge applied principles of collateral estoppel with respect to the jury's findings in *Doe v. Torres* to establish that respondent harassed Doe and intentionally inflicted emotional distress on her. As noted above respondent contends that the hearing judge erred in applying collateral estoppel. We disagree.

Principles of collateral estoppel may be applied to preclude a respondent from re-litigating an issue that was actually litigated and resolved against him in a prior civil proceeding. (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 329.) In State Bar Court proceedings, principles of collateral estoppel may be applied with respect to an adverse prior civil finding if (1) the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) the respondent was a party to the civil proceeding, (4) there is a final judgment on the merits in the civil proceeding, and (5) the respondent does not establish that it would be unfair to bind him to the prior adverse civil finding. (*Ibid.*)

There is no serious dispute that the first four requirements for applying collateral estoppel in State Bar Court proceedings have been met in the present matter. Even though OCTC did not offer into evidence, in the State Bar Court, a copy of the transcript of the trial in *Doe v. Torres* to establish the first requirement that the issues in the two proceedings be substantially identical, OCTC introduced into evidence a certified copy of the civil court file, which included the jury instructions, the special verdict, and the judgment. The civil court file establishes that the issues in the two proceedings are substantially identical.

The jury instruction and special verdict in *Doe v. Torres* establish that the civil findings that respondent harassed and intentionally inflicted emotional distress on Doe were made under the same clear and convincing burden of proof applicable in this State Bar Court proceeding. Respondent's admits that he was a party in *Doe v. Torres*, that the judgment in *Doe v. Torres* is on the merits after trial, that he did not appeal the judgment, and that the judgment is now final.

[2a] The only serious dispute respondent has with respect to applying principles of collateral estoppel to bind him to the jury's findings in *Doe v. Torres* that he harassed Doe and that he intentionally inflicted emotional distress on her is respondent's claim with respect to the fifth requirement. Respondent contends that it is unfair to preclude him from re-litigating the harassment and intentional infliction of emotional distress in this proceeding because, according to respondent, the civil trial judge was biased against him and made serious legal errors; he (respondent) was suffering from his serious neuromuscular illness and unable to speak during the civil trial; he was distraught because his mother was dying and he was not mentally prepared to defend himself in the civil trial, and that he did not appeal the civil judgment because it did not make economic sense to do so since he lives on disability payments and is judgment proof. The only evidence respondent presented in the hearing

department to support these claims was his own testimony.

It is by no means self-evident that any or all of these alleged facts would establish that it would be unfair to bind respondent, in the present proceeding, to the adverse civil finding of harassment and intentional infliction of emotional distress. (See, e.g., *Stolz v. Bank of America* (1993) 15 Cal. App.4th 217, 222 [a respondent may demonstrate unfairness 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]; see also *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 329.) However, even if one or more of these alleged facts were an appropriate basis for concluding that it would be unfair to bind respondent in this proceeding to the prior adverse civil findings, respondent's contention could not succeed.

[2b] As noted above the only evidence respondent presented to establish the alleged facts was his own testimony. The hearing judge rejected respondent's testimony. On review respondent restates his testimony with respect to these alleged facts. Respondent's iteration 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. 1994) 2 Cal. State Bar Ct. Rptr. 767, 775.)

[2c] As the hearing judge noted, respondent did not produce a copy of the *Doe v. Torres* transcript to corroborate his testimony. Moreover, respondent did not present any corroborating testimony from a participant or witness to the *Doe v. Torres* proceedings. Nor did he present any medical evidence to support his testimony that he was physically and emotionally incapacitated during the *Doe v. Torres* proceedings. Even though respondent was not required to produce any corroborating evidence to support his testimony, he took the chance that the hearing judge would reject his testimony because he did not do so. (See, generally, Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."]; see also *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033 [attorney's inability to produce documentation to support his claim that he had his client's authorization to use the client's funds was circumstantial evidence that he did not have client's authorization].) We adopt the hearing judge's rejection of respondent's testimony with respect to these alleged facts. (Cf. Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a) [review department gives great weight to hearing judges' factual findings resolving issues pertaining to credibility of witnesses].)

[3a] In sum, we conclude that respondent failed to establish that it would be unfair to bind him, in this State Bar Court proceeding, to the civil findings made against him in *Doe v. Torres*. Therefore, we hold that the final civil judgement in *Doe v. Torres* is a conclusive legal determination that respondent's harassment and intentional infliction of emotional distress upon Doe involved oppression or malice. Yet, introducing the pleadings and exhibits from *Doe v. Torres* into evidence in this proceeding without also introducing the *Doe v. Torres* trial transcript, provides us with little evidence as to the nature and extent of respondent's conduct underlying the adverse civil findings of harassment and intentional infliction of emotional distress or the resulting harm to Doe.[11] Nonetheless, when we view that evidence together with the testimony of Doe and respondent in the present proceeding, we find sufficient evidence in the record (1) to conclude that respondent's harassment and infliction of emotional distress on Doe (as set forth above) involved moral turpitude in violation of section 6106 and (2) to determine the appropriate level of discipline for that misconduct.

11. **[3b]** By failing to offer into evidence the relevant portion of the transcript of the civil matter or more extensive evidence of the circumstances, OCTC has deprived the State Bar Court of the underlying evidence upon which the civil court based its judgment. Such evidence may have had a material effect on our measure of the appropriate level of discipline.

2. Statements Regarding Promiscuous Sexual Conduct

The hearing judge found that respondent promulgated lewd and offensive discovery to Doe in *Doe v. Torres* that falsely "intimated" that he had a sexual relationship with Doe and that Doe was sexually promiscuous. Based upon that factual finding, the hearing judge found that respondent engaged in acts of moral turpitude in violation of section 6106. We disagree.

[4a] Even though we adopt the hearing judge's construction of respondent's discovery request in *Doe v. Torres* as falsely "intimating" (i.e., to convey an idea by indirect, subtle means) that he had a sexual relationship with Doe and that she was sexually promiscuous, we cannot conclude that, in the context of an emotional and adversarial lawsuit, such "intimations" are clear and convincing evidence of acts of moral turpitude in violation of section 6106.

[5a] Furthermore, because Doe introduced respondent's offensive discovery requests into evidence at the trial in *Doe v. Torres*, we must presume, in the absence of any jury instruction to the contrary, that the jury relied upon them as evidence in making its findings, by clear and convincing evidence, that respondent acted with oppression or malice when he harassed and intentionally inflicted emotional distress upon Doe. Therefore, to use respondent's discovery to find a third section 6106 moral turpitude violation would be duplicative of the section 6106 moral turpitude violations we found based on respondent's harassment of and infliction of emotional distress on Doe. It is generally inappropriate to find redundant charged violations. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *Heavey v. State Bar* (1976) 17 Cal.3d 553, 559-560.) In that regard it is important to note that the appropriate level of discipline for an act of misconduct does not depend upon how many rules of professional conduct or statutes proscribe the misconduct. (*Bates v. State Bar*, *supra*, 51 Cal.3d at p.1060 [There is "little, if any, purpose served by duplicative allegations of misconduct."].)

In sum, we reverse the hearing judge's finding that respondent violated section 6106 by falsely "intimating" that he had a sexual relationship with Doe and that she was sexually promiscuous and dismiss that charge with prejudice.

B. Section 6068, Subdivision (f) (Advance Facts Prejudicial to a Party)

The relevant portion of section 6068, subdivision (f) provides that an attorney shall "advance no *fact* prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause *with which he or she is charged.*" (Emphasis added.) OCTC charged in the NDC and the hearing judge found that respondent violated that portion of section 6068, subdivision (f) by "intimating," in his depositions in *Doe v. Torres* and the offensive discovery he propounded to Doe in that case, that he had a sexual relationship with Doe and that Doe was sexually promiscuous

[4b] First, the plain language of section 6068, subdivision (f) prohibits an attorney from advancing prejudicial *facts*. Accordingly, it is not clear that section 6068, subdivision (f) proscribes the use of "intimations" as the hearing judge found. However, even assuming that subdivision (f) does proscribes the use of "intimations," we cannot adopt the hearing judge's finding that respondent is culpable of violating that subdivision. As we noted above, Doe introduced respondent's discovery requests into evidence at the trial in *Doe v. Torres*. Therefore, we must presume that the jury relied upon the evidence in making its findings, by clear and convincing evidence, that respondent acted with oppression or malice when he harassed and intentionally inflicted emotional distress upon Doe. **[5b]** Therefore, to use the "intimations" in respondent's discovery to find section 6068, subdivision (f) violation would be duplicative of the section 6106 moral turpitude violations we found based on respondent's harassment of and infliction of emotional distress on Doe. It is generally inappropriate to find redundant charged violations. (*Bates v. State Bar*, *supra*, 51 Cal.3d at p. 1060; *Heavey v. State Bar*, *supra*,17 Cal.3d at pp. 559-560.)

[6] OCTC contends that the section 6068, subdivision (f) is not duplicative of the section 6106 charge because the section 6068, subdivision (f) charge "reflects the additional harm that Respondent has caused: harm to the administration of justice and

harm Ms. Doe's right to seek redress in the courts." We disagree. Culpability of misconduct is determined by whether an attorney has violated the Rules of Professional Conduct, a disciplinable provision of the State Bar Act, or other disciplinable provision of law. Harm or the lack thereof is an aggravating circumstance (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct (standards), standard 1.2(b)(iv)) or a mitigating circumstance (std. 1.2(e)(iii)).

In sum, we reverse the hearing judge's finding that respondent violated section 6068, subdivision (f) and dismiss that charge with prejudice.

C. Section 6068, Subdivision (m)
(Failure to Communicate)

OCTC charged in the NDC and the hearing judge found that respondent violated his duty, under section 6068, subdivision (m), to keep his clients reasonably informed of significant developments in the matters in which they are providing legal services. That charge and finding of culpability are based on respondent incorrectly advising Doe that she did not need to worry about having to pay Dr. Wahl's costs in the event that she lost her medical malpractice lawsuit.

[7a] The hearing judge's finding of culpability cannot be sustained because the violation as charged in the NDC fails to state an offense upon which discipline may be imposed. Section 6068, subdivision (m) requires that attorneys keep their clients advised of significant developments in the matters in which they are providing legal services. It neither addresses nor purports to address the issue of whether attorneys communicate correct or incorrect legal advice to their clients.

[7b] Whether attorneys communicate correct legal advice to their clients is addressed by rule 3-110(A) of the Rules of Professional Conduct of the State Bar and not section 6068, subdivision (m). Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Conceivably, respondent may have violated rule 3-110(A) and, if so, it might be appropriate to consider such a violation as aggravation under standard 1.2(b)(ii) (multiple acts of misconduct) or standard 1.2(b)(iii) (other violations of State Bar Act or Rules of Professional Conduct) under *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36. However, such a violation was neither charged nor proved.

[7c] At most, the evidence establishes that respondent's incorrect legal advice to Doe was based upon his negligent belief that Dr. Wahl's settlement offer was a token or nominal offer so that Doe would not be required to pay Dr. Wahl's costs under Code of Civil Procedure section 998 unless Doe's lawsuit was frivolous or meritless. (But see *Jones v. Dumrichob* (1998) 63 Cal. App.4th 1258, 1262-1264 [defendant doctor's section 998 offer to allow judgment to be taken against him for waiver of costs does not necessarily violate section 998's good faith requirement].) We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113, and cases there cited.)

In sum, we reverse the hearing judge's finding that respondent violated section 6068, subdivision (m) and dismiss that charge with prejudice.

III. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Dishonesty and Bad Faith

The hearing judge found that respondent's misconduct was surrounded by dishonesty and bad faith, which are aggravating circumstances under standard 1.2(b)(iii). More specifically, the hearing judge found that respondent's testimony in this proceeding was dishonest and that he served a discovery request on Doe in this proceeding in bad faith.

a. Respondent's Testimony

The hearing judge found that respondent's "testimony in this proceeding was not truthful. At times his recitation of events in both the past and the present *appeared* to be deliberately false or evasive, and at times it *appeared* close to delusional" and that

such dishonesty to the Court is a serious factor in aggravation. (Emphasis added.) Even though the hearing judge found that respondent's testimony only appeared to be deliberately false in the above quoted portion of her decision, in other portions of her decision she expressly found that parts of respondent's testimony were false.

In any event, after independently reviewing the record, we conclude that there is clear and convincing evidence that respondent deliberately presented false testimony in the State Bar Court. Accordingly, we hold that respondent's testimony in the State Bar Court was dishonest, which is an aggravating circumstance under standard 1.2(b)(iii). (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 293-294; see also *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200 [fraudulent and contrived misrepresentations to the State Bar may constitute a greater offense that misappropriation].

b. Respondent's Discovery Request

The hearing judge found that, in this State Bar Court proceeding, respondent inappropriately served a subpoena on Doe for extensive financial records. That subpoena was quashed because respondent could not articulate a sufficient reason for needing Doe's financial records. The hearing judge found that respondent served the subpoena on Doe with the clear intent to continue to harass Doe. The record does not support that finding. The record establishes that respondent committed a discovery violation, which was properly remedied by the hearing judge when she quashed the subpoena. Such a single discovery violation, without more, does not rise to the level of bad faith aggravation under standard 1.2(b)(iii).

2. Harm

Doe testified that the calls from respondent were extremely frightening and disturbing to her and eventually caused her to become so emotionally unstable that she lost her job and is now able to work only part-time performing clerical tasks. The hearing judge found Doe's testimony to be credible and that Doe had suffered significant harm as a result of respondent's misconduct. We agree and adopt the hearing judge's finding that respondent's misconduct significantly harmed Doe, which is an aggravating circumstance. (Std. 1.2(b)(iv).)

3. Indifference Towards Rectification

The hearing judge found that respondent displays complete indifference towards rectification of the consequences of his misconduct. Even though we cannot find in the transcript of the trial in the hearing department or respondent's filings in this matter that respondent displays a complete indifference, we do find that he displays a moderate level of indifference particularly in light of the fact that he has not made any payment to Doe on the civil judgment at least in accordance with his ability to pay or otherwise done anything in an attempt to rectify his misconduct In addition, we conclude, from respondent's testimony in the hearing department, that he fails to appreciate the seriousness of his misconduct.

We adopt the hearing judge's finding that respondent displays indifference towards rectification for his misconduct. That indifference and respondent's failure to appreciate the seriousness of his misconduct are aggravating circumstances. (Std. 1.2(b)(v).)

4. Failure to Cooperate

The hearing judge found that respondent failed to cooperate with OCTC in this proceeding and that that failure to cooperate was an aggravating circumstance under standard 1.2(b)(vi). More specifically, the hearing judge found that respondent failed to cooperate with OCTC in this proceeding by first agreeing to the authenticity of OCTC's exhibits, but then withdrawing his agreement with out any apparent cause. According to respondent, he withdrew his agreement so as to put to OCTC the burden of proving its case against him. We cannot agree that respondent's withdrawal of his agreement, without more, is clear and convincing evidence of a failure to cooperate, and thus a finding of aggravation under standard 1.2(b)(vi). Therefore, we reject the hearing judge's aggravation finding of a failure to cooperate.

B. Mitigating Circumstances

The only mitigation respondent contends he is entitled to is for the many hours of free legal services

he has provided to the poor and under privileged for which respondent has received multiple bar commendations. Contrary to OCTC's contention, the hearing judge properly gave respondent substantial mitigation for this public service. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 665.)

IV. APPROPRIATE LEVEL OF DISCIPLINE

Above, we have concluded respondent is culpable of committing acts of moral turpitude when he harassed and intentionally inflicted emotional distress on his client. In aggravation we have concluded that respondent was dishonest in testifying in the State Bar Court and that respondent's client suffered significant harm as a result of respondent's misconduct. In addition, respondent displayed indifference towards rectification for his misconduct and failed to appreciate the seriousness of his misconduct. In mitigation respondent provided many hours of free legal services to the poor and underprivileged.

It is also important to note the depravity of this misconduct in its relation to the legal profession. Here is a lawyer that turns on his client, without provocation, through a pattern of harassment and the intentional infliction of serious emotional distress for the purpose of causing the client grief. Such duplicitous conduct by a lawyer makes the legal profession not a highly essential aid to society, but a detriment.

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.)

The applicable sanction in this proceeding 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. In the present proceeding, the magnitude of the misconduct is substantial. Respondent is culpable of two serious acts of moral turpitude. In addition, the victim was a client. Thus, significant discipline is warranted under standard 2.3.

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.) The parties have not cited any prior case dealing with substantially similar misconduct as that present in this proceeding.

Both the hearing judge and OCTC cite to *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 as supporting a disbarment recommendation. In *Varakin* we recommended and the Supreme Court ordered the attorney's disbarment. The hearing judge cites to *Varakin* to support her conclusion that disbarment is appropriate because, according to the hearing judge, respondent shows no remorse for his misconduct. (*Id.* at p. 190.) OCTC cites to *Varakin* to support the hearing judge's disbarment recommending because, according to OCTC, respondent's misconduct is similar to the misconduct found in *Varakin*.

Both the hearing judge and OCTC place too much reliance on *Varakin*. In *Varakin* we rejected the hearing judge's recommended lengthy suspension coupled with probation terms and recommended that the attorney be disbarred. (*Ibid.*) However, we did not recommend the respondent's disbarment solely because he displayed a total lack of repentance. Instead, we recommended that the respondent be disbarred because, in light of the extensive and protracted nature of his misconduct, the danger was great that he would fail to comply with any probation terms imposed. (*Ibid.*)

Even though there is a similarity between the attorney's misconduct in *Varakin* and the misconduct we have found in the present proceeding, the misconduct in *Varakin* was much more extensive. OCTC describes that the attorney in *Varakin* engaged in "a 12-year campaign of litigation terror against his ex-wife." The misconduct in *Varakin* was focused on four lawsuits relating to the attorney's

divorce from his wife. (*Id.* at pp. 183-184.) In those four lawsuits, the attorney repeatedly filed and continued to file frivolous motions and appeals even though he had been sanctioned for that misconduct eight times by a superior court and six times by a court of appeal. (*Id.* at p. 184.) Those 14 sanctions totaled more than $80,000. (*Ibid.*)

The attorney in *Varakin* was found culpable of (1) habitually abusing the judicial system by repeatedly misstating facts and failing to reveal prior adverse ruling to trial and appellate courts, failing to follow court rules, and flouting the authority of the courts; (2) deliberately violating court orders; (3) repeatedly filing baseless and vexatious litigation; (3) repeatedly making requests for court action when there were no legitimate grounds to support the request, which requests were also gratuitously insulting and offensive; (4) acting in bad faith, out of spite, and with the purpose to harm others and cause delay; (5) willfully failing to report to the State Bar the sanctions imposed against him; and (6) intentionally refusing to cooperate with the State Bar's investigation of complaints against him. (*Id.* at pp. 186, 187-188, 189.)

It is only in light of such extensive misconduct and of Varakin's refusal to conform his conduct to the ethical strictures of the profession after being sanctioned 14 times and paying more than $80,000 in sanctions that we recommended Varakin's disbarment because of his *total* lack of remorse. In contrast, respondent ceased his misconduct (i.e., telephoning Doe) immediately after Doe's attorney contacted him.

In sum, respondent's misconduct in the present proceeding is not as serious as Varakin's misconduct. Nor does the record in the present proceeding establish that respondent displays a *total* lack of remorse or that respondent has refused to comply with disciplinary probation. Accordingly, we reject the hearing judge's disbarment recommendation.

The only case we are aware of that involves an attorney who, like respondent, maliciously and gratuitously oppressed and harassed another individual is *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. In *Sorensen* the attorney violated his duty to bring only such actions and proceedings as are just and not to commence or continue an action from any corrupt motive or interest when he sued a court reporter who had reported a deposition taken by one of the attorney's associate and employee. The attorney and associate contended that the court reporter's fee of $94.05 was excessive and that a reasonable fee was only $49.00.

The attorney and the associate did not, however, communicate their contention to the court reporter. Instead, they failed to file an answer when the court reporter sued them in small claims court; allowed the court reporter to obtain an default judgment against them in small claims court; and then sued the court reporter in superior court alleging fraud and deceit and sought actual damages in an unstated amount and $14,000.00 in punitive damages.

Thereafter, the attorney and associate misused the process of the courts to purse and continue their lawsuit against the court reporter to redress the alleged $45.00 fee dispute in large measure out of spite and vindictiveness. The court reporter was forced to pay approximately $4,375.00 in legal fees and costs to defeat the superior court lawsuit. For that misconduct, the attorney was placed on a one-year period of stayed suspension and a two-year period of probation on conditions including 30 days' actual suspension and restitution to the court reporter in the amount of $4,375.00. Respondent's misconduct, however, is far more egregious than that of the attorney in *Sorensen*.

We also find guidance in other cases in which the attorney over reaches or exploits a vulnerable client that amounts to moral turpitude, but does not engage in dishonesty or misappropriate client funds. One such case is *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233. In *Johnson* the respondent exploited a vulnerable client whom she represented in a personal injury action by improperly borrowing the bulk of the client's share of the settlement proceeds and not repaying the loan. There the respondent's misconduct violated both the rule of professional conduct proscribing improper business dealings with clients and section 6106's proscription of acts involving moral turpitude. Moreover, the aggravating circumstances offset the respondent's eleven prior years of practice with discipline. The substantial aggravation in that case

involved harm to the client, the fact that the respondent knew of the client's vulnerabilities because the client was a relative, multiple acts of misconduct, indifference towards rectification for the misconduct, lack of any attempt to repay the loan, lack of candor in State Bar Court trial, and the respondent's loss of control of between four and five hundred case files when the respondent closed her practice.

In *Johnson* we adopted the hearing judge's recommendation of five years' stayed suspension and five years' probation on conditions including restitution as well as a period of actual suspension of two years and until proof of compliance with standard 1.4(c)(ii). However, we also modified the hearing judge's recommendation to provide that the respondent remain on actual suspension until she made restitution in the amount of the unpaid loan. The Supreme Court adopted our recommendation and disciplined Johnson accordingly.

Our discipline recommendation in *Johnson* is consistent with prior attorney disciplinary cases of gross overreaching amounting to moral turpitude, which also contained substantial aggravating circumstances and little evidence in mitigation. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300; *Beery v. State Bar* (1987) 43 Cal.3d 802.)

We consider the present matter unique, although similar to *Johnson*. Here, we are confronted with an attorney who turned on his client, making late night harassing phone calls for a period of nine months and creating an atmosphere of fright and terror for the client. The client ultimately became unstable from this action by respondent, losing her job as an office manager. She also became unable to work other than performing part-time clerical tasks. But for respondent's terminating the course of conduct promptly upon being contacted by Doe's new attorney, we would consider even harsher discipline. This, combined with our determination that respondent gave deliberately false and evasive testimony in responding to the charges of harassment and infliction of emotional distress, causes us to have grave concerns about respondent's willingness or ability to accept responsibility for this serious misconduct. That, in turn suggests that a three-year period of actual suspension, along with an appropriately tailored mental health treatment probation condition, is necessary to assure that respondent will reform his conduct to a standard acceptable to the profession.

A. Restitution

We decline to recommend that respondent be ordered to make restitution to Doe. The Supreme Court does not "approve imposition of restitution as a means of compensating the victim of wrongdoing. [Citation.]" (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1044.) In fact, up until *Sorensen*, almost all of the Supreme Court's cases requiring restitution involved misuse of client funds and unearned fees. (*Ibid.*) Then in *Sorensen* the Supreme Court extended the protective and rehabilitative principles of restitution to cover specific out-of-pocket loses directly resulting from an attorney's violation of his duties (1) to bring only such actions and proceedings as are just and (2) not to commence or continue an action from any corrupt motive or interest. However, we do not construe *Sorensen* as extending restitution to cover tort damages.

[8] In fact, in *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 650, we held that it is inappropriate to use restitution as a means of awarding tort damages for legal malpractice. (Accord *King v. State Bar* (1990) 52 Cal.3d 307, 312, 315-316 [Supreme Court adopted review department's discipline recommendation, which recommendation deleted the hearing panel's probation condition requiring King to make restitution to a former client for the $84,000 legal malpractice judgment client obtained against King].) Accordingly, we hold that is inappropriate to use restitution as a means of awarding tort damages for harassment and intentional infliction of emotion distress.

B. Mental Health Treatment

Throughout this State Bar Court proceeding, respondent has maintained that his misconduct with respect to Doe was not and cannot be attributable to any mental or emotional problem. He has steadfastly denied having any mental or other problem that requires psychiatric, psychological, or mental health treatment. In addition, respondent contends that, in any event, it is inappropriate to include, as a condition

of his disciplinary probation, a requirement that he obtain psychiatric, psychological, or mental health treatment because OCTC did not introduce any expert evidence to establish that he suffers from specific mental or other problem requiring such treatment. To support this contention, respondent cites to our opinion in *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 629.

Respondent reads our holding in *Koehler* too narrowly. In *Koehler* we held that there must be either expert *or* other clear evidence of a mental or other problem requiring psychiatric treatment. (*Ibid.* citing *In re Bushman* (1970) 1 Cal.3d 767, 777 disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486.)

[9] Even though OCTC did not proffer any expert testimony that respondent suffers from a mental or other problem requiring psychiatric treatment, the record contains other clear evidence that respondent suffers from either a mental or other problem requiring medical treatment. First, the fact that respondent made well over one hundred unwarranted late night telephone calls to Doe alone establishes that respondent suffers from a mental or other problem requiring medical treatment particularly in light of the strange messages respondent left on Doe's answering machine. Second, even though respondent denies having an alcohol drinking problem, he admits that he made many of the late night telephone calls to Doe after he returned home from an evening or night of drinking alcohol. In addition, he admits to having two recent drunk driving convictions: one in 1994 and another in 1997. As the Supreme Court has made clear, we need not sit back and wait for an attorney's use of alcohol to adversely affect his practice of law. (*In re Kelley* (1990) 52 Cal.3d 487, 495-496.)

We conclude that the record clearly establishes that a probation condition requiring respondent to obtain appropriate mental health treatment is necessary in this case.

V. DISCIPLINE RECOMMENDATION

We recommend that respondent Felix Torres Jr. be suspended from the practice of law in the State of California for a period of five years and until respondent shows proof satisfactory to the State Bar Court of respondent's 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; that the five-year period of suspension be stayed; and that respondent be placed on probation for a period of five years on 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 the period of probation and until respondent shows proof satisfactory to the State Bar Court of respondent's 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. We recommend that respondent be given credit for the period of his inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4) towards this recommended three-year period of actual suspension.

2. The State Bar's Probation Unit shall promptly assign a probation monitor referee to respondent. Respondent must promptly review the terms and conditions of this probation with the probation monitor referee and establish a manner and schedule of compliance with them. Such manner and schedule of compliance must, of course, be consistent with the terms and conditions of probation. Respondent must furnish such reports concerning respondent's compliance as may be requested by the probation monitor referee. Respondent must cooperate fully with the probation monitor referee to enable the referee to discharge the referee's duties. (See Rules Proc. of State Bar, title III, General Provisions, rule 2702 [duties of probation monitor referees].)

3. Respondent shall 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.

4. Respondent shall 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 shall state that it covers the preceding calendar quarter or applicable portion 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 shall 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 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.

5. Subject to the assertion of any applicable privilege, respondent shall fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit and any assigned probation monitor referee 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.

6. 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 shall maintain that official address with the State Bar's Probation Unit in Los Angeles and any assigned probation monitor referee. In addition, respondent shall maintain with the Probation Unit in Los Angeles and any assigned probation monitor referee, a current office address and telephone number or, if respondent does not have an office, a current home address and telephone number. Respondent shall 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 referee.

7. Within one year after the effective date of the Supreme Court order in this matter or the period of respondent's actual suspension which ever is longer, respondent shall 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 MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course.

8. No later than 30 days after the effective date of the Supreme Court order in this matter, respondent must, at respondent's own expense, locate and enroll in a program for mental health treatment from a California licensed psychiatrist (M.D.), psychologist (Ph.D.), licensed clinical social worker (L.C.S.W.), or mental health counselor (M.H.C.). Respondent must, during his first meeting with his treating mental health professional, provide his treating mental health professional with a complete copy of this opinion on review. Respondent must participate in this program for mental health treatment for the lesser of six months or until the treating mental health professional (1) is of the opinion, after reading this opinion and treating respondent, that respondent has recovered from the mental or other problems referred to in this opinion on review and no longer requires treatment and (2) notifies respondent's assigned probation monitor referee of that opinion in a written statement executed under the penalty of perjury under the laws of the State of California. At the time respondent files each of the probation reports required under probation condition number four, respondent must provide proof satisfactory, to the State Bar's Probation Unit in Los Angeles, of respondent's compliance with this mental health treatment probation condition.

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if respondent has complied with the terms and conditions of probation, the Supreme Court order suspending respondent from the practice of law for five years shall be satisfied, and the suspension shall be terminated.

VI. 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 one year after the effective date of the Supreme Court order in this matter or the period of respondent's actual suspension which ever is longer and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within that period.

VII. 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 subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VIII. COSTS

We further 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).

IX. ORDER

Finally, because we reject the hearing judge's disbarment recommendation, we order that respondent Felix Torres Jr.'s inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4) be terminated immediately.[12] This order does not affect respondent's ineligibility to practice law that has resulted or that may hereafter result from any other cause.

We concur:

OBRIEN, P.J.
STOVITZ, J.

12. In light of this order terminating respondent's inactive enrollment, we deny as moot respondent's motion to be reinstated to active status, which was filed on January 26, 2000.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LEON JENKINS

A Member of the State Bar

No. 93-J-18832

Filed August 7, 2000

SUMMARY

Respondent's Michigan law license was revoked and he was removed as a state trial judge due to his corrupt misconduct as a judge, including accepting bribes, gifts and favors, soliciting someone to commit perjury on his behalf, engaging in improper ex parte communications and signing a writ of habeas corpus to release a close friend without adequate information. The hearing judge found that respondent's misconduct was so serious and showed such a deep lack of understanding of the duties of a judge or attorney that he recommended disbarment. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent sought review contending procedural error. The review department rejected respondent's arguments, concluded that the hearing judge's decision is fully supported and adopted hearing judge's disbarment recommendation.

COUNSEL FOR PARTIES

For State Bar: David Carr

For Respondent: Leon Jenkins, in pro. per.

HEADNOTES

[1 a-c] **1931.30 Section 6049.1 Cases–Expedited**
1931.50 Section 6049.1 Cases–Record from Foreign Proceeding
1933.10 Section 6049.1 Cases–Burden of Proof
1933.20 Section 6049.1 Cases–California Law
1933.30 Section 6049.1 Cases–Constitutionality of Foreign Proceeding
1933.40 Section 6049.1 Cases–Limitation of Issues

Business and Professions Code section 6049.1 provides an expedited, streamlined disciplinary proceeding in this state when an attorney has been disciplined by another state or federal jurisdiction.

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 certified copy of another jurisdiction's final attorney disciplinary order conclusively establishes that a California attorney is culpable of professional misconduct in California, except where, as a matter of law, the misconduct found in the other jurisdiction would not warrant discipline in California or the other jurisdiction's proceedings lacked fundamental constitutional protection. The attorney bears the burden to establish that the exceptions do not warrant imposing discipline. The statute also provides that discovery need not be afforded unless the State Bar Court so orders on a showing of good cause, and that a certified copy of any part of the record of the other jurisdiction's proceedings may be admitted in evidence in this proceeding. Reviewing the applicable law as a whole, there are two issues in this expedited proceeding: 1) whether the California attorney has sustained his or her burden to establish that final attorney discipline in another state, territory or the federal system should not result in finding culpability in this proceeding; and 2) the appropriate degree of discipline.

[2] **147 Evidence–Presumptions**
162.30 Issues/Proof in § 6049.1 Matters
1933.10 Section 6049.1 Cases–Burden of Proof

Respondent objects to giving conclusive weight to the Michigan proceedings, since they were adjudicated under a lower standard of proof than that required in California. Respondent's license revocation and judicial removal were judged under standards requiring only a preponderance of evidence to find him culpable of judicial misconduct. However, the Michigan Supreme Court considered the evidence of respondent's culpability overwhelming; and, in any event, the record of this proceeding contains ample evidence that was received in the Michigan proceedings to permit us to independently determine that sufficient evidence is present to clearly and convincingly establish respondent's culpability in California. Respondent's argument lacks merit.

[3] **192 Dues Process/Procedural Rights**
1931.90 Section 6049.1 Cases–Other Procedural Issues

Since over a year of respondent's Michigan misconduct was committed after the 1986 effective date of Business and Professions Code section 6049.1, that statute was not retroactively applied to respondent.

[4] **1933.20 Section 6049.1 Cases–California Law**
1933.50 Section 6049.1 Cases–Degree of Foreign Discipline
1933.90 Section 6049.1 Cases–Other Substantive Issues

Respondent's claims that Business and Professions Code section 6049.1 unconstitutionally infringes on judicial power and is otherwise beyond legislative power are without merit. Respondent was given a full opportunity to litigate the issue of whether the Michigan discipline should be conclusive of his culpability in this proceeding. The Supreme Court is never bound by a legislative enactment in exercising its inherent functions in attorney discipline. However, the Supreme Court has upheld section 6007(c) authorizing an expedited proceeding to enroll an attorney inactive prior to the adjudication of the merits of disciplinary charges.

[5] **1699 Conviction Cases–Miscellaneous Issues**
1933.20 Section 6049.1 Cases–California Law

Respondent was not found guilty of criminal charges in Michigan based on the identical facts underlying his Michigan discipline. However, it is well settled in California that dismissal or acquittal of criminal charges does not bar disciplinary proceedings covering the same facts.

ADDITIONAL ANALYSIS

Culpability
Found
221.11 Section 6106–Deliberate Dishonesty/Fraud
Aggravation
Found
586.12 Harm to Administration of Justice
621 Lack of Remorse
Mitigation
Found
750.10 Rehabilitation
765.10 Pro Bono Work
Found but Discounted
740.32 Good Character
760.32 Personal/Financial Problems
Declined to Find
750.52 Rehabilitation
Discipline
1010 Disbarment

OPINION

STOVITZ, J.:

The Michigan law license of respondent Leon Jenkins, who is also a member of the California Bar, was revoked in 1994 for the same corrupt judicial misconduct that led to his removal by the Michigan Supreme Court as a state trial judge. In 1995, the State Bar's Office of Chief Trial Counsel (State Bar) filed an expedited proceeding for his discipline in California, based on the Michigan revocation. After extensive proceedings and two unsuccessful interlocutory appeals by respondent to us, a State Bar Court hearing judge recommended disbarment.

Respondent seeks our review, urging, as he has done previously, that procedural error surrounded the hearing judge's recommendation and that the discipline is too severe considering favorable evidence he offered. The State Bar contends that no error occurred below and that the hearing judge's decision is correct and should be upheld.

Independently reviewing the record, we conclude that the hearing judge's decision and recommendation of respondent's disbarment are fully supported, and we adopt them for recommendation to the Supreme Court.

I. STATEMENT OF THE CASE.

A. Chronology.

Respondent was admitted to practice law in Michigan in 1979 and California in 1980. In 1983, after a few years' service as a private practitioner, Wayne County, Michigan charter commissioner and chair of that commission, he was appointed by the Governor of Michigan as judge of the 36th District Court in Detroit.[1] Between 1984 and 1987, he engaged in serious misconduct on the bench. He was prosecuted twice in federal court, but not found guilty[2]. However, in 1991, between the two federal criminal trials, he was removed from the bench by the Michigan Supreme Court on the recommendation of the Michigan Judicial Tenure Commission. (*In re Jenkins* (1991) 437 Mich. 15 [465 N.W.2d 317].) This recommendation followed an evidentiary hearing before a special master in which an extensive record was adduced.

Following respondent's removal from the Michigan bench, the Michigan Attorney Grievance Administrator started attorney disciplinary proceedings against respondent. After an 11-day hearing in which respondent appeared and testified, his Michigan license to practice law was revoked in 1994 by the Michigan Attorney Disciplinary Board (Michigan Board). The sole basis of this revocation was the conduct which led to respondent's removal from the bench. Proceedings were started in California in October 1995 to discipline him here under laws operative when a member of the State Bar has been disciplined in another jurisdiction. (Bus. & Prof. Code, § 6049.1.)[3] After the hearing judge determined that the final decision of the Michigan court conclusively established respondent's culpability in this proceeding, respondent sought our interlocutory review. In July 1997, we upheld the hearing judge's determination. In December 1997, respondent filed a motion to dismiss, seeking to relitigate our July 1997 ruling. The hearing judge denied relief, and we summarily denied interlocutory review for failure of the petition to comply with the appropriate rules. Thereafter, the hearing judge held three days of hearing and recommended that respondent be disbarred. Respondent then sought our plenary review.

B. Respondent's Misconduct.

A brief summary from the opinion of the Supreme Court of Michigan demonstrates the gravity of respondent's misconduct which was the basis of the

1. Respondent's Michigan judgeship was roughly equivalent to a California municipal court judgeship, prior to court unification.

2. As we discuss, *post*, dismissal or acquittal of criminal charges does not bar these disciplinary proceedings based on the same acts.

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

revocation of his law license in Michigan. "On the basis of our de novo review of the record, we find overwhelming evidence that during the period from 1984 to 1987 respondent systematically and routinely sold his office and his public trust, committed acts which would, if proven in a criminal trial, constitute violations of three criminal statutes, committed wholesale violations of the most elementary canons of judicial conduct, and brought grave dishonor upon this state's judiciary." (*In re Jenkins*, *supra*, 437 Mich. at p. 19 [465 N.W.2d at p. 319].)

The Michigan Supreme court found that, on numerous occasions, respondent accepted specific bribes to dismiss traffic citations, intentionally misstated his residence address to get a $2,015 reduction in auto insurance premiums over an eighteen-month period from December 1985 to June 1987, solicited someone in the Spring of 1987, for whom he had agreed to dismiss traffic citations to commit perjury regarding a federal investigation of respondent's misconduct, engaged in improper ex parte conversations with parties and counsel regarding matters coming before him as a judge, improperly accepted gifts and favors from litigants and counsel appearing before him and did not report the gifts, and in August 1986 signed a writ of habeas corpus to release from custody someone respondent believed to be a close friend without adequate information as to the facts of the case and after another close friend was retained as defense counsel. (*Id.* at pp. 19-23 [465 N.W.2d at pp. 319-320].)

In revoking respondent's license to practice law in Michigan, the Michigan board concluded that its hearing panel's agreement with the findings of the Michigan Judicial Tenure Commission was "well-supported." The board noted that its hearing panel had the opportunity to evaluate the credibility of witnesses that respondent presented as well as his own testimony. The board concluded that, in view of the seriousness of respondent's misconduct, the mitigating evidence he presented did not warrant less discipline than license revocation.

C. Respondent's Evidence in Mitigation and the Hearing Judge's Findings.

The State Bar Court hearings below included the relevant part of the extensive record relied on by the Michigan board in revoking his law license. On the issue of appropriate discipline, respondent and six witnesses testified below. Respondent conceded that he dismissed a few citations improperly, that he thereby violated the public trust, and that he agreed that he should not continue to sit on the bench. However, he disputed most of the findings and evidence against him. He testified that he was new to law practice, that he was inexperienced when appointed as a judge, and that he had to cope with several deaths in his family just a few years after his judicial appointment, including the sudden death of his wife after a very brief illness. These family tragedies left respondent depressed and required him to assume sole parenting responsibilities for his two young daughters. Respondent also claimed that the leading witness against him was a government informant who worked hard to ingratiate himself with respondent so that he could trap respondent.

Respondent moved to California in November 1990 and has practiced in this state since that time. He has not sought reinstatement in Michigan. His California private law practice involved mostly police brutality, personal injury, wrongful death, and medical malpractice cases. He devoted about 20 or 30 percent of his practice to pro bono cases. He was chair of the NAACP legal redress committee and served on the executive board of another non-profit organization.

Respondent's six character witnesses included an attorney who tried a case with him for about two weeks, several former clients, and an official of the NAACP. Although these witnesses had very favorable opinions of respondent's character, they knew little about his Michigan judicial removal and license revocation. Two witnesses, including the attorney, did not even know the purpose of the State Bar Court hearing at which they testified.

The State Bar Court hearing judge gave only nominal weight to character evidence of four witnesses who testified in the Michigan proceedings, considering the evidence stale, and in any event, unlikely to change the ultimate recommendation. However, the hearing judge gave substantial weight to respondent's strong record of community service which started as he was appointed to the bench and continued through his California law practice. These

activities included funding a scholarship in his late wife's name, speaking to schools to encourage youth to complete school and working with at-risk youths.

The State Bar Court hearing judge made detailed findings based on the record. In the hearing judge's view, the record conclusively established respondent's commission of moral turpitude by routinely engaging in corrupt acts. Respondent allowed gifts and favors he accepted to repeatedly influence his judicial acts and often accompanied this behavior with improper ex parte contacts with parties or counsel. He also sought to conceal his behavior, including advising another to make up information that was not true. The hearing judge also found that respondent's actions caused serious harm to the administration of justice and was more reprehensible than if respondent had acted only as an attorney.

The hearing judge noted respondent's discipline-free practice in California since 1990, his commitment to community service, and his expression of some regret for his behavior. However, the hearing judge concluded that this evidence fell short of demonstrating adequate rehabilitation to warrant less than disbarment since respondent has continued to deny all of the very serious acts that led to his license revocation in Michigan. Weighing and balancing considerations bearing on discipline, the hearing judge concluded that disbarment was the only appropriate discipline.

Just prior to oral argument before us, respondent moved that we take judicial notice of additional character evidence. We decline to do so and have not considered that evidence.

II. DISCUSSION.

A. Statutory Framework.

[1a] This matter is before us under section 6049.1, providing an expedited, streamlined disciplinary proceeding in this state when an attorney has been disciplined by another state or federal jurisdiction. Because this is the first such proceeding to come before us, we describe briefly the relevant framework.

[1b] Section 6049.1 became effective in January 1986. With two exceptions, it provides that a certified copy of another jurisdiction's final attorney disciplinary order conclusively establishes that a California attorney is culpable of professional misconduct in California. In brief, the exceptions are whether, as a matter of law, the misconduct found in the other jurisdiction would not warrant imposing discipline in California and whether the other jurisdiction's proceedings lacked fundamental constitutional protection. The attorney bears the burden to establish that the exceptions do not warrant imposing discipline. (§ 6049.1, subds.(a) and (b).) The only other issue open under this proceeding is the degree of discipline to impose. (§ 6049.1, subd.(b)(1).)

[1c] The statute also provides that discovery need not be afforded unless the State Bar Court so orders on a showing of good cause (§ 6049.1, subd.(c)), and that a certified copy of any part of the record of the other jurisdiction's proceedings may be admitted in evidence in this proceeding. (§ 6049.1, subd.(d).) Pursuant to section 6049.1, subdivision (b), the State Bar's Board of Governors is authorized to adopt implementing rules, and the Board has adopted simple rules consistent with the statute, declaring the proceedings expedited. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rules 620-625.) Reviewing the applicable law as a whole, there are two issues in this expedited proceeding: 1) whether the California attorney has sustained his or her burden to establish that final attorney discipline in another state, territory or the federal system should not result in finding culpability in this proceeding; and 2) the appropriate degree of discipline. We shall discuss each issue in turn.

B. Respondent's culpability.

As he did throughout his Michigan attorney disciplinary proceedings, respondent levied many procedural arguments from the earliest stages in this proceeding. When the hearing judge determined that the record of discipline imposed in Michigan conclusively established respondent's culpability here, he sought our interlocutory review. Following our upholding of the hearing judge's determination, he has continued his many procedural and other attacks on the findings of his culpability.

We hold that respondent has clearly not sustained his burden to show that culpability should not be found. The Michigan board revoked respondent's law license after extensive hearings by its hearing panel in which respondent testified. The Michigan board considered a full evidentiary record, which established respondent's serious misconduct while a Michigan judge. The Michigan Supreme Court independently reviewed the record of Michigan judicial disciplinary proceedings, finding respondent culpable of corrupt and improper judicial conduct on "overwhelming evidence." (*In re Jenkins*, *supra*, 437 Mich. at p. 19 [465 N.W. 2d at p. 317].) The Michigan high court also considered and rejected as meritless respondent's constitutional and legal arguments. (*Id.* at pp. 24-29 [465 N.W.2d at pp. 321-323].) From the State Bar Court hearing judge's 31-page decision, and the record on which it rests, it is clear that despite respondent's contentions to the contrary, his procedural arguments below have been fairly and fully considered throughout. Respondent has shown no constitutional unfairness, and his culpability found in Michigan would compel a finding of culpability in California.

Before proceeding to the one remaining issue, the appropriate degree of discipline, we resolve respondent's essential procedural arguments he urges on this review.

[2] Respondent objects to giving conclusive weight to the Michigan proceedings, since they were adjudicated under a lower standard of proof than that required in California. Respondent's license revocation and judicial removal were judged under standards requiring only a preponderance of evidence to find him culpable of judicial misconduct. (*In re Jenkins*, *supra*, 437 Mich. at p. 18 [465 N.W. 2d at p. 319]; see also *Grievance Administrator v. Jenkins* (Mich. Atty. Discipline Bd., Mar. 18, 1994, 90-139-GA) at p. 1.) However, as noted, *ante*, the Michigan Supreme Court considered the evidence of respondent's culpability overwhelming; and, in any event, the record of this proceeding contains ample evidence that was received in the Michigan proceedings to permit us to independently determine that sufficient evidence is present to clearly and convincingly establish respondent's culpability in California. Respondent's argument lacks merit.

[3] Respondent claims that section 6049.1 was retroactively applied to his conduct. We disagree. Respondent concedes that his wrongful acts occurred between 1984 and 1987. In addition, as we noted, *ante*, the Michigan Supreme Court found overwhelming evidence that, between 1984 and 1987, respondent "systematically and routinely sold his office and his public trust and committed acts [of misconduct]." (*In re Jenkins*, *supra*, 437 Mich. at p. 19 [465 N.W. 2d at p. 319].) Thus, since over a year of his continuing (i.e., systematic and routine) misconduct was committed after the 1986 effective date of section 6049.1, that statute was not retroactively applied to him. (Cf. *People v. Grant* (1999) 20 Cal.4th 150, 156-158 [criminal sentencing statute may apply to continuous course of conduct occurring before and after statute's effective date].)

[4] Next, respondent levies many attacks against section 6049.1, claiming it unconstitutionally infringes on judicial power and is otherwise beyond legislative power. Respondent's arguments are, again, without merit. The statute gave respondent a full opportunity to litigate the issue of whether the Michigan discipline should be conclusive of his culpability in this proceeding. Of course, the Supreme Court is never bound by a legislative enactment in exercising its inherent functions in attorney discipline. (See, e.g., *In re Rose* (2000) 22 Cal.4th, 430, 452-453.) However, the Supreme Court has upheld a statute authorizing an expedited proceeding to enroll an attorney inactive prior to the adjudication of the merits of disciplinary charges (*Conway v. State Bar* (1989) 47 Cal.3d 1107 [upholding § 6007, subd. (c)].) Moreover, the court rules or laws of many other jurisdictions provide for streamlined proceedings when an attorney has been disciplined elsewhere[4] and several states pro-

4. Among representative authorities see Colorado Rules of Civil Procedure, rule 251.21; Rules Governing the District of Columbia Bar, rule XI, section 11; Rules Regulating the Florida Bar, Rule 3 - 4.6; Kentucky Supreme Court Rules, rule 3.435(4); Rules of the Supreme Judicial Court of Louisiana, rule XIX, section 21(D), Maryland Rules of Court, rule 16-710(c); Rules of the Supreme Judicial Court of Massachusetts, rule 4.01, section 16; and, Minnesota Rules on Lawyers Professional Responsibility, rule 12(d).

vide for less discretion in setting the degree of discipline than our section 6049.1 allows. (See, e.g., *In re Disciplinary Action Against Morin* (Minn. 1991) 469 N.W.2d 714, 716-717 [Minnesota Supreme Court will defer to degree of discipline imposed by sister state unless certain exceptions are met]; *People v. Bengert* (Colo. 1994) 885 P.2d 241, 242 [Colorado Supreme Court will generally impose same degree of discipline as ordered in other state unless certain exceptions are met].) In this proceeding, the issue of discipline was completely open for litigation. (§ 6049.1, subd.(b)(1).)

[5] Finally, respondent points out that he was not found guilty of criminal charges based on the identical facts underlying his Michigan discipline. However, petitioner's claim is unavailing, for it is well settled in California that dismissal or acquittal of criminal charges does not bar disciplinary proceedings covering the same facts. (*Wong v. State Bar* (1975) 15 Cal.3d 528, 531, and cases there cited.)

C. Degree of Discipline.

We hold that the hearing judge appropriately considered all relevant factors in recommending disbarment. (See, generally, *Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) He gave considerable weight to respondent's community service and desire to help those less fortunate in the community and some weight to character evidence even though the witnesses were not aware of the extent of respondent's culpability as found in Michigan. We also agree with the hearing judge's assignment of only moderate weight to the tragic loss of respondent's wife and other family members. The hearing judge noted that some of respondent's misconduct continued several years after the death of his wife. But, as stressful and sympathetic as such personal tragedies are, they cannot serve to excuse conduct that is patently corrupt or dishonest. (Accord, *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073.) The hearing judge also noted favorably the passage of time without apparent ethical problems in California. But he correctly concluded that respondent's judicial misconduct was so serious and showed such a deep lack of understanding of the duties of a judge or attorney that disbarment was the appropriate discipline. One of the cases the hearing judge cited as guiding toward disbarment, is especially persuasive, *Sands v. State Bar*, *supra*, 49 Cal.3d 919. Although Sands was found culpable of three counts of offenses to clients, he was also found to have given four $100 bribes to a motor vehicle department hearing officer at paid lunches and to have received favorable action for his clients thereafter. The Supreme Court ordered disbarment, rejecting Sands' arguments, similar to respondent's here, that there was no clear evidence that specific payments to the hearing officer were consideration for specific action. (*Id.* at pp. 929-931.)

Respondent cites several decisions allowing judges removed in California to practice law.[5] However, before the Supreme Court will allow a removed judge to practice law, the Court must be satisfied that the judge's conduct did not involve moral turpitude, dishonesty, or corruption proscribed by section 6106. (*Gonzales v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 378; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 707-708.) The present case involved all three of those elements of section 6106 and was clearly more serious than any of the cases respondent cites or any other California case we have found where the removed judge was allowed to practice law.

Respondent also contends that there is ample evidence of rehabilitation in his practice of law in California to warrant less than disbarment here. We disagree for the same reason that the hearing judge rejected respondent's argument. Throughout these proceedings and despite the passage of ample time since the Michigan proceedings, respondent has failed to demonstrate that he understands the magnitude and severity of his misconduct found in the Michigan decision to revoke his law license.

5. *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 914-915; *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 199; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 802-803).

III. RECOMMENDATION.

For the foregoing reasons, we adopt the decision of the hearing judge and his recommendation that respondent Leon Jenkins 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 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 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 and that such costs be payable in accordance with section 6140.7.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DANIEL M. CHESNUT

A Member of the State Bar

No. 96-O-00544

Filed October 25, 2000

SUMMARY

The hearing judge found respondent culpable of falsely representing to two judges that he had personally served an opposing party in a family law matter with a summons and complaint in violation of Business and Professions Code sections 6068, subdivision (d), and 6106, and recommended that respondent be suspended from the practice of law for two years, stayed, and be placed on probation for three years on conditions, including nine months' actual suspension. (Hon. Michael D. Marcus. Hearing Judge.)

Respondent requested review arguing that there was no clear and convincing evidence establishing that he made a false representation, and that even if there was, he was not culpable of the charged offenses as the alleged representations were not material to the family law proceedings. Respondent further asserted that, even if culpability was established, the actual suspension should not exceed 60 days.

The review department concluded that respondent was culpable of the charged offenses. Finding less aggravation than did the hearing judge and considering the record as a whole, the review department also concluded that the actual suspension should be reduced to six months, but otherwise adopted the recommended discipline.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Michael E. Wine

HEADNOTES

[1 a-c] 119 Procedure–Other Pretrail Matters
130 Procedure–Procedure on Review
135.50 Procedure–Defaults and Trials
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers

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148 Evidence–Witness
162.11 Proof–State Bar's Burden–Clear and Convincing
166 Independent Review of Record
194 Statues Outside State Bar Act

Rule 219 of the Rules of Procedure of the State Bar provides that, after the party with the burden of proof has rested, the opposing party may move for a determination that the party with the burden of proof has failed to meet that burden. In deciding the motion, the hearing judge is required to consider all the evidence introduced, weigh that evidence and make determinations of credibility. The review department held that the hearing judge's ruling on a motion made pursuant to rule 219 is reviewable on plenary review under rule 301 of the Rules of Procedure of the State Bar and that such review is de novo. The review department must determine, based upon its independent review of the evidence before the hearing judge at the time the motion was made, whether clear and convincing evidence was presented of each element of the charged offenses. In deciding these issues, the review department must give great weight to the hearing judge's credibility determinations.

[2] **161 Duty to Present Evidence**
162.20 Proof–Respondent's Burden
164 Proof of Intent
213.40 State Bar Act–Section 6068(d)

The good faith of an attorney in making a false statement is a defense to the charge of violating Business and Professions Code section 6068, subdivision (d). As a defense, respondent had the burden of proving that he acted in good faith and he failed to meet that burden.

[3] **213.40 State Bar Act–Section 6068(d)**
221.00 State Bar Act–Section 6106

Business and Professions Code section 6068, subdivision (d) requires attorneys to refrain from misleading and deceptive acts without qualification. An attorney need not utter an affirmative falsehood in order to violate section 6068, subdivision (d). Concealment of a material fact misleads a judge just as effectively as a false statement. No distinction can therefore be drawn among concealment, half-truth, and false statement of fact. Respondent's unqualified and unequivocal statements to the judges that he served John under circumstances that should have caused him at least some uncertainty were, at a minimum, deceptive, in violation of Business and Professions Code sections 6068, subdivision (d) and 6106.

[4 a-d] **147 Evidence–Presumptions**
164 Proof of Intent
213.40 State Bar Act–Section 6068(d)

Respondent's argument is that a misrepresentation to a court is not material unless it successfully misleads the court is contrary to the express wording of Business and Professions Code section 6068 subdivision (d), which provides that it is the duty of an attorney to never seek to mislead a judge by a false statement of fact or law. The conduct denounced by this statute is not the act of an attorney by which he successfully misleads the court, but the presentation of a statement of fact, known by him to be false, which tends to do so. It is the endeavor to secure an advantage by means of falsity which is denounced. Whether respondent violated section 6068, subdivision (d) depends first upon

whether his representation to the court was in fact untrue, and second, whether he knew that his statement was false and he intended thereby to deceive the court. With regard to whether respondent intended to deceive the court, the presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of section 6068, subdivision (d). Respondent's statements to the two courts were in fact untrue and he knew they were untrue. Thus, it is presumed that the statements were made with an intent to secure an advantage. No credible evidence rebutted this presumption.

[5] **795 Mitigation–Other–Declined to Find**

No mitigating credit was given to any changes respondent made to his office practices as the changes would not prevent similar misconduct, where, as here, the misconduct resulted from moral deficiency, not faulty office procedures.

ADDITIONAL ANALYSIS

Culpability
- Found
  - 213.41 Section 6068(d)
  - 221.11 Section 6106–Deliberate Dishonest/Fraund

Aggravation
- Found
  - 601 Lack of Candor–Victim
- Declined to Find
  - 582.50 Harm to Client

Mitigation
- Found
  - 765.10 Pro Bono Work
- Declined to Find
  - 715.50 Good Faith
  - 725.50 Emotional/Physical Disablity/Illness
  - 760.52 Personal/Financial Problems

Discipline
- 1013.08 Stayed Suspension–2 years
- 1015.04 Actual Suspension–6 months
- 1017.09 Probation–3 years
- Probation Conditions
  - 1024 Ethics Exam/School

Other
- 543.90 Bad Faith, Dishonest
- 595.90 Indifference
- 760.59 Personal/Financial Problems

OPINION

OBRIEN, P.J.:

We review the recommendation of a hearing judge that respondent Daniel M. Chesnut be suspended from the practice of law in this state for two years, execution of which be stayed, and that he be placed on probation for three years on conditions, including nine months' actual suspension. Respondent was admitted to the State Bar in April 1991 and, as detailed below, was previously disciplined by the Supreme Court in April 1996. In the present case, the hearing judge found respondent culpable of falsely representing to two judges that he had personally served an opposing party in a family law matter with a summons and complaint in violation of Business and Professions Code sections 6068, subdivision (d), and 6106.[1]

Respondent requested review arguing that there is no clear and convincing evidence establishing that he made a false representation, and that even if there is, he is not culpable of the charged offenses as the alleged representations were not material to the family law proceedings. Respondent further asserts that, even if culpability is established, the actual suspension should not exceed 60 days. The State Bar, represented by the Office of the Chief Trial Counsel, asserts that the hearing judge's decision, including the discipline recommendation, is supported by the record.

We have independently reviewed the record and conclude that respondent is culpable of the charged offenses. Finding less aggravation than did the hearing judge and considering the record as a whole, we also conclude that the actual suspension should be reduced to six months, but otherwise adopt the recommended discipline.

CULPABILITY

1. FINDINGS AND CONCLUSIONS

In 1995 John and Daisy Palella[2] were husband and wife and were living in Texas with their three minor children. They had lived in California previously and owned a two-unit residential rental property (the rental property) here. In October 1995, Daisy moved with the three children back to California. John remained in Texas. Respondent is an attorney and was also, during the relevant time period, a full-time high school teacher here in California. In October 1995, Daisy hired respondent to represent her in dissolving the marriage, and respondent thereafter filed a dissolution petition on Daisy's behalf in California.

On November 5, 1995, John traveled to Los Angeles to pick up the rent from Gustavo Lopez, a tenant occupying the front unit of the rental property. John met with Mr. Lopez early on the morning of November 6 and was paid the rent. John then went to the airport for his flight back to Texas. His plane departed from Los Angeles at 12:04 p.m. on November 6, and he arrived in Texas at 5:16 p.m. the same day.

Mr. Lopez was in his living room in the front corner of the rental property from around 9:30 a.m. until the end of the day on November 6. He did not go outside his home and he did not see or hear anyone enter the property that afternoon. There were no other males at the rental property during the afternoon on November 6.

Daisy learned on November 6 that John was in Los Angeles and might be at the rental property. She telephoned respondent and left a message on his answering machine informing him that John was in town and could be served with the dissolution papers at the rental property.

Respondent testified that he went to the rental property around 2:00 p.m. on November 6 and saw a man who resembled John; that he approached the man and said "Mr. Palella or John Palella or something like that" as he handed the man the dissolution pleadings; that the man did not respond to him and looked somewhat surprised; and that he (respondent) then went back to his office. The hearing judge found that respondent's testimony was not credible and he

1. All further references to sections are to the Business and Professions Code.

2. For convenience, we hereafter refer to Mr. and Mrs. Palella as John and Daisy.

concluded that respondent did not serve John or anyone resembling John on November 6 and did not go the rental property on that day.

John, through Texas counsel, filed a dissolution action in Texas in November 1995, and a hearing was set in that action in December 1995. John, John's Texas attorney, Daisy, and respondent appeared at the hearing. Respondent told the Texas judge that a dissolution proceeding was filed in California before the Texas action and that he had personally served John on November 6 in California. After seeing John in court at the Texas hearing, respondent told Daisy that John "looked different."

In February 1996, John, John's California attorney, Daisy, and respondent appeared in Los Angeles Superior Court in the California proceeding. Respondent told the California judge that he had personally served the dissolution pleadings on John on November 6 at the rental property.

The two-count notice of disciplinary charges alleged in count one that, by stating to the Texas and California judges that he had personally served John on November 6 with the California dissolution pleadings, respondent sought to mislead the judges by a false statement of fact in wilful violation section 6068, subdivision (d). Count two alleged that, by repeating the same false statement to each of the two judges, respondent committed acts of moral turpitude in wilful violation of section 6106.[3] The hearing judge found respondent culpable as charged.

2. DISCUSSION

Respondent's contends on review (1) that the hearing judge erred in denying his motion to dismiss the proceeding; (2) that there is no clear and convincing evidence showing that he did not serve John on November 6; (3) that there is no clear and convincing evidence establishing that his statements to the two judges were "knowingly" false; and (4) that even if he made the charged misrepresentations to the judges, his statements were not material to the proceedings and therefore he is not culpable.

[1a] Respondent's motion to dismiss the entire matter was made pursuant to rule 219 of the Rules of Procedure of the State Bar, tittle II, State Bar Court Proceedings.[4] As relevant here, that rule provides that, after the party with the burden of proof has rested, the opposing party may move for a determination that the party with the burden of proof has failed to meet that burden. In deciding the motion, the hearing judge is required to "consider all the evidence introduced, weigh that evidence and make determinations of credibility." (Rule 219(b).) The State Bar questions whether the denial of a rule 219 motion is reviewable on plenary review. We have not previously considered this issue.

[1b] Rule 219 is substantially similar to Penal Code section 1118 and Code of Civil Procedure section 631.8. As relevant here, both statutes provide that in cases tried by a court without a jury, the defendant may move for an acquittal or judgment of one or more of the charges or causes of action after the plaintiff has rested. In determining the motion, the statutes require the trial court to weigh the evidence then before it, evaluate the credibility of witnesses, and determine whether the plaintiff failed to meet the applicable burden of proof. (*In re Andre G.* (1989) 210 Cal. App.3d 62, 66; *People v. Partner* (1986) 180 Cal. App.3d 178, 183; *Roth v. Parker* (1997) 57 Cal. App.4th 542, 549-550.) The standard of appellate review that applies to rulings made under both statutes is whether there is substantial evidence of the existence of each element of the charge or charges. (*People v. Ceja* (1988) 205 Cal. App.3d 1296, 1301; *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal. App.4th 517, 528; *Jordan v. City of Santa Barbara* (1996) 46 Cal. App.4th 1245, 1254-1255.) The sufficiency of

3. Count two also alleged that respondent violated section 6106 by making the same false statement to a State Bar investigator. The hearing judge granted respondent's motion to dismiss this part of count two as the State Bar presented no evidence of a misrepresentation to an investigator. The parties do not contest this dismissal on review and we adopt it without further discussion based on our independent review of the record.

4. Unless otherwise noted, all further references to rules are to these Rules of Procedure.

the evidence is tested as it stands at the time the motion is made. (*People v. Ceja, supra,* 205 Cal. App.3d at p. 1301; *People v. Mobile Oil Corp.* (1983) 143 Cal. App.3d 261, 274-275.) Thus, on review of a trial judge's ruling on the motion in the criminal and civil context, the appellate court determines, applying the standard of review applicable in review of appeals of final judgments, whether, at the time the motion was made, sufficient proof was presented of each element of the charge or charges.

[1c] State Bar disciplinary proceedings are of a nature of their own and are not governed by the rules of procedure governing criminal and civil litigation. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226.) Nevertheless, we may look to those rules for guidance. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) In view of the similarity between rule 219 and Penal Code section 1118 and Code of Civil Procedure section 631.8, we interpret our rule of procedure to apply in the same manner as the criminal and civil statutes.[5] Accordingly, we hold that the hearing judge's ruling on a motion made pursuant to rule 219 is reviewable on plenary review under rule 301 and that our review of that ruling is de novo, which is the standard of review we apply to appeals of "final judgements" (i.e., orders and decisions that fully dispose of a proceeding). (See rule 301.) Based upon our independent review of the evidence before the hearing judge at the time the motion was made, we must determine whether clear and convincing evidence was presented of each element of the charged offenses. In deciding these issues, we must give great weight to the hearing judge's credibility determinations. (See rule 305(a).)

The evidence presented by the State Bar in its case-in-chief included the testimony of John and his mother, who testified that they were on an airplane at 2:00 p.m. on November 6; respondent, who testified that he was in his law office alone on November 6 when he spoke to Daisy and that he went to the rental property and served John or someone resembling John at 2:00 p.m.; John's Texas attorney, who testified that respondent was unequivocal in his assertion to the Texas judge that he had served John; and the principal of respondent's school, who testified regarding school attendance records. The transcripts of the Texas and California proceedings were introduced as well as other documentary evidence showing that John and his mother were on an airplane when John was allegedly served. Teacher attendance records were also introduced showing that respondent was not absent from school for a full day on November 6. In denying the motion to dismiss, the hearing judge concluded that respondent's testimony that he served John or someone resembling John was not truthful and that in fact, respondent was at school all day on November 6 and did not serve John or anyone.

Viewing the evidence independently, we conclude that clear and convincing evidence of respondent's culpability of the charged offenses was presented in the State Bar's case-in-chief. Respondent's testimony was that he was alone at his office. The teacher attendance records, which respondent signed, showed that he was not absent a full day. No evidence had been introduced at this point showing that respondent was at school only part of the day on November 6. Thus, the evidence in the record at the time the rule 219 motion was made indicated that respondent was either in his law office on November 6 or at school teaching. The hearing judge found the latter more credible. As John was on an airplane when he was allegedly served and as respondent was at school and therefore could not have served John or anyone else, respondent's statements to the two judges were knowingly false.

Although detailed, respondent's next two arguments are in essence simply that the hearing judge should have found respondent's version of the events credible. Respondent's version was that he went to the rental property and served John or someone resembling John. The State Bar's version was that respondent did not serve John or anyone else.

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5. We need not and do not decide in this case whether dismissal of a disciplinary proceeding where serious misconduct was proven subsequent to a rule 219 motion would be consistent with the goals of protecting the public, courts, and profession.

Respondent "take[s] issue" with some of the inferences drawn by the hearing judge in assessing respondent's credibility. We agree that some of the inferences, such as the inferences drawn from respondent's failure to have Daisy accompany him to serve John and from respondent's failure to produce a picture of John given to him by Daisy, are not supported by the record. Further, we note that reliance on questionable inferences can seriously undermine confidence in the hearing judge's over-all assessment of credibility. Nevertheless, the hearing judge's decision affirmatively demonstrates that his credibility determinations were not based solely on his consideration of these questionable inferences. Respondent does not argue otherwise. In any event, ample evidence supports the conclusion that respondent's testimony that he went to the property and served John or someone was not credible.[6]

Respondent's testimony regarding the events of November 6 was evasive and inconsistent, which alone supports the hearing judge's adverse credibility conclusion. (See Evid. Code, § 780.) During the State Bar's case-in-chief, respondent testified that he "believed" he was in his law office on November 6 at noon, but that it was "almost two years ago" and "as I sit here today, I can't remember where I was on November 6th." He also testified that he "believed" Daisy called his office that day, but he could not recall the exact time that he talked to her and he was not sure how long he spoke to her. However, respondent was sure that he was the only person in his office when he spoke to Daisy on November 6.

Respondent's memory apparently improved significantly during the course of the State Bar trial as he later gave a detailed account of his asserted whereabouts and actions on November 6. This later testimony included respondent's assertions that he was in his law office interviewing another client, Walker, when Daisy called, that he interrupted his interview to speak to her, and that he spoke to her "20 minutes maybe at the most."

Other evidence also supports the credibility determination. Respondent testified that he spoke to another attorney regarding the Walker matter on the telephone on November 6. He also testified that he was teaching school that day and had to arrange for another teacher to cover his classes for him so he could leave school to serve John. Respondent could not remember the identity of the other teacher. Other than a copy of a facsimile (fax) that lacked a date stamp, a copy of his calendar with a handwritten notation of the Walker appointment, and a copy of a request for production of documents in the Walker matter that required production at respondent's office at 4:00 p.m. on November 6, respondent presented no evidence corroborating his testimony.[7]

Daisy testified that she first called respondent on November 6 around 1:00 p.m., that she was not able to reach him, and that she left a voice mail message for him. Daisy thought she called respondent's office around three times on that day and was not sure if she ever spoke to respondent directly.[8]

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6. Although we have not considered the inferences mentioned in footnote 6 of respondent's opening brief in assessing respondent's credibility, the facts from which the inferences were derived are relevant and appropriate facts to consider, albeit varying greatly in weight, in determining credibility.

7. We have not considered the information derived by the hearing judge by way of judicial notice regarding "commonplace" data found on fax copies, nor have we considered the inferences drawn by the hearing judge from that information. (See *Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925 ["This court may take judicial notice that there are many kinds of copying machines utilizing different processes. In the absence of evidence it may not take judicial notice that a particular photostat was made from an unstapled original."].) Regardless of what information may or may not be "commonly" found on a fax, the lack of a date stamp on the fax that respondent introduced into evidence is relevant to the weight to be accorded this evidence as corroboration of respondent's version of the events of November 6.

8. Respondent introduced into evidence a declaration signed by Daisy in 1996 in which she stated that respondent answered the telephone when she called around 1:00 p.m. At the State Bar Court trial, Daisy testified as indicated in the text above and was sure that she did not speak to respondent directly when she first called around 1:00 p.m. The declaration was prepared by respondent, apparently for use in the California dissolution proceeding. The hearing judge's factual findings indicate that he found that Daisy's testimony at the State Bar Court trial was the more credible. We agree.

Respondent had never seen John before November 6, 1995. Daisy had given him a photograph of John that was taken in 1990. Respondent testified that the person he served "resembled" the person in the photograph. Respondent also testified that, at the Texas hearing, he commented to Daisy that John "looked different." Yet, at that Texas hearing and at the later California hearing, respondent told the judges without equivocation that he had served John.

John traveled to Los Angeles with his mother. Both testified that they did not go to the rental property on November 6 and that they were on an airplane on their way back to Texas by approximately noon on that day. In addition, the State Bar presented corroborating documentary evidence showing when the airplane departed Los Angeles and showing that John and his mother were on the airplane. Mr. Lopez testified that he was at his residence from about 9:45 a.m. through the remainder of the day on November 6; that he was, except when he used the bathroom, in a position to see his front door and the entrance to the property and to hear someone enter the property; and that he did not see or hear anyone enter the property that afternoon. Based on the above, we agree with the hearing judge that respondent's testimony that he went to the rental property on November 6 and served John or someone resembling John is not credible.

Respondent argues, correctly, that disbelieving his testimony does not establish that he did not go to the rental property and serve someone. [2] In essence, respondent's argument is that he is not culpable of the charged misconduct because, even if he did not serve John, he served someone resembling John and therefore his statements to the two judges were made in good faith. We have implicitly recognized that good faith of an attorney in making a false statement is a defense to the charge of violating section 6068, subdivision (d). (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280; see also *Vickers v. State Bar* (1948) 32 Cal.2d 247, 253-256 [attorney culpable of violating § 6068, subd. (d) where issue of his good faith in making false statement was determined adversely to him].) As a defense, respondent had the burden of proving that he served someone resembling John. As indicated above, respondent failed to meet this burden.

It is clear that respondent did not serve John as he was on an airplane at the time. In addition, Mr. Lopez's testimony was found credible by the hearing judge. As noted above, he was at the rental property during the relevant period of time. Mr. Lopez was recuperating from a work-related injury and was on his couch watching television. From that location, be could see the entrance to the property through his front door, which was open. Mr. Lopez would also have been able to hear people talking outside his home. He did not see or hear anyone enter the property that afternoon. No credible evidence was presented contradicting Mr. Lopez's testimony.

While the persuasiveness of the State Bar's evidence may very well have been reduced if it was rebutted by credible evidence, it was not. We are satisfied, based on the above and the record as a whole, that sufficient evidence was presented proving clearly and convincingly that respondent did not serve John or anyone else on November 6 and that his statements to the two judges were therefore knowingly false.[9]

We also note that even under respondent's version of the events, his culpability of the charged offenses is established. According to respondent, the person he served did not acknowledge he was John and looked surprised when respondent handed him the dissolution papers. Respondent made no attempt to verify that the person he allegedly served was in fact John. At the Texas hearing, respondent observed, outside the presence of the court, that John "looked different." In spite of any questions this observation may (and should) have created in his mind, respondent stated unequivocally in the California and Texas divorce hearings that he served John, and in the State Bar Court proceeding, respondent

9. We need not and do not adopt the hearing judge's finding that respondent did not leave school on November 6. Regardless of whether he was at school or in his office, no credible evidence was introduced showing that respondent went to the rental property and served anyone.

testified that he served John *or* someone resembling John.

[3] Section 6068, subdivision (d) requires attorneys "to refrain from misleading and deceptive acts *without qualification*. [Citation.]" (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315 [emphasis added].) An attorney need not utter an affirmative falsehood in order to violate section 6068, subdivision (d). (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.) Concealment of a material fact misleads a judge just as effectively as a false statement. (*Ibid.*) "No distinction can therefore be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) Respondent's unqualified and unequivocal statements to the judges that he served John under circumstances that should have caused him at least some uncertainty were, at a minimum, deceptive, in violation of sections 6068, subdivision (d) and 6106.

[4a] Respondent's last argument regarding culpability is that service of the dissolution papers was not a material issue in either the Texas or California proceedings and therefore he is not culpable of violating either section 6068, subdivision (d) or section 6106. Although the issue of whether John was personally served was before both Courts, neither judge resolved it. In the Texas proceeding, the judge severed the custody and support issues from the marriage termination issue, transferred the custody and support issues to the California proceeding, abated the marriage termination issue in Texas pending the outcome of the proceedings in California, and deferred the determination of whether John had been served in the California proceeding to the California courts. In the California proceeding, John filed a motion to quash service of the summons on the ground that he had not been served. The California judge denied the motion because he determined that he had personal jurisdiction over John in California as John had substantial contacts, including ownership of property, in California. The judge did not decide whether respondent served John.[10] The two judges spoke by telephone and agreed that California was the proper place to decide the custody and support issues.

[4b] Respondent cites *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, in support of his argument that his misrepresentations were not material. In *Farrell*, we noted that in a prior case we had accepted the State Bar's concession that, in order to violate section 6068, subdivision (d), a misrepresentation made to a tribunal must be material to the issues before the tribunal. (*Id.* at p. 497.) We concluded that Farrell's false statement to a judge that he had served a witness with a subpoena was material because it caused the court to delay a proceeding and was considered by the court in determining whether the witness disobeyed the subpoena. (*Ibid.*) Respondent postulates from this holding that, in order to be material, a false statement must have an "impact" on the proceedings before the tribunal.

[4c] In effect, respondent's argument is that a misrepresentation is not material unless it successfully misleads the court. This interpretation is clearly contrary to the express wording of the statute which provides that it is the duty of an attorney to never *seek to mislead* a judge by a false statement of fact or law. The Supreme Court long ago held that "[t]he conduct denounced by [section 6068, subdivision (d)] is not the act of an attorney by which he successfully misleads the court, but the presentation of a statement of fact, known by him to be false, which tends to do so. It is the endeavor to secure an advantage by means of falsity which is denounced." (*Pickering v. State Bar* (1944) 24 Cal.2d 141, 144-145.) Whether respondent violated section 6068, subdivision (d), "depends first upon whether his representation to the . . . court was in fact untrue, and secondly, whether he knew that his statement was false and he intended thereby to deceive the court." (*Vickers v. State Bar*, *supra*, 32 Cal.2d at pp. 252-253; see also *Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.) With regard to whether respondent intended to deceive the court, the Supreme Court has held that "[t]he presentation to a

10. When his motion to quash was denied, John converted his special appearance to a general appearance.

court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [section 6068, subdivision (d)]." (*Pickering v. State Bar, supra*, 24 Cal.2d at p. 144; see also *Davis v. State Bar, supra*, 33 Cal.3d at pp. 239-240.)[11]

[4d] In the present case, respondent's statements to the two courts that he had served John were in fact untrue and he knew they were untrue. Thus, it is presumed that the statements were made with an intent to secure an advantage. No credible evidence rebutted this presumption.

Even without consideration of the presumption, it's clear that respondent sought to secure an advantage in both forums. In the Texas proceeding, the only reasonable inference that can be drawn from respondent's conduct in telling the judge that John had been served in a pending California proceeding is that respondent sought to secure a determination from the Texas court that the case should be heard in California and not in Texas. In the California proceeding, the only reasonable inference that can be drawn from respondent's conduct in telling the judge that he had personally served John is that he intended to secure a determination that the motion to quash should be denied.

Based on the above, we conclude that the record establishes by clear and convincing evidence that respondent wilfully violated section 6068, subdivision (d). The hearing judge also concluded that the same facts underlying the section 6068, subdivision (d) violation constituted a violation of section 6106 as charged in count two. We agree with this conclusion. Because the same facts underlie both violations, the section 6106 violation is duplicative of the section 6068, subdivision (d) violation and we therefore have not given the section 6106 violation any weight in determining the appropriate discipline. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 435.)

DISCIPLINE

1. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Findings and Conclusions

In aggravation, the hearing judge found that respondent has a record of prior discipline. (Std. 1.2(b)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Rules Proc. of State Bar, title IV (standards).) In April 1996, the Supreme Court suspended respondent for one year, stayed execution of that suspension, and placed him on probation for a period of one year on conditions, including 15 days' actual suspension. That discipline was based on a stipulation to facts and disposition filed in October 1995. The stipulated facts show (1) that, in 1992, respondent filed a personal injury lawsuit on his own behalf and that, during the course of that action, he failed to pay court ordered discovery sanctions totaling $3,320 in wilful violation of section 6103; and (2) that, in response to an interrogatory, he failed to disclose that he had received prior medical treatment for chronic pain in his knee in wilful violation of rule 5-220 of the Rules of Professional Conduct of the State Bar and section 6068, subdivision (d). In mitigation, respondent had no record of prior discipline and his misconduct did not result in any harm. No aggravating circumstances were found.

The hearing judge also found that respondent's misconduct was surrounded by bad faith, dishonesty, and concealment (std. 1.2(b)(iii)); that the misconduct harmed the administration of justice by "making each court an unwitting party to [respondent's] fraud and subjecting each to potential ridicule or scorn" (std. 1.2(b)(iv)); that respondent's insistence in the California action that he had served John demonstrated his indifference toward rectification or atonement for the consequences of his misconduct (std. 1.2(b)(v)); and, citing standard 1.2(b)(vi), that respondent's continued assertion in the State Bar Court proceeding that he had served John demonstrated that he had not learned from his misconduct.

11. Any false statement made with the intent to secure an advantage is also, by its very nature, material to the person making the statement.

In mitigation, the hearing judge found that respondent's participation in extra-curricula school programs and the Army Reserve were pro bono community service activities and that respondent's character witnesses presented an extraordinary demonstration of good character (std. 1.2(e)(vi)).

Based on our independent review of the record, we conclude that the hearing judge's factual findings in aggravation and mitigation, as modified by the order filed October 21, 1998, are supported by clear and convincing evidence, and we adopt them. However, we modify the legal conclusions as discussed below.

B. Discussion

Respondent asserts that the conclusion in aggravation that his misconduct was surrounded by bad faith, dishonesty, and concealment is not supported by the record. We agree as we do not find any such conduct that is not duplicative of the conduct underlying culpability. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133.)

Respondent also takes issue with the hearing judge's conclusion that respondent's misconduct harmed the administration of justice. We conclude that any such harm was minimal at best and therefore is not "significant" harm as required by standard 1.2(b)(iv).

Respondent asserts that the hearing judge erred in finding that respondent's insistence in the California family law action that he had served John demonstrated indifference toward rectification or atonement for the consequences of his misconduct (std. 1.2(b)(v)) as that finding is duplicative of the misconduct underlying the culpability finding. We agree.

Respondent also argues that the hearing judge incorrectly found that his testimony in this proceeding lacked candor. The hearing judge, citing standard 1.2(b)(vi), found that respondent's continued assertion in the State Bar Court proceeding that he had served John demonstrated that he had not learned from his misconduct. Although this specific finding does not fall within the parameters of standard 1.2(b)(vi), the hearing judge also cited to *Selznick v. State Bar* (1976) 16 Cal.3d 704, 709, which held that lack of candor is an aggravating circumstance. Respondent's statements to the Texas and California judges that he served John were untruthful. Accordingly, respondent's testimony in this State Bar Court proceeding that he served John was also untruthful and therefore lacked candor.

We do not find persuasive respondent's arguments regarding the mitigating circumstances found by the hearing judge. Contrary to respondent's assertion, the hearing judge gave him mitigating credit for his Army Reserve activities. We agree with the hearing judge that, to the extent that respondent was compensated for this activity, he is not entitled to mitigating credit for *pro bono* community service. Also contrary to respondent's assertion, the hearing judge found that respondent's character witnesses presented an extraordinary demonstration of good character.[12] The hearing judge specifically noted that he did not devalue the weight of that showing, and neither do we.

We also agree with the hearing judge that respondent did not meet his burden of proving that any emotional difficulties he faced were directly responsible for the misconduct (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 515) or that any financial difficulties he suffered were extreme and the result of circumstances not reasonably foreseeable or beyond his control (*In re Naney* (1990) 51 Cal.3d 186, 196). [5] We agree with the State Bar that any changes respondent made to his office practices regarding service of pleadings will not prevent similar misconduct. The misconduct here resulted from moral deficiency, not faulty office procedures. (See *In the Matter of Lais* (Review

12. Eight character witnesses testified; respondent's commanding officer who is an attorney, three former students, an attorney who does contract work for respondent, a paralegal who also works for respondent, a fellow teacher who is an attorney, and another fellow teacher. All were generally aware of the misconduct in the present case and all testified favorably regarding respondent's good character.

Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 926 [mitigating credit is appropriate only for reforms designed to prevent the type of misconduct that occurred].) Finally, serving John at a later date does not show that respondent's misrepresentations were made in good faith, nor does it show a spontaneous recognition of wrongdoing where, as here, respondent has not admitted to any wrongdoing.

In sum, we find respondent culpable of violating section 6068, subdivision (d) by misrepresenting to the Texas and California judges that he served John. In aggravation, we conclude that respondent has a record of prior discipline and that his testimony in the State Bar proceeding lacked candor. We find mitigating respondent's demonstration of good character and his pro bono activities.

2. DISCIPLINE

Respondent argues that he should receive "no more than sixty days actual suspension" if he is found culpable of the charged violations. The State Bar asserts that we should adopt the hearing judge's recommended discipline.

The hearing judge considered several cases on the issue of the appropriate discipline and the parties have cited numerous cases in support of their respective positions. Of the more recent cases, we find guidance from *Bach v. State Bar* (1987) 43 Cal.3d 848; *Davis v. State Bar*, *supra*, 33 Cal.3d 231; and *In the Matter of Farrell*, *supra*, 1 Cal. State Bar Ct. Rptr. 490. These cases involved circumstances more similar to the circumstances we have found in the present case and therefore represent a more appropriate range of discipline.

In *Bach*, the attorney was suspended for one year, stayed, and placed on probation for three years on conditions, including 60 days' actual suspension. Bach was found culpable of misleading a judge by falsely stating that he had not been ordered to have his client appear for a family law mediation. Bach had a record of prior disciplined, having been publically reproved for communicating with a an adverse party represented by counsel. Respondent's misconduct and his prior discipline distinguish his case from *Bach*.

In *Farrell*, the attorney was suspended for two years, stayed, and placed on probation for three years on conditions, including six months' actual suspension. Farrell had been found culpable of falsely stating to a judge that he had a witness under subpoena and of failing to cooperate with the State Bar in its investigation of the misconduct. In mitigation, Farrell believed that a subpoena had been prepared and sent out for service by his staff, but had no basis for believing that the subpoena had in fact been served. Farrell had a record of prior discipline for improper business transactions with a client and for abandonment of a client. That prior discipline resulted in two years' stayed suspension and two years' probation on conditions, including 90 days' actual suspension.

In *Davis*, the attorney was suspended for three years, stayed, with three years' probation and one year's actual suspension. Davis wilfully failed to perform legal services competently and falsely denied that he represented a client in his verified answer in a malpractice action. Davis had been previously disciplined on two occasions. In one of the prior matters, Davis was suspended for two years, which was stayed, and was placed on probation without any actual suspension for failing to perform services competently, misleading a client, and commingling funds. In the other prior matter, Davis was suspended for one year, stayed, and placed on probation without actual suspension for failing to perform legal services competently.

Like *Davis*, respondent's prior discipline involved similar misconduct. Respondent stipulated in October 1995 in his prior discipline proceeding that he engaged in a misleading act. Less than three months latter in December 1995 he was again engaging in deception in the present case. Respondent's past and present misconduct show a disturbing willingness to employ deceitful means to accomplish his objectives. However, respondent's prior discipline is not as extensive as the prior discipline in *Davis*.

Although there are differences, on balance, we find that the circumstances in the present case are more similar to the circumstances in *Farrell* than the other cases. The misconduct here, which includes two separate acts of dishonesty, is more serious than

the misconduct *Farrell*, but Farrell's prior discipline, which resulted in 90 days actual suspension, is arguably more serious than respondent's prior discipline.

We are not unmindful of the mitigating circumstances here, but we do not find them to be overwhelming and we are not persuaded that they, when balanced with the aggravating circumstances, demonstrate that a lesser degree of discipline will accomplish the purposes of attorney discipline. The risk of future misconduct that results from respondent's several dishonest acts and his second time through the discipline system in less than 10 years of practice requires strong prophylactic measures.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Daniel M. Chesnut be suspended from the practice of law for a period of two years, that execution of the 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 we reduce the recommended actual suspension to six months.

We further recommend that respondent be ordered to comply with the requirements 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 in this matter.

We also recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and to furnish satisfactory proof of such passage to the State Bar's Probation Unit within one year after the effective date of the Supreme Court's order in this matter.

Finally, 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 section 6140.7 of that Code.

We Concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALAN W. JOHNSON

A Member of the State Bar

Nos. 96-O-05705 et al.

Filed October 26, 2000

SUMMARY

The Hearing Department found respondent culpable of all but one of the six charged matters and recommended that respondent be suspended for three years, stayed on conditions including actual suspension for six months and until he made specified restitution. (Hon. Nancy R. Lonsdale, Hearing Judge.)

The Review Department found culpability on all six of the charged matters and that the aggravating circumstances overwhelmed the near absence of mitigating factors. Accordingly, the Review Department recommended that respondent be suspended for five years, stayed, on conditions including five years probation and actual suspension for two years and until he makes specified restitution, completes six hours of approved continuing education in law-office management, develops a law office management plan and establishes his rehabilitation, present fitness to practice and present learning in the law.

COUNSEL FOR PARTIES

For State Bar: David C. Carr

For Respondent: Jeffrey A. Lowe

HEADNOTES

[1 a, b] 221.00 State Bar Act–Section 6106

Respondent committed an act of moral turpitude by signing his client's name to a declaration under penalty of perjury without her approval or without her even seeing the declaration in advance. Even if he had the client's authority to sign her name to the declaration, respondent would still he culpable of moral turpitude. Respondent's acts, particularly if it was determined that the client had not agreed to the text of the declaration he had prepared in her name, could have resulted in his prosecution for forgery, a crime involving moral turpitude.

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] **191 Effect/Relationship of Proceedings**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

The agreement between respondent and his client's subsequent counsel for respondent to refund $500 in unearned fees was sufficient to defeat the client's small claims suit against respondent to collect the advanced fee the client had paid him. Nonetheless, their agreement does not affect the ethical conclusion that respondent failed to earn any part of the fee paid.

[3 a-c] **143 Evidence–Privileges**
147 Evidence–Presumptions
213.50 State Bar Act–Section 6068(e)
213.60 State Bar Act–Section 6068(f)

Business and Professions Code section 6068 subdivision (e) is the most strongly worded duty binding on a California attorney. It requires the attorney to maintain inviolate the confidence and at every peril to himself or herself to preserve his client's secrets. The ethical duty of confidentiality is much broader in scope and covers communications that would not be privileged under the evidentiary attorney-client privilege. It prohibits an attorney from disclosing facts and even allegations that might cause a client or former client public embarrassment. The duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential. Respondent breached his client's confidence in violation of section 6068 subdivision (e) by disclosing to another, without good cause, that the client was a convicted felon, although the conviction was a public record, but not easily discovered. The client had communicated his status to respondent to aid respondent in effectively representing him. Even if respondent had not been charged with such a violation, the hearing judge could have concluded in aggravation of discipline that respondent's divulgence was of a fact prejudicial to his client in violation of Business and Professions Code section 6068, subdivision (f).

[4] **735.10 Mitigation–Candor–Victim–Found but Discounted**

Very limited mitigating weight is afforded on account of respondent's cooperation with the State Bar in entering into a factual stipulation covering background facts in most of the matters. More extensive mitigating weight is accorded those who, where appropriate, willingly admit their culpability as well as the facts.

[5] **159 Evidence–Miscellaneous**
221.00 State Bar Act–Section 6106

Respondent's production of verifications purporting to bear his client's signature but which were signed by a manipulated means involved dishonesty, an aggravating circumstance. Respondent engaged in moral turpitude whether he was grossly negligent in offering the verifications as signed by his client or prepared them intentionally to mislead. Although there is no direct evidence that respondent personally simulated his client's signature, he offered the documents to exculpate himself and he must bear responsibility for their altered nature.

ADDITIONAL ANALYSIS

Culpability
- Found
  - 214.31 Section 6068(m)
  - 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
  - 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
- Not Found
  - 213.95 Section 6068(i)
  - 221.50 Section 6106
  - 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation
- Found
  - 511 Prior Record
  - 521 Multiple Acts
  - 541 Bad Faith, Dishonesty
  - 561 Uncharged Violations
  - 582.10 Harm to Client
  - 611 Lack of Candor–Bar–Found

Mitigation
- Found but Discounted
  - 740.31 Good Character
  - 740.32 Good Character
  - 740.39 Good Character

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
  - 1025 Office Management
  - 1030 Standard 1.4(c)(ii)
  - 1091 Substantive Issues re Discipline–Proportionality

Other
- 175 Discipline–Rule 955
- 178.10 Costs–Imposed

OPINION

STOVITZ, J.:

Respondent Alan W. Johnson and the State Bar's Office of Chief Trial Counsel (State Bar) each seek our review in this attorney discipline case. A hearing judge found respondent culpable of all but one of the six charged matters and recommended that respondent be suspended for three years, stayed on conditions of a six-month actual suspension and until he made specified restitution. Respondent was admitted to practice law in California in December 1990, was publicly reproved effective January 8, 1997, and ordered to comply with certain duties. One of the six matters in the present record is the disciplinary proceeding arising out of his failure to comply with the duties of his earlier reproval.

Respondent claims that procedural error warrants reversal of the hearing judge's decision. The State Bar opposes respondent's claims arguing that we should increase the discipline to a two-year actual suspension for the misconduct found and its surrounding aggravation. Independently reviewing the record (Cal. Rules of Court, rule 951.5 (adopted Feb. 28, 2000); *In re Morse* (1995) 11 Cal.4th 184, 207), we determine that there is clear and convincing evidence to find respondent culpable in a sixth matter, that aggravating circumstances overwhelm the near absence of mitigation and that the appropriate discipline is a five-year stayed suspension on conditions of probation including a two-year actual suspension and until respondent makes restitution and provides the proof of fitness and rehabilitation required by standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Standards).

I. CULPABILITY FINDINGS AND DISCUSSION.

We now summarize the essential findings in each charged matter in order in which they appear in the hearing judge's decision. We shall also discuss the pertinent evidence and adopt the appropriate conclusions. At the outset, we note that many of the background facts were the subject of a stipulation of the parties or are otherwise not in dispute.

A. The St. John Matter.

1. Facts and findings.

We summarize the hearing judge's findings, augmented by evidence in the record. In 1993, Buffy St. John was sued in Municipal Court, South Bay Judicial District, by Colonial National Bank (Bank) over a credit dispute. In March 1996, in order to try to settle the matter, Bank's counsel sent St. John a copy of the summons and complaint and a stipulation for entry of judgment in Bank's favor. St. John never signed or returned these documents. On April 25, 1996, a default judgment was entered for Bank against St. John for $5,715.10, and on April 29, 1996, St. John retained respondent to set aside the default. St. John told respondent that Bank never personally served her with process, that Bank breached an agreement with a consumer credit organization to honor a payment schedule and that she owed Bank only about $750. Respondent's fee was a $1,000 "flat fee" to prepare the papers to set aside the default. Fees for added services were $150 per hour. St. John paid respondent's $1,000 fee.

Between April 15 and 17, 1996, St. John gave respondent two declarations not under penalty of perjury concerning the merits of her dispute with Bank. Between April and August of 1996, St. John tried repeatedly and unsuccessfully to reach respondent by phone. On August 8, she wrote respondent that he had not returned her many calls and informed him that she would complain to the State Bar. On October 2 and November 1, 1996, the State Bar wrote to respondent concerning St. John's complaint. On October 24, 1996, respondent filed in Municipal Court a motion to set aside the default. It was accompanied by a two-page declaration under penalty of perjury purportedly signed by St. John.[1] St. John's name was in fact signed on the declaration by respondent. Eleven days later, respondent wrote to

1. This declaration stated facts as to St. John's knowledge of attempted service, alleged that no co-occupant lived at her address at the time of service and set forth facts concerning the underlying credit dispute.

St. John enclosing the motion papers he filed on her behalf. He advised her that he had signed her name to the declaration and apologized for any failure to return her earlier calls.

Respondent tried to shorten time on his motion to set aside the default but was unsuccessful. He therefore obtained a hearing date and the motion was heard. On November 25, 1996, the civil court denied respondent's motion to set aside the default on the ground of respondent's failure to diligently seek relief. Meanwhile, on November 18, 1996, respondent wrote a nine page letter to the State Bar in answer to its two earlier letters. That same day, he and St. John attended a civil court hearing on his motion to set aside the default. That day, respondent got St. John's signature to the declaration, but did not file it with the court nor serve it on opposing counsel. Respondent took the position in responding to the State Bar investigation that St. John then told him that another person who lived at her address had been served with Bank's complaint just as Bank had contended.

The hearing judge noted that St. John did not testify in the State Bar Court hearings and that respondent denied that he had failed to communicate with St. John at all times. The hearing judge also noted respondent's testimony that St. John did not provide him with needed documents. Respondent also advanced a legal theory that he had more than six months from the entry of default to move to set aside the judgment. The hearing judge concluded that there was no clear and convincing evidence that respondent's failure to file the motion earlier was culpable conduct under rule 3-110, Rules of Professional Conduct of the State Bar.[2] The judge also concluded that the evidence fell short of clear and convincing that respondent failed to respond to St. John's reasonable status inquiries as required by Business and Professions Code section 6068, subdivision (m).[3] The hearing judge concluded that respondent was innocent of charges under rule 3-700(D)(2) that he failed to promptly refund fees he had not earned in representing St. John, since he did file papers and attended a court hearing to try to set aside the default judgment. Finally, the hearing judge concluded that although respondent admitted that he signed St. John's name to the declaration, he did not commit moral turpitude as charged because his testimony and statements that he had St. John's full authority to do so was unrebutted by her. The hearing judge also noted that respondent promptly sent St. John a copy of "her" declaration.

2. Discussion.

On review, the State Bar does not take issue with the hearing judge's dismissal of all charges in this matter, and respondent does not address the matter in his brief. On our independent review, we adopt the hearing judge's conclusions exonerating respondent of the charges that he failed to refund unearned fees and to proceed diligently. Yet we cannot agree with the hearing judge that respondent should be exonerated of the charges that he engaged in moral turpitude and failed to respond to reasonable status inquiries.

We give great weight to the findings of the hearing judge turning on her assessment of the credibility of witnesses. (See, e.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056; Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).) As we shall show, however, independently reviewing the record, our findings of respondent's failure to communicate adequately with St. John and his moral turpitude in misrepresenting as a declaration of his client one which was subscribed to by respondent were clearly established by the documentary evidence. That evidence included respondent's own writings to his client.

Because neither party raised these issues in their briefs, prior to oral argument, we notified the parties that we were considering the issues we now address. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(b).)

2. Unless noted otherwise, all references to rules are to the provisions of the Rules of Professional Conduct of the State Bar.

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

We conclude, contrary to the hearing judge's decision, that clear and convincing evidence exists that respondent violated section 6068, subdivision (m). The parties' stipulation admits that respondent received St. John's letter complaining that he had not returned St John's numerous messages. Respondent's November 4, 1996 letter to St. John expresses respondent's apology for any failure to return telephone messages "or to contact you." Respondent explained that he was out of his office on another case for "quite a lengthy period of time" except from the hours of midnight to 6:00 a.m. He stated further that he had found another law firm to take over the case that was taking up so much of his time and expected to be in his office on a regular basis "and available should you try and reach me." We regard this evidence as an admission by respondent that he was not only unavailable to St. John for an extended period of time, but also that he failed to communicate with her. In the circumstances, respondent wilfully violated section 6068, subdivision (m).

[1a] Regarding the charge of moral turpitude, we regard the documentary evidence as clear that respondent signed St. John's name to a declaration bearing her name without her approval or without her even seeing the declaration in advance. The parties' stipulation admits that respondent signed St. John's name to the declaration bearing her name. Respondent's November 4, 1996 letter to St. John was consistent. It enclosed for the first time, the papers he prepared for St. John. Respondent's greatest concern was that he did not simulate St. John's signature on the declaration as closely as her own handwriting.[4] Respondent never recited in his letter that he had her authority to sign her name and claimed he did it for expediency. He never explained why he could not have attempted to contact her later that morning even if he had determined that the declaration had to be filed that day. In respondent's November 19 letter to the State Bar, respondent claimed for the first time that St. John earlier authorized him to sign her name to a declaration that stated true facts, but respondent did not give any specifics as to when that authority was given and had no proof of it. However, as we shall discuss, even if respondent had St. John's authority to sign her name to this declaration, respondent would still be culpable of moral turpitude.

[1b] In the case of *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 858, the Supreme Court criticized an attorney offering a declaration under penalty of perjury which was not subscribed by the declarant. As the Court stated, "we cannot approve or condone a law office practice or procedure according to which the signature of a person making a sworn affidavit, declaration or other statement or making an unsworn declaration or other statement under penalty of perjury is subscribed by a person other than the one making the sworn or unsworn statement, as the case may be." (*Ibid.*) At best, respondent's claim that he merely stated facts in the declaration which he knew to be true, if credited, could warrant him preparing and signing his own declaration attesting to those facts, not signing another's name to a declaration bearing her name. Respondent's acts, particularly if it was determined that St. John had not agreed to the text of the declaration he prepared in her name, could have resulted in his prosecution for forgery (Pen. Code, § 470 subd.(a)), a crime involving moral turpitude. (See, e.g., *In re Bogart* (1973) 9 Cal.3d 740, 745.) We therefore reverse the hearing judge's contrary conclusion and conclude that respondent committed an act of moral turpitude.

B. The Burneff Matter.

1. Facts and findings.

In April 1996, a Mr. Burneff received a notice from the California Department of Motor Vehicles (DMV) that his California driver's license would be suspended effective September 18, 1996, pursuant to former section 11350.6 of the Welfare and Institutions Code (now see Family Code section 17520), because of his failure to pay court-ordered child

4. As respondent wrote to St. John on November 4, 1996, concerning this declaration: "You will note the signature on the Declaration may not resemble yours very closely, but since I was doing this at about 3:00 a.m. I was not able to come to your house to have you sign it. Also, I knew everything in there to be the truth and had to get it filed early that morning."

support.[5] Burneff agreed that an out-of-state court order directed him to pay spousal support, but no order directed him to pay child support. Also, Burneff had no children by the marriage involved in the court order.

On April 26, 1996, Burneff retained respondent to prevent the suspension of his license. Burneff paid respondent's $750 attorney fee by check and gave respondent the papers he had about the matter. Respondent said he would call the DMV and set up a hearing date with the district attorney's office. Respondent tried to call the DMV while Burneff met with him, but was unable to speak with anyone about the case.

After this April meeting, Burneff tried repeatedly to contact respondent about progress on the matter, but was unsuccessful. On June 28, 1996, Burneff came to respondent's office and gave respondent $750 in cash to replace the check he gave earlier, but which respondent said he was too busy to cash. Respondent told Burneff that, if he had cash, it should speed things along. In July and August, Burneff again had difficulty reaching respondent. In September 1996, Burneff was finally able to see respondent in his office. He requested a refund of the $750 and return of his file. Respondent agreed, but failed to follow through. Respondent also ignored Burneff's October 2, 1996, written request for a fee refund. In October, Burneff was able to recover his file from respondent, but it took a small claims judgment and a sheriff's levy for Burneff to recover his advanced fee. The hearing judge's findings recount the foregoing evidence. Further, the hearing judge found that respondent did no work for Burneff, and we agree with this finding. Burneff filed a complaint with the State Bar, and in January 1997, respondent wrote a six-page answer to the State Bar investigator looking into Burneff's complaint. Respondent's letter to the State Bar did not contend that he did any work for Burneff. Respondent offered several excuses for failing to proceed, including Burneff's first tendering a check for respondent's fee that was not valid and then in failing to provide respondent with needed documentation. Respondent's testimony was similar to his reply to the State Bar investigator. The hearing judge discredited respondent's testimony.

2. Discussion.

From the findings, the hearing judge concluded that respondent wilfully violated rule 3-110(A) by recklessly failing to provide competent services. The hearing judge observed that despite there being some urgency in resolving the proposed DMV suspension, respondent did nothing for Burneff. Further, the hearing judge concluded that respondent violated section 6068, subdivision (m) by failing to return Burneff's telephone calls between May and July and August and September 1996. The hearing judge noted that Burneff was only minimally successful in communicating with respondent when he stopped by his office. Respondent's failure to refund Burneff's unearned fees was a wilful violation of rule 3-700(D)(2). We agree with the hearing judge's findings and with these conclusions and find that they are established by clear and convincing evidence. Our review of the evidence shows that the documents Burneff gave respondent were sufficient by themselves to show that Burneff was not in breach of any court order for child support and that it should have been a relatively simple matter for respondent to pursue a resolution promptly with the appropriate district attorney's personnel. We also note that, on review, respondent does not take any issue with the evidence in the Burneff matter.

C. The Coleman Matter.

1. Facts and findings.

In 1993 Robert Coleman was facing eviction from his apartment. He retained respondent that

5. The DMV notice instructed Burneff that if he had any questions to contact the district attorney's family support office and not the DMV. The notice listed the address and telephone number of the district attorney's office handling the case and gave a case number. The notice also advised Burneff about his right to seek review of DMV's proposed action and enclosed a request for review which Burneff was instructed to mail to the district attorney's office. Under former section 11350.6 of the Welfare and Institutions Code, license suspension was authorized only for defined failure to comply with a court order for payment of child support.

year, and respondent defended him in two unlawful detainer actions. Respondent believed that Coleman had a valid cause of action against the lessor and, in April 1993, verbally agreed to file such an action in Superior Court. Respondent's fee was made up of a flat fee of $1,500 for filing of the summons and complaint and a 50 percent contingent fee for all remaining services. In November 1993, Coleman paid respondent's flat fee.

In March 1994, respondent filed a 14-count superior court complaint for Coleman. In September 1994, one of the defendants in this action served respondent with interrogatories and requests for admissions and for production of documents addressed to Coleman. The next day, respondent's secretary forwarded these discovery requests to Coleman. Coleman and his girlfriend prepared draft responses and met with respondent in mid-October 1994 to review them with him. Respondent was supposed to finalize the discovery reply and serve it on the defense. Coleman did not hear from respondent for several months. Respondent obtained a two-week extension of time from defendant, but failed to respond to the discovery.

In March 1995, the superior court granted the defense motion to compel and sanctioned Coleman $600. Respondent did not oppose the motion. In April 1995, respondent told Coleman's girlfriend that a motion for sanctions had been filed. Respondent blamed an office assistant. Shortly thereafter, Coleman and his girlfriend met with respondent who advised that it would be better to allow the suit to be dismissed. Respondent promised to refile it. When respondent continued to fail to reply to discovery or to pay the sanctions, the defendant moved to dismiss the action. A hearing was set for June 1, 1995, on the defense order to show cause re dismissal. No one appeared and, that day, the court dismissed the action. Respondent did not refile the action.

Coleman sought without success to contact respondent by phone and letter between June 1995 and June 1996. In January 1997, he requested that respondent refund his $1,500 advance fee, but respondent failed to do so. Coleman also complained to the State Bar.

At trial, respondent presented some verification forms in the Coleman matter which he had found the previous evening behind some office furniture. He sought to show that their signature and date were consistent with his claim that Coleman delayed in providing respondent with needed information. These forms bore Coleman's purported signature, but a questioned documents expert opined that some of the signatures were not Coleman's but were forged and reproduced through manipulated duplication. Coleman testified that some forms produced by respondent bore his signature and others were not signed by him. Respondent testified that Coleman or his girlfriend signed these forms. After the documents expert was called but before the expert gave his opinion, respondent stipulated that the discovery forms were not signed by Coleman. Respondent later testified that until Coleman testified about his signature, respondent believed that Coleman or another had signed the forms outside his office and gave them to his office staff. Respondent conceded that the signature of Coleman's name on the verification forms was different than on a known exemplar of Coleman's signature, the retainer agreement. The hearing judge found that there was no direct evidence that respondent simulated Coleman's signature or reproduced the simulation; however, the verification forms were produced by respondent's office.

2. Discussion.

We adopt the findings set forth above as they rest on clear and convincing evidence. On review, respondent offers a convoluted argument. Without taking issue with the findings, he claims that the witnesses made inconsistent statements. He singles out Coleman's testimony as to attorney fees and Coleman's girlfriend's testimony which respondent claims shows that Coleman's discovery responses were not brought to respondent's office timely. We disagree that respondent's claims show inconsistent testimony or undermine the hearing judge's findings. Regarding the testimony of Coleman's girlfriend, respondent cites to no part of the record. Our reading of that testimony is that Coleman and his girlfriend provided respondent with all information requested on a timely basis.

From these findings, we also adopt the hearing judge's conclusion that respondent wilfully violated rule 3-110(A) by recklessly failing to provide competent legal services in not responding to discovery requests, in failing to oppose the motion to dismiss the case and in failing to refile the case. We further adopt the hearing judge's conclusion that respondent violated section 6068, subdivision (m) by failing to respond promptly to Coleman's requests for information both by telephone and in writing during the period from June 1995 to early 1997. We agree with the hearing judge that there was insufficient evidence to show that respondent committed an act of moral turpitude by allowing the court in assessing sanctions to conclude that the failure to respond to discovery was Coleman's fault. Finally, we agree with the hearing judge that respondent did not wilfully violate rule 3-700(D) by failing to refund the $1,500 fees after Coleman's suit was dismissed. As the hearing judge correctly observed, respondent's fee agreement entitled him to $1,500 once he prepared the summons and complaint.

D. The Oplado Matter.

1. Facts and findings.

In December 1994, Leddie Oplado was facing eviction from the home she rented. She retained respondent that same month and paid him $175 to represent her. Between February and December 1995, she paid respondent an additional $499 in advanced fees and costs. In early January 1995, respondent sent letters to the lessor's counsel on Oplado's behalf.

Oplado gave respondent information showing that the leased property was in disrepair. In early 1995, respondent advised Oplado that she had a good Superior Court suit against the lessor for lack of habitability. On March 8, 1995, respondent filed the action. Oplado paid the filing fee, and she and respondent agreed to a forty percent contingency fee. The lessor answered and cross-complained.

In August 1995, the lessor filed an unlawful detainer action against Oplado. Oplado gave respondent the summons and complaint which she told him were left on her mailbox. On September 5, 1995, Oplado's default was entered in the unlawful detainer action.

After continuances at respondent's request, the superior court habitability suit was set for arbitration on February 9, 1996. Respondent did not appear at this hearing.

Respondent's motion to set aside the default in the unlawful detainer action was successful, but the court required Oplado to post a $4,260 deposit. Ultimately, the parties agreed that Oplado would leave the house by the end of February 1996. The unlawful detainer court was to hold Oplado's deposit until transferred to the superior court action.

After respondent filed a status conference statement in Oplado's habitability suit on November 16, 1995, the superior court set a status conference for March 15, 1996, but respondent did not appear. The court issued an order to show cause why respondent and Oplado should not be sanctioned for failing to appear at the March 15 hearing. Court trial was set for April 15, 1996. On April 5, 1996, the court held a mandatory settlement conference, but neither respondent nor Oplado appeared. The court imposed sanctions against them of $1,000 and dismissed the action. Oplado made many calls to respondent to find out what had happened in the superior court case. At one time, he told her that it had been dismissed and that he would have to find out what had happened, but he did not report to her further.

During the summer of 1996, Oplado learned that the court returned to the lessor's counsel in the unlawful detainer action the $4,260 deposit. When Oplado could not reach respondent to assist her, in September 1996, she and a friend went to the law library, did some research and filed a motion to set aside the release of the deposit. The court refused to hear Oplado's motion unless respondent was present, but set a hearing for another date. Respondent appeared at that hearing. The judge told respective counsel to resolve the matter and denied the motion to set aside his earlier order releasing the deposit.

Oplado was able to retrieve some, but not all, of her papers from respondent. She only learned of the $1,000 sanction against her when she saw the court

file at the superior court clerk's office. Respondent never informed Oplado why the case was dismissed.

Respondent testified that he filed the superior court action solely as a strategic device in defending the unlawful detainer action. He told Oplado he could not proceed with the superior court action unless she paid $2,500. Oplado denied that respondent made this demand, and the hearing judge credited her testimony.

2. Discussion.

We have summarized above the findings of the hearing judge, and we adopt them as our findings. As the hearing judge pointed out in her decision, even if respondent were to be credited with his testimony that Oplado's payment of $2,500 was a condition precedent to taking action in the superior court suit, it did not excuse respondent's inaction after he filed suit and took intermittent action. We also adopt the following conclusions which the hearing judge drew from her findings. Respondent wilfully violated rule 3-110(A) by repeatedly failing to perform legal services competently in failing to appear at the arbitration hearing and two pretrial conferences and failing to oppose release of the rent deposit. Respondent's inaction resulted in the dismissal of the superior court action. We also agree with the hearing judge that respondent violated section 6068, subdivision (m) by failing to return Oplado's calls between March and October 1996 and by failing to inform Oplado of hearing dates. We also agree with the hearing judge's dismissal of two counts that charged respondent with failing to cooperate with a State Bar investigation and with failure to refund unearned fees.

E. The Robinson Matter.

1. Facts and findings.

In April 1996, a Mr. Robinson, an electrician, hired respondent to represent him in getting visitation rights to see his five-year-old son. Robinson's marriage had been dissolved in 1995. The marriage judgment denied visitation to Robinson. In 1996 he had been released from prison after serving a sentence for a felony conviction and found that his former wife prohibited even telephone contact with his son.

Robinson paid respondent's requested fee of $1,000 in cash. Robinson also gave respondent all the papers he had from the marriage dissolution case and a partially-completed financial declaration form. Respondent predicted that he would need four to six weeks to prepare court papers. It is undisputed that respondent never filed any papers in a court to modify the visitation order.

In May 1996, Robinson moved and telephoned respondent's secretary with his new address and the name of his new parole officer.[6] Not until late July 1996 was Robinson able to hear from or speak to respondent despite repeated telephone calls and one visit. On that July occasion, respondent told Robinson that he had filed the case for him, but that his office had made a mistake on the cover page and was about to refile it. Respondent asked Robinson to be patient.

Robinson was unable to reach respondent throughout August and, on September 3, 1996, Robinson checked court records and found that respondent had filed nothing to seek visitation. Robinson immediately drove to respondent's office and confronted him, complaining that he had paid respondent, but still had no court date. Respondent conceded he had "dropped the ball," but asked for one more week. Robinson agreed. Respondent told him to meet on September 10 and that the court papers would be ready and they would talk about a court date. On September 10, respondent told Robinson that he had the court clerk on the phone and could secure an October 7, 1996, hearing date. Robinson was pleased, but his later attempts to get the papers or an accounting from respondent failed. When Robinson learned from the court that no date had been obtained by respondent, he terminated respondent's services and requested, in person and by letter, the refund of his $1,000 and his file.

6. Because of a court order, communication with Robinson's ex-wife had to be routed through Robinson's parole officer.

[2a] In September 1996, Robinson hired another attorney, Ralph N. George. George told respondent of his representation of Robinson. On September 30, 1996, respondent communicated directly with Robinson offering him a $500 refund and his file. George ultimately accepted this offer and, in November, filed the moving papers to modify visitation in favor of Robinson. This was ultimately successful. Robinson's further efforts were unsuccessful to get respondent to justify the work he did to keep $500 of the fee. Robinson's small claims suit against respondent for the $500 was also unsuccessful since George had agreed to accept the $500 as a sufficient refund.

Robinson also worked with another client of respondent, Burneff, whose matter we discuss *ante*. In late August 1996, Burneff came to work and said he had met with respondent who told Burneff that Robinson was a convicted felon. Burneff made this remark in front of other co-workers and this embarrassed Robinson greatly, as he believed that he had told respondent of his past background in confidence.

2. Discussion.

From the findings set forth above, the hearing judge concluded that respondent recklessly failed to perform services competently and wilfully violated rule 3-110 (A). She also found that respondent wilfully violated: rule 4-100(B)(3) by failing to provide Robinson with an accounting; rule 3-700(D)(2) by refusing to refund the remaining $500 of advanced fees which he did not earn; and section 6106 by making two separate false statements to Robinson, respectively, that respondent had prepared and filed papers for Robinson when he had not and that a court date was set when no date had been obtained. We adopt the foregoing findings and these conclusions of the hearing judge. We note that on review, respondent does not take issue with any specific findings in the Robinson matter. [2b]Regarding respondent's failure to refund to Robinson the unearned fees, we observe that whatever civil limits flowed from the agreement negotiated between respondent and successor counsel George for only a $500 fee refund, that did not affect the ethical conclusion that respondent failed to earn any part of the $1,000 fee. As the hearing judge aptly observed, respondent's inaction delayed for five months Robinson's quest for visitation rights.

The hearing judge correctly accorded weight to the credibility of Robinson. She noted that his prior conviction did not involve moral turpitude and that he had reason to remember his experience with respondent. On the other hand, it is undisputed that respondent never filed any papers for Robinson and that respondent provided no proof that he had even drafted any papers. At trial, respondent blamed Robinson for not providing him with enough information to proceed. However, we agree with the hearing judge that this explanation was not credible. It was clear from Robinson's testimony that he was always available to respondent if he needed any added information.

[3a] The final conclusion of the hearing judge merits added discussion that respondent violated section 6068, subdivision (e) by disclosing to another client, Burneff, the information Robinson intended as confidential, that he was a convicted felon. The hearing judge found this to be a first impression matter as the fact of Robinson's conviction was of public record, but not easily discovered. She examined the policy surrounding section 6068, subdivision (e) and determined that respondent violated the section. We agree. There seems no dispute that Robinson communicated to respondent his criminal history in confidence. Respondent only disputed below that he had divulged it to Burneff. He makes no claim on review concerning this matter.

[3b] Section 6068, subdivision (e) is the most strongly worded duty binding on a California attorney. It requires the attorney to maintain "inviolate" the confidence and "at every peril to himself or herself" to preserve the client's secrets.

[3c] This ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege. (*Goldstein v. Lees* (1974) 46 Cal. App.3d 614, 621, fn. 5.) It prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment. (*Dixon v. State Bar* (1982) 32 Cal.3d 728, 735, 739.) This duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential. (Evid. Code, § 917; see also *In re Jordan* (1972) 7 Cal.3d 930, 940-941 ["the protection

of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes"].) Robinson communicated to respondent his status to aid respondent in effectively representing Robinson. Indeed, the very reason for both the duty of confidentiality and the attorney-client privilege is to foster frank and open communication between client and lawyer so that the lawyer will be fully informed of the client's case and may counsel the best means to achieve the client's aims. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) In addition, the attorney-client privilege can attach to confidential communications of documents that are available to the public and information that may be known to others. (*Id.* at p. 600; *In re Jordan* (1974) 12 Cal.3d 575, 580; *In re Navarro* (1979) 93 Cal. App.3d 325, 330.) On this record, we have an ample basis to uphold the hearing judge's conclusion that respondent breached Robinson's confidence by disclosing to Burneff, without good cause, that Robinson was a convicted felon. Even if respondent had not been so charged, the hearing judge could have also concluded in aggravation of discipline that respondent's divulgence to Burneff was of a fact prejudicial to Robinson and violated section 6068, subdivision (f). (See *Dixon v. State Bar*, *supra*, 32 Cal.3d at p. 739.)

F. The Reproval Compliance Matter.

1. Facts and Findings.

Respondent conceded his culpability of the following findings which the hearing judge adopted. Effective January 8, 1997, respondent was publicly reproved and ordered to comply with duties to which he stipulated. Those duties, attached to respondent's reproval pursuant to rule 956 of the California Rules of Court required that he: 1) make restitution within one year to one individual or company, or the State Bar's Client Security Fund, of $1,165.00 plus interest and furnish proof of his restitution; 2) file quarterly reports of his compliance with the State Bar Act and professional conduct rules; and 3) pass the professional responsibility examination by January 8, 1998. Respondent was to pay restitution in quarterly installments each three months starting April 8, 1997. Respondent failed to pay the April and July quarterly payments. He made full restitution in January 1998. He also failed to file the quarterly reports due April and July 1998 and failed to pass the professional responsibility examination by the one-year deadline.

2. Discussion.

There is no dispute over respondent's culpability. His testimony gave no excuse for his failure to comply with his duties, and on review, respondent does not dispute his culpability of these charges. We therefore adopt the hearing judge's findings as stated above. These findings support the hearing judge's conclusion that respondent wilfully violated rule 1-110 as charged.

II. EVIDENCE BEARING ON DEGREE OF DISCIPLINE, FINDINGS AND DISCUSSION.

A. Mitigation.

The hearing judge gave only slight mitigating weight to the testimony of respondent's two character witnesses. These witnesses were attorneys who were aware of respondent's dealings with clients and gave very favorable opinions of his character. The hearing judge was correct in the slight weight given this evidence, since it came from only two witnesses. Moreover, our reading of the record shows that one witness was not aware that respondent had a prior disciplinary record and that the other witness, while adhering to his favorable opinion of respondent's character, did express concern over respondent's late-filed probation reports as reflective on his obligations as an attorney. With one small exception, we agree with the hearing judge that no other evidence presented by respondent established mitigation. **[4]** Even though the hearing judge did not do so, we accord respondent very limited mitigation on account of his cooperation in entering into a factual stipulation with the State Bar covering background facts in most of the matters. However, we note that more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts. (Compare *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079; *Pineda v. State Bar* (1989) 49 Cal.3d 753, 760.)

B. Aggravation.

The hearing judge found aggravating respondent's prior public reproval, the terms of which he violated, his multiple acts of wrongdoing and dishonesty in the present record, his misconduct ranging beyond that charged, his significant harm to his clients by delaying their relief or extinguishing their causes of action and respondent's display of a lack of candor in this proceeding. We agree with the hearing judge's findings in aggravation.

Because respondent's prior public reproval is significant, we summarize its basis. It rested on a stipulated disposition filed in December 1996. Respondent admitted that a client retained him in February 1995 and paid his advance fee of $2,000 for research and filing of summons and complaint in a civil dispute with a storage company. One month later, the client terminated respondent's services. At that time, respondent prepared an accounting showing $1,125 in unearned advanced fees due the client. However, respondent failed to refund this sum to his client and still owed the sum as of December 1996. Respondent and the State Bar agreed that as a result of his failure to refund this unearned fee to his client, respondent wilfully violated rule 3-700 (D)(2).

[5] The hearing judge also found that respondent's production of verifications purporting to bear Coleman's signature, but which were signed by a manipulated means involved dishonesty. We hold that respondent engaged in moral turpitude whether he was grossly negligent in offering the verifications as signed by Coleman or prepared them intentionally to mislead. (Compare *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15.) We agree with the hearing judge's assessment that, although there was no direct evidence that respondent personally simulated Coleman's signature, these documents were offered by respondent to exculpate himself, and he must bear responsibility for their altered nature. In upholding this finding, we also note respondent's varying and inconsistent testimony surrounding the signatures on these forms.

Finally, we agree with the hearing judge that an additional aggravating circumstance was respondent's communication directly with Robinson after he knew that Robinson was represented by successor counsel, George. (See rule 2-100(A).)

III. PROCEDURAL CONTENTIONS.

On review, virtually all of respondent's argument is based on a three-pronged attack on the fairness of some procedures followed in his case. We have reviewed each of these claims and find them to be without merit.

Respondent first contends that the court erred in not allowing him to call adverse witnesses under section 776 of the Evidence Code. In his brief, respondent gives no specifics of when he made this request of the hearing judge or the form of his request, whether written or oral. He points to nothing in the record to assist us. We are thus left with only a generalized claim of error. This is insufficient. Moreover, an attorney claiming procedural error must show specific prejudice before being entitled to relief. (E.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 310; *Stuart v. State Bar* (1985) 40 Cal.3d 838, 844-845.) From oral argument, it appears that respondent made his request to call the State Bar's witnesses as adverse just minutes before the start of trial before the record opened. The State Bar called each such witness except St. John who did not testify and respondent cross-examined each. He fails to show how his cross-examination was insufficient to elicit evidence that could have been elicited had he called these same witnesses as adverse under Evidence Code section 776. He has shown no specific prejudice or reversible error. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 214.)

Next respondent advances a similarly generalized claim that he was denied the chance to subpoena witnesses. This claim is also without merit. Respondent had a full opportunity to and did call witnesses in putting on his defense.

Finally, respondent claims that the record on review was incomplete because it fails to include a transcript of the pretrial conference proceedings. Rule 1310, Rules of Practice of the State Bar Court, defines the record as including the transcript of testimony in the matter. Respondent does not dispute that the record includes all testimony taken at trial.

Respondent has failed to show wherein the failure to receive a transcript of any pretrial hearing has prejudiced him in his defense. Accordingly, respondent's claim entitles him to no relief.

IV. DISCUSSION OF RECOMMENDED DISCIPLINE.

Respondent stands culpable of a variety of ethical misconduct in six matters spanning a two and a half-year period, commencing less than four years after he was admitted to practice. As the hearing judge found, respondent's offenses were multiple. They also approached a pattern where he would receive advance fees to perform services, either perform no services (Burneff and Robinson matters) or perform initial services (St. John, Oplado and Coleman matters), only to fail to communicate with his clients for notable periods of time and to fail to follow through with their matters. In two of the matters, respondent failed to promptly return all or a portion of unearned fees, and in all of the matters, his clients were required to put repeated pressure on respondent to proceed, usually resorting to unannounced office visits and complaints to the State Bar. The foregoing misconduct is serious enough, but the record also shows clear evidence of respondent's dishonesty and lack of candor. In the St. John matter, respondent filed his client's declaration by simulating her signature without her advance knowledge. In the Robinson matter, respondent deceived his client in two regards: that he had filed an application for relief and that he had obtained a court date. Finally, in the Coleman matter, respondent presented, in defense, verification forms which expert evidence established were not signed by Coleman but by a mechanical means of signature simulation. Also, in the Robinson matter, the evidence in aggravation established that respondent communicated directly with Robinson on a subject of controversy although he knew that Robinson was represented by successor counsel. Respondent also breached Robinson's confidence by revealing to another Robinson's past felony conviction.

These matters are also of great concern because several occurred while respondent was facing disciplinary proceedings in the matter that resulted in his reproval and, when reproved, he admittedly failed to abide by the several duties to which he had agreed.

Given this record of misconduct, we have sought to understand why the hearing judge recommended an actual suspension which could be as short as six months, if respondent promptly made restitution, particularly in view of the serious aggravating circumstances she found. Although we differ with the hearing judge over respondent's culpability in the St. John matter, we do not see that as the key reason for her lenient recommendation. Rather, as found in her decision, it appears that the key to her recommendation is her evaluation that the most effective discipline in this case was one which recognized the significant value she found that respondent placed on his ability to practice law and his professional reputation and motivated him to "put his practice in order." This she found would combine a relatively short period of actual suspension with several "and until" conditions -- conditions which respondent would have to fulfill or the actual suspension would continue.

We do not doubt that respondent values his law license. Indeed, the same can be said of almost any active practitioner defending State Bar proceedings. However assuming, arguendo, that such value of one's law license and professional reputation can be a mitigating circumstance, this record does not demonstrate that any such belief is mitigating. The range of respondent's serious, repeated and varied misconduct and the sheer lack of mitigation belie the force of this factor. By whatever criterion we examine, we can only agree with the hearing judge's earlier findings that several, serious aggravating circumstances are present in this case compared to insignificant mitigation. Accordingly, we cannot consider this case to warrant less discipline than comparable cases, irrespective of the feeling of significant value on his law practice and professional reputation that respondent may have left with the hearing judge.

The hearing judge did not cite any cases for guidance on the overall degree of discipline to recommend. Nor did respondent offer any such citations. The State Bar, which did not seek reversal of the hearing judge's decision in the St. John matter, cited several cases in support of its two-year actual suspension recommendation for the five remaining matters: *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490; *In the Matter of Boyne*

(Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389; *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219; and *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73. Although those cases present some factors similar to the case before us, we believe that an even more comparable case is *Martin v. State Bar* (1991) 52 Cal.3d 1055. Martin was found culpable of mishandling five matters over a four year period. Although he had no prior disciplinary record, unlike respondent, Martin's misconduct was quite similar to that which respondent committed, and Martin's misconduct started within three years of his admission to practice. Martin was found to have made misrepresentations to two of the clients whose matters he mishandled. Martin apparently participated in defending the proceedings until just before the day of the hearing, but failed to appear when he claimed that an auto accident two days earlier prevented it. Martin's request for a continuance was deemed unsupported, and the trial proceeded in Martin's absence. At trial, a former client's letter praising Martin's representation was received in evidence. The Supreme Court followed the State Bar Court recommendation of a two-year actual suspension, as part of a five-year stayed suspension, noting that Martin contested the fairness of the proceedings rather than the evidence. Two justices would have disbarred Martin.

Almost all attorney disciplinary cases have differences among them. However, we believe that the *Martin* case has the greatest similarity to the facts of this case, and we are guided to recommend the same degree of discipline as in *Martin*, including a two-year actual suspension.

V. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent Alan W. Johnson be suspended from the practice of law in the State of California for five years; that execution of the five-year suspension be stayed; and that respondent be placed on probation for five years on all the conditions recommended by the hearing judge in her decision, except that we modify her first recommended condition of probation to provide that respondent shall be actually suspended from the practice of law in the State of California during the first two years of his probation and until he: (1) makes restitution to Guy Robinson, or the Client Security Fund if it has paid, in the sum of $500.00 plus interest thereon at the rate of 10% simple interest per annum from September 26, 1996, until paid; (2) pays the $1000.00 sanction, together with any interest that may be due thereon, that the superior court imposed on respondent and Leddie Oplado or, if the $1000.00 sanction and any interest thereon has already been paid by or on behalf of Leddie Oplado, makes restitution in that same sum directly to Leddie Oplado, or the Client Security Fund if it has paid; (3) pays the $600.00 sanction, together with any interest that may be due thereon, that the superior court imposed on Robert Coleman or, if the $600.00 sanction and any interest thereon has already been paid by or on behalf of Robert Coleman, makes restitution in that same sum directly to Robert Coleman, or the Client Security Fund if it has paid; (4) provides satisfactory proof of all of the foregoing restitution to the State Bar's Probation Unit in Los Angeles; (5) attends six hours of Mandatory Continuing Legal Education Courses in law office management that meets with the prior approval of the State Bar's Probation Unit and provides satisfactory proof of completion of those courses to the State Bar's Probation Unit; (6) develops a written law office management plan that meets with the approval of the State Bar's Probation Unit; and (7) shows proof satisfactory to the State Bar Court of his 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.

Like the hearing judge, we do not recommend that respondent be required to take and pass the State Bar's Ethics School as he did so incident to his public reproval.

We further 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 in this matter.

We do not recommend that respondent be required to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners as he did so incident to his public reproval.

Finally, we recommend to the Supreme Court 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 section 6140.7 of that Code.

We concur:
OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BOLDEN BRUCE KITTRELL

A Member of the State Bar

No. 95-O-14321

Filed October 26, 2000

SUMMARY

A woman sued respondent over a business transaction that she entered into with him. The woman prevailed at the civil trial and obtained a judgment against respondent. A hearing judge applied principles of collateral estoppel with respect to the civil judgment to bind respondent to the jury's findings that he defrauded and breached his fiduciary duties to the woman and to bind respondent to evidentiary record in the civil proceeding without giving respondent a fair opportunity to attempt to contradict, temper, or explain any of the evidence. Based on the record in the civil proceeding, the hearing judge found respondent culpable of three violations of the former rule of professional conduct governing business transactions with clients and engaged in acts involving moral turpitude in violation of the statute proscribing acts of moral turpitude. The hearing judge further found, based upon the testimony of an attorney employed by the State Bar, that respondent violated his statutory duty to report the adverse civil judgment to the State Bar. During the discipline phase of the trial, the hearing judge precluded respondent from fully cross-examining the State Bar's witnesses and relied upon the evidence in the civil record to find various aggravating circumstances against respondent. The hearing judge recommended a five-year stayed suspension and four years' probation on conditions, including a three-year period of actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Both respondent and the State Bar sought review. Respondent challenged the hearing judge's application of collateral estoppel and contended that the hearing judge was not impartial and that he was, therefore, denied due process. The State Bar argued that all of respondent's contentions were meritless and that the hearing judge erred by not recommending that respondent be disbarred.

The review department held that the hearing judge erred in applying collateral estoppel to bind respondent to the evidentiary record in the civil proceeding without first giving respondent a fair opportunity to attempt to contradict, temper, or explain the evidence in it and in making findings adverse to respondent based upon the evidence in the civil record. The review department also held that the hearing judge erred in precluding respondent from fully cross-examining the State Bar's witnesses. Because of the hearing judge's errors, the review department reversed all of the hearing judge's findings with respect to charged violations of the former rule governing business transactions with clients and aggravating circumstances as well as discipline 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.

The review department did not reverse the hearing judge's finding that respondent engaged in violated of the moral turpitude statute because the review department concluded that, under the proper application of collateral estoppel, the jury's verdict that he engaged in acts of moral turpitude. The review department did, however, reverse the hearing judge's findings as to the nature and extent of those acts of moral turpitude because the application of collateral estoppel did not establish the nature and extent of respondent's acts.

The review department adopted the hearing judge's finding that respondent violated his statutory duty to report the civil judgment to the State Bar because that violation was established by the testimony of the State Bar's witness. Finally, the review department remanded the matter for a new trial on the issues of: factual findings regarding the nature and extent of respondent's violation of the moral turpitude statute; factual findings and conclusions of law regarding the charged violations of the former rule governing business transactions with clients; aggravating and mitigating circumstances; and discipline.

COUNSEL FOR PARTIES

For State Bar: Charles Weinstein

For Respondent: Bolden Bruce Kittrell, in pro. per.

HEADNOTES

[1 a-c] **139 Procedure–Miscellaneous**
159 Evidence–Miscellaneous
161 Duty to Present Evidence
162.11 Proof–State Bar's Burden–Clear and Convincing
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings

The application of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that the State Bar must establish each element of a disciplinary violation and aggravating circumstance by clear and convincing evidence. The State Bar may rely upon collateral estoppel to establish an element of a disciplinary violation or aggravating circumstance only if that same element was found against the attorney in the civil proceeding by clear and convincing evidence. If the same element was not found against the attorney in the civil proceeding by clear and convincing evidence, the State Bar must established that element in the State Bar Court with clear and convincing evidence.

[2 a, b] **120 Procedure–Conduct of Trial**
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
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous

Collateral estoppel may be applied in the State Bar Court to deny an attorney the right to relitigate an issue that was litigated and resolved against him or her in a prior civil proceeding only if (1) the

issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) the civil finding was made under the same burden of proof applicable to the same issue in the State Bar Court, (3) the attorney was a party to civil proceeding, (4) there is final judgment on the merits in the civil proceeding, (5) the attorney fails to demonstrate any unfairness in precluding the relitigation of the issue, and (6) the civil finding was necessary to the judgment in the civil proceeding. The requirement that the civil finding be necessary to the judgment in the civil proceeding is required by procedural fairness to insure that preclusive effect is not given to nonessential prior findings.

[3] **141 Evidence–Relevance**
148 Evidence–Witnesses
159 Evidence–Miscellaneous
191 Effect/Relationship of Other Proceedings

The relevant testimony of a witness given in civil proceeding is admissible in disciplinary proceedings without regard to the witness's availability and is considered and weighed as though the witness was present and testifying in the disciplinary proceeding. Moreover, the State Bar Court may take judicial notice of non-testimonial matters (i.e., pleadings, exhibits, findings) in a civil action that involved the same conduct underlying the disciplinary charges against an attorney.

[4 a, b] **120 Procedure–Conduct of Trial**
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

Whenever the State Bar relies upon all or part of the record in prior civil proceeding to prove an element of a disciplinary violation or aggravating circumstance independent of the application of collateral estoppel, neither the evidence nor any factual findings in the civil proceeding may be judicially noticed as conclusive or otherwise given preclusive effect in the State Bar Court, but must be independently assessed under the clear and convincing standard of proof. In addition, the attorney must be given a fair opportunity to contradict, temper, or explain the evidence and findings in the civil proceeding with other evidence, including the live testimony of the same witnesses who testified in the civil proceeding. The attorney need not be given free reign to completely retry the civil suit in the State Bar Court. The hearing judge retains the sound discretion to restrict or excluded cumulative evidence and otherwise control the introduction of evidence as in any other case.

[5] **139 Procedure–Miscellaneous**
147 Evidence–Presumptions
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

Independent of the application collateral estoppel, admissions made by an attorney in a prior civil proceeding are not conclusive and cannot be given preclusive effect in the State Bar Court even

if they are admissible in the State Bar Court as party admissions. Such admissions must be independently assessed under the clear and convincing standard of proof.

[6 a-f] **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
221 State Bar Act–Section 6106

In its answers to the special findings in a prior civil proceeding against respondent, the jury found that respondent was liable to the plaintiff on the plaintiff's claims for, among other things, breach of fiduciary duty and fraud. In a separate special finding on the issues of malice, oppression, and fraud, the jury found by clear and convincing evidence that respondent "was guilty of malice, oppression or fraud in the conduct upon which [the jury based its] finding of liability for either breach of fiduciary duty or fraud." The use of the disjunctive conjunction "or" in the phrase "malice, oppression or fraud," precluded the review department from determining whether the jury found that respondent was guilty of malice, oppression, fraud, or some combination thereof. And the use of the disjunctive correlative conjunction "either . . . or" in the phrase "finding of liability for either breach of fiduciary duty or fraud" precluded the Review Department from determining whether the jury found that respondent was guilty of "malice, oppression or fraud" when he breached his fiduciary duty to the plaintiff, when he defrauded the plaintiff, or both. Nonetheless, regardless of whether the jury based its answer against respondent on the malice, oppression, and fraud special finding on a finding that respondent was guilty of malice, oppression, fraud, or some combination thereof when he breached his fiduciary duty to the plaintiff, when he defrauded the plaintiff, or both, the jury's answer against him on the malice, oppression, and fraud special finding established, under collateral estoppel principles, that he committed acts involving moral turpitude in violation of statute proscribing acts of moral turpitude, but did not establish the nature and extent of those acts. An attorney who breaches a fiduciary duty (whether to a client or non-client) with malice, oppression, fraud, or some combination thereof, as those terms were defined for the jury, commits an act of moral turpitude as a matter of law. Similarly, an attorney who commits an act of fraud (whether in the capacity as of an attorney or not) with malice, oppression, fraud, or some combination thereof, as those terms were defined for the jury, commits an act of moral turpitude as a matter of law.

[7] **120 Procedure–Conduct of Trial**
130 Procedure–Procedure on Review
139 Procedure–Miscellaneous
146 Evidence–Judicial Notice
159 Evidence–Miscellaneous
166 Independent Review of Record
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
199 General Issues–Miscellaneous

Even though the hearing judge properly admitted and judicially noticed the record in a prior civil proceeding in which respondent was a party, the hearing judge erred in making factual findings regarding the nature and extent of respondent's violations of the moral turpitude statute based upon the evidence in the civil record independent of the application of collateral estoppel because he did

not first give respondent a fair opportunity to attempt to contradict, temper, or explain the evidence in it with other evidence. That error required the reversal of the hearing judge's findings as to the nature and extent of respondent's statutory violations and precluded the review department from exercising its authority to reweigh the evidence and independently make appropriate findings regarding the nature and extent of respondent's violations.

[8] **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
273.00 Rule 3-300 [former 5-101]

The requisite elements of a violation of the first subdivision of the former rule of professional conduct governing business transactions with clients (i.e., subdivision (A) of former rule 3-300) were that the transaction was unfair to the client or that the terms of the transaction were not disclosed and transmitted to the client in writing in a manner that the client should have been able to understand. The requisite elements of a violation of the second subdivision of that former rule (i.e., subdivision B of former rule 3-300) were that the client was not advised, in writing, of the right to seek advice from an independent attorney of the client's choice or that the client was not given a reasonable opportunity to exercise that right. None of these elements are addressed in the special finding under which the jury in a prior civil proceeding in which respondent was a party found, by clear and convincing evidence, that respondent "was guilty of malice, oppression or fraud in the conduct upon which [the jury based its] finding of [respondent's] liability for either breach of fiduciary duty or fraud." Thus, collateral estoppel does not establish that respondent violated the former rule governing business transactions with clients.

[9 a, b] **120 Procedure–Conduct of Trial**
130 Procedure–Procedure on Review
139 Procedure–Miscellaneous
146 Evidence–Judicial Notice
159 Evidence–Miscellaneous
166 Independent Review of Record
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
199 General Issues–Miscellaneous

In making his factual findings with respect to charged violations of the former rule of professional conduct governing business transactions with clients, the hearing judge erred in reweighing and relying upon the evidence in a prior civil proceeding in which respondent was a party without first giving respondent a fair opportunity to attempt to contradict, temper, or explain that evidence. That error required the reversal of the hearing judge's findings that respondent committed multiple violations of the former rule governing business transactions with clients and precluded the review department from exercising its authority to reweigh the evidence and independently make appropriate findings regarding the charged violations of that former rule.

[10] **103 Procedure–Disqualification/Bias of Judge**
192 Due Process/Procedural Rights

The fact that a portion of a hearing judge's salary might be paid from part of the costs that the State Bar recovers from disciplined attorneys does not create a condition disqualifying the judge because the amount of costs actually recovered are relatively nominal to the State Bar's Budget.

ADDITIONAL ANALYSIS

Culpability

Found

214.51 Section 6068(o)

221.11 Section 6106.1

OPINION

NORIAN, J.:

Both respondent Bolden Bruce Kittrell[1] (respondent) and the State Bar, represented by its Office of the Chief Trial Counsel (OCTC), seek review of a hearing judge's recommendation that respondent be suspended from the practice of law for five years, that the suspension be stayed, and that respondent be placed on probation for four years on conditions including that respondent be actually suspended for three years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law. The hearing judge's discipline recommendation is based upon his findings that, with respect to a business transaction with a 59-year-old woman of limited means, respondent committed three violations of the former Rules of Professional Conduct of the State Bar that were effective from May 27, 1989, through September 13, 1992[2] and two violations of the Business and Professions Code.[3]

More specifically, the hearing judge found that, with respect to a business a transaction with Ms. Czarine Hope James (James), respondent committed two violations of former rule 3-300(A): first by entering into an unfair business transaction with James and second by entering into that transaction without disclosing the terms of the transaction to James in writing. The hearing judge also found that respondent violated former rule 3-300(B) by failing to inform James in writing that she could seek independent legal advice with respect to the transaction. Next, the hearing judge found that respondent violated section 6106 by engaging in acts of concealment and deception amounting to moral turpitude with respect to respondent's dealings with James. Finally, the hearing judge found that respondent violated section 6068, subdivision (o)(2) by failing to report, to the State Bar, the entry of a civil judgment against him for, among other things, fraud and breach of fiduciary duty with respect to the James business transaction.[4]

In making his findings that respondent violated former rule 3-300 and section 6106, the hearing judge applied principles of collateral estoppel to bind respondent to the adverse civil judgment that James obtained against respondent in the Orange County Superior Court after an eight-day jury trial (the James lawsuit). The hearing judge applied those principles to preclude respondent, in this disciplinary proceeding, from relitigating the jury's findings in the James lawsuit that respondent defrauded and breached his fiduciary duty to James. Moreover, in addition to applying principles of collateral estoppel in this proceeding, the hearing judge also bound respondent to and relied upon the evidentiary record in the James lawsuit to find, at least, the former rule 3-300 violations, the nature and extent of the section 6106 violation, and various aggravating circumstances. The hearing judge bound respondent to and relied upon the civil record without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record. In addition, on the basis that respondent was bound to the civil record, the hearing judge precluded respondent from fully cross-examining OCTC's witnesses during the discipline phases of the trial and from fully presenting his (i.e., respondent's) mitigation evidence.

Respondent raises numerous contentions challenging the propriety of the disciplinary trial and attacking the hearing judge's decision and discipline recommendation. We summarize respondent's contentions into the following categories. First, respondent contends that it is inappropriate to apply, in this disciplinary proceeding, principles of collateral

1. Respondent was admitted to the practice of law in the State of California in December 1967 and has been a member of the State Bar since that time.

2. Unless otherwise indicated, all future reference to former rules are to these former rules.

3. Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

4. OCTC also charged respondent with violating section 6068, subdivision (o)(1), which requires attorneys to report, to the State Bar, the filing of three or more lawsuits against them for legal malpractice in a twelve-month period. However, the hearing judge found that OCTC failed to establish such a violation. We agree and, accordingly, adopt that finding, but also dismiss the charge with prejudice (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 261(a)).

estoppel with respect to the judgment in James lawsuit. Next, respondent contends that, even if those principles can be appropriately applied in this proceeding, their application neither establishes that he violated former rule 3-300 and section 6106 nor justifies the hearing judge's action in binding him to the evidentiary record in the James lawsuit. Then, respondent contends that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting his mitigation evidence. Finally, respondent contends that he was denied due process because the hearing judge was not impartial since his judicial salary is paid by the State Bar.

On review OCTC asserts that all of respondent's contentions are meritless. In addition, it asserts that the hearing judge erred in not recommending respondent's disbarment.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; 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 principles of collateral estoppel can properly be applied in this proceeding and that their application establishes that respondent engaged in acts of moral turpitude in violation of section 6106. However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor does the application of those principles establish that respondent violated former rule 3-300.

Moreover, we agree with respondent's contentions that the hearing judge erred in binding respondent to and relying upon the evidentiary record in the James lawsuit to make, at a minimum, his findings regarding the nature and extent of the found former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the evidence in that civil record. We also agree with respondent's contentions that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and in precluding respondent from fully presenting his mitigating evidence. On the other hand, we reject respondent's contention challenging the impartiality of the hearing judge.

Because the application of collateral estoppel principles neither establishes the nature and extent of respondent's acts of moral turpitude in violation of section 6106 nor the former rule 3-300 violations found by the hearing judge and because the hearing judge erred in binding respondent to the evidentiary record in the James lawsuit without giving respondent an opportunity to attempt to contract, temper, or explain that evidence, we must reverse the hearing judge's findings regarding the nature and extent of respondent's section 6106 violation as well as the hearing judge's findings that respondent violated former rule 3-300. Moreover, because the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting his mitigating evidence, we must reverse the hearing judge's aggravation and mitigation findings.

Notwithstanding the foregoing reversals, we adopt the hearing judge's factual findings and legal conclusion that respondent violated section 6068, subdivision (o)(2).

Because we reverse most of the hearing judge's findings, we must also vacate his discipline recommendation and remand this matter for a new trial on all issues except the issues of respondent's culpability for violating section 6106, which we hold has been established under principles of collateral estoppel, and for violating section 6068, subdivision (o)(2), which we hold has been established by clear and convincing evidence independent of the application of collateral estoppel. Finally, in light of our order vacating the hearing judge's discipline recommendation and remanding the matter for further proceedings, OCTC's contention that the hearing judge erred in not recommending that respondent be disbarred is moot and, therefore, not addressed.

I. PRELIMINARY FACTUAL MATTERS AND PROCEDURAL HISTORY

In December 1991 James gave respondent $61,000 for investment purposes. One investment was in the amount of $7,000; the other investment was in the amount of $54,000. The disciplinary charges against respondent deal only with the $54,000 investment. The $54,000 investment was in a loan secured by a deed of trust on real property used as a

dance studio in Studio City, California. That loan went into default and the deed of trust that was to secure it was extinguished by a superior trust deed. Accordingly, James lost all of her $54,000 investment and, as noted above, sued respondent.

James filed her lawsuit in 1993 and sued not only respondent, but also respondent's law partners and others. She sued them for, among other things, violating California and federal securities laws, legal malpractice, fraud, and breach of fiduciary duty. After trial in July 1994, the jury found respondent liable to James on each of James's causes of actions. The jury found, by a preponderance of the evidence, that respondent breached his fiduciary duties to James, that respondent defrauded James, and that, as a result of each of these wrongful acts, James incurred actual damages. The jury additionally found, by clear and convincing evidence, that respondent was guilty of oppression, malice, or fraud with respect to his breach of fiduciary duty or fraud.

Judgment was ultimately entered for James on her breach of fiduciary duty claim because it was the claim on which the jury awarded the most damages. In addition, because the jury found that respondent was guilty of oppression, malice, or fraud by clear and convincing evidence, judgment was also entered for James on her claim for punitive damages. (Civ. Code, § 3294 [under 1987 amendments to this statute, punitive damages may be recovered in cases involving the breach of an obligation not arising in contract when it is proved by clear and convincing evidence that the defendant is guilty of oppression, malice, or fraud].) The jury awarded James $180,800 on her breach of fiduciary duty claim and $61,200 on her claim for punitive damages. After these two awards totaling $242,000 were increased to include prejudgment interest and reduced to give respondent credit of the settlement proceeds James received from respondent's law partners, a final judgment in the amount of $217,235.10 plus an additional $4,281.31 in costs was entered against respondent and in favor of James.

Respondent appealed the judgment on the sole ground that the evidence was insufficient to support the jury's findings. The court of appeal disagreed and affirmed the judgment. Thereafter, the California Supreme Court rejected respondent's request to file an untimely petition for review. Similarly, the United States Supreme Court denied respondent's application for an extension of time to file a petition for a writ of certiorari. At that time, the judgment became final.

In July 1997 OCTC filed a motion in limine in the hearing department. In that motion OCTC sought an order precluding respondent from relitigating those issues that were previously litigated and found against him by clear and convincing evidence in the James lawsuit. The hearing judge granted OCTC's motion. Respondent sought interlocutory review of the hearing judge's order. We denied that petition because no abuse of discretion or error of law was shown. In our order denying respondent's petition, we specifically pointed out that collateral estoppel applies *only to those issues* that the jury in the James lawsuit *found by clear and convincing evidence*.

[1a] Thereafter, in April 1998, the hearing judge filed an order clarifying how the principles of collateral estoppel would be applied in this disciplinary proceeding. In his clarification order, the hearing judge correctly pointed out to the parties that the application of principles of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that, to establish a disciplinary violation, OCTC must prove each element of a charged violation by clear and convincing evidence. Thus, as the hearing judge correctly noted, the application of collateral estoppel will establish an element of a charged disciplinary violation only if that same element was previously found by the jury in the James lawsuit by clear and convincing evidence. As the hearing judge also correctly noted, if an element of a charged violation was not previously found by the jury by clear and convincing evidence, OCTC would be required to establish that element in this proceeding with clear and convincing evidence independent of the principles of collateral estoppel.

Notwithstanding the admonitions in our order denying respondent's petition for interlocutory review and the hearing judge's clarification order regarding the proper application of principles of collateral estoppel in this proceeding, OCTC attempted to establish the charged former rule 3-300 and section 6106 violations solely through the application

of principles of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence.[5] Instead, OCTC left it to the hearing judge to glean through the voluminous documents that it introduced into evidence and determine whether each element of the charged violations were found by the jury by clear and convincing evidence.

The voluminous documents OCTC introduced into evidence included copies of (1) the superior court's file in the James lawsuit (including the jury instructions and special verdicts, the judgment, the transcript of the trial, and the exhibits); (2) the court of appeal's opinion in the James lawsuit, and its order denying respondent's petition for rehearing; (3) a letter from the California Supreme Court refusing respondent's request for permission to late file a petition for review of the James lawsuit judgment; and (4) a letter from the United States Supreme Court denying respondent's request for an extension of time to file a petition for a writ of certiorari for review of the James lawsuit judgment.

After it introduced the foregoing documents, OCTC presented the testimony of a State Bar attorney with respect to the charged section 6068, subdivision (o)(2) violation. That attorney testified that respondent did not report, to the State Bar, the entry of the civil judgment against him the James lawsuit. Respondent cross-examined that witness, and OCTC then rested.

Respondent was then permitted to make an opening statement and to call one witness to testify. That witness is a former owner of the dance studio property that was to have been the collateral (under a third deed of trust) securing James's $54,000 investment/loan. That witness testified as to the improvements he made to the dance studio and the studio's fair market value. When respondent attempted to testify in his own defense and to present exculpatory evidence as to the adverse jury findings, OCTC objected. The hearing judge sustained OCTC's objection and precluded respondent from presenting any other evidence with respect to the former rule 3-300 and section 6106 violations on the ground that he had previously granted OCTC's motion in limine to preclude respondent, under principles of collateral estoppel, from "retrying" the James lawsuit in this disciplinary proceeding.

The hearing judge gave the parties permission to file written closing statements and briefs on the issue of culpability. Thereafter, the hearing judge made tentative findings that respondent was culpable of misconduct, but did not specify the charges on which he found respondent culpable.[6] The hearing judge then scheduled a date for the disciplinary portion of the trial to begin.

During the disciplinary portion of the trial, OCTC presented its aggravating evidence first. OCTC had James testify as to the significant harm she suffered from respondent's misconduct. (Rule Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(iv) [harm aggravation].) OCTC also had James testify as to respondent's alleged misrepresentations to her regarding the terms of the transaction/loan and when he would return her $54,000 investment/loan to her. (Std. 1.2(b)(iii) [misconduct surrounded by dishonesty or bad faith aggravation].) The hearing judge precluded respondent from fully cross-examining James on the stated basis that he was not going to permit respondent to go into the facts of or retry the James lawsuit in the discipline phase of the trial.

5. OCTC did file, in the hearing department, two pleadings containing summaries and references to portions of the testimony and some of the exhibits in the James lawsuit. However, those references were only to various portions of the civil record that OCTC believed to be of particular importance or relevance in this proceeding and not to the record references needed for the proper application of collateral estoppel.

6. Respondent argues at some length that the hearing judge's failure to specify his culpability findings before the discipline phase of the trial prevented respondent from being able to adequately prepare for the discipline phase of the trial. Because we reverse the hearing judge's findings as to aggravating and mitigating circumstances and remand for a new trial on those issues, respondent's contention is moot and, therefore, not addressed.

OCTC also presented the testimony of Evan Borges, who was James's attorney in the James lawsuit. Attorney Borges testified that respondent lacks remorse over and an adequate understanding of the seriousness of his (i.e., respondent's) misconduct with respect to James. During respondent's cross-examination of attorney Borges, the hearing judge precluded respondent from going into any area that respondent asserted as a defense in the James lawsuit.

After OCTC presented its aggravation evidence, respondent presented his mitigation evidence. First, respondent testified on his own behalf. He gave a general overview of his extensive experience in dealings with loans secured by second and third deeds of trust on real property. When respondent attempted to testify as to his state of mind and his alleged good faith in dealing with James (std. 1.2(e)(ii) [good faith mitigation]), the hearing judge would not let respondent proceed. In addition, the hearing judge would not let respondent testify as to any aspect of his prior dealings or transactions with James on the stated basis that they were covered in the James lawsuit. The hearing judge also concluded that such testimony was not "a proper subject of mitigation evidence."

Second, respondent called three character witness. (Std. 1.2(e)(vi) [good character mitigation].) These witnesses all testified that they believed respondent to be of good character. Next, respondent pointed out to the hearing judge that he had additional evidence in mitigation, but that it was not "admissible" under the hearing judge's rulings on the application of collateral estoppel. Respondent did not, however, make an offer of proof as to what that additional evidence would have been.

After respondent presented his three character witnesses, OCTC presented the testimony of two rebuttal witnesses. Both of these rebuttal witnesses testified that they did not believe respondent to be of good character. Thereafter, the parties rested.

The hearing judge permitted the parties to file written closing statements. Subsequently, the hearing judge filed his decision. In his decision the hearing judge made extensive findings of fact regarding respondent's dealings with James. In addition, as we noted above, the hearing judge found respondent culpable of committing three violations of former rule 3-300, committing acts involving moral turpitude in violation of section 6106, and failing to report the adverse judgment in the James lawsuit to the State Bar in violation of section 6068, subdivision (o)(2). Finally, the hearing judge's decision and his evidentiary rulings at trial establish that he reweighted the evidence in the record in the James lawsuit under the clear and convincing standard of proof applicable to attorney disciplinary proceedings and then relied upon that evidence to make his factual findings regarding the former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record.

II. PRINCIPLES OF COLLATERAL ESTOPPEL

[2a] Principles of collateral estoppel may be applied to preclude an attorney from relitigating, in the State Bar Court, "an issue that was actually litigated and resolved adversely to [the attorney] 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 [attorney] 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 [attorney]. [Citation.]" (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 329; see also *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 731.)

[2b] Furthermore, in order for a civil finding to be given preclusive effect under collateral estoppel principles, it must have been necessary to the civil judgment. (*McMillin Development, Inc. v. Home Buyers Warranty* (1998) 68 Cal. App.4th 896, 906.) "This requirement 'prevent[s] the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation.' [Citation.] The requirement 'is necessary in the name of procedural fairness, if not due process itself. . . .' [Citation.]" (*Ibid.*)

[1b] The application of collateral estoppel principles in attorney disciplinary proceedings does not alter the fundamental requirement that OCTC prove each element of a charged violation by clear and convincing evidence. (*Golden v. State Bar* (1931) 213 Cal. 237, 247.) Nor does the application of those principles alter the requirement that OCTC prove each element of an aggravating circumstance by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933.)

[1c] The application of collateral estoppel principles can be applied only to preclude a respondent attorney from relitigating, in the State Bar Court, an issue (i.e., fact) that was previously decided against him in a civil proceeding under the clear and convincing burden of proof. (*In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at p. 329.) Thus, if a factual element of a disciplinary violation or an aggravating circumstance has not previously been found against the respondent by clear and convincing evidence in a prior civil proceeding, OCTC must prove that element in the State Bar Court with clear and convincing evidence independent of the application of collateral estoppel. To prove such an element, OCTC may choose to rely, in whole or in part, upon the record in the prior civil proceeding as evidence.

[3] Contrary to respondent's contention, the relevant testimony of a witness given in a prior civil proceeding is admissible in State Bar Court disciplinary proceedings without regard to the availability of the witness (§ 6049.2) and is to be considered and weighed by the State Bar Court as though the witness were present and testifying before it (cf. Evid. Code, § 312 [the finder of fact determines the weight and credibility of witnesses including hearsay declarants]; Code Civ. Proc., § 2025, subd. (u) [deposition testimony must be considered as if it were given in court during trial]). Moreover, under Evidence Code section 452, subdivision (d), the State Bar Court can take judicial notice of the non-testimonial matters (i.e., the pleadings, exhibits, jury findings, and other court documents) in a civil action that involves the course of conduct underlying the disciplinary charges against an attorney. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 662, fn. 11, 633-634, citing *Caldwell v. State Bar* (1975) 13 Cal.3d 488, 496-497; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 444.)

[4a] Whenever OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding (whether testimonial evidence, non-testimonial matters, or both) to prove one or more elements of a disciplinary violation or an aggravating circumstance *independent* of the application of collateral estoppel, the evidence in the civil record as well as any factual findings made by the jury or the judge in the civil proceeding cannot be judicially noticed as conclusive or otherwise given preclusive effect in the State Bar Court, but must be assessed independently by the State Bar Court under the clear and convincing standard of proof applicable in attorney disciplinary proceedings. (*In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 324-325, citing *Rosenthal v. State Bar, supra,* 43 Cal.3d at pp. 619-620, 634 and *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 949-950, 947.)[5] Moreover, contrary to OCTC's contentions, admissions made by a respondent attorney in a prior civil proceeding are not conclusive and cannot be given preclusive effect in the State Bar Court independently of the application of collateral estoppel even if they are admissible as party admissions under Evidence Code section 1220. (*Aronow v. LaCroix* (1990) 219 Cal. App.3d 1039, 1053.) Only final judgments and orders have preclusive effect. (*Ibid.*) Such party admissions must still be independently assessed under the clear and convincing standard of proof.

[4b] Finally, whenever OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding to prove one or more element of a disciplinary violation or an aggravating circumstance *independent* of the application of collateral estoppel, the respondent must always be given a fair opportunity, in the State Bar Court, to contradict, temper, or explain the evidence in the civil record with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. (*In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) But the respondent need not be given free reign to completely retry the civil suit in the State Bar Court with the identical evidence presented in the civil proceeding. As always, the hearing judge retains the discretion to restrict or exclude cumulative evidence. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 226 [hearing judge may exclude

cumulative evidence]; see also Evid. Code, § 352 [judge may exclude evidence if its probative value is outweighed by the probability that its admission will necessitate the undue consumption of time]; *Dixon v. State Bar* (1982) 32 Cal.3d 728, 736 [hearing department has discretion to exercise reasonable control over evidence in order to avoid an*unnecessarily* long trial].)

III. DISCUSSION

A. Section 6106 and Former Rule 3-300

For the reasons stated below we hold: that the principles of collateral estoppel can properly be applied in this proceeding; that their application establishes that respondent committed acts involving moral turpitude in violation of section 6106; but does not establish the nature and extent of those acts. We further hold that the application of those principles does not establish that respondent violated former rule 3-300.

There is no dispute that respondent was a party to the James lawsuit and that the judgment in the James lawsuit is a final judgment on the merits. Furthermore, other than making a general claim that it would be unfair to apply principles of collateral estoppel against him in this proceeding, respondent did not specifically identify any such unfairness. Respondent did not show that he had less incentive to litigate the issues in the James lawsuit, that the jury findings in the James lawsuit are inconsistent with the findings in another judicial proceeding, or that he was required to litigate under less advantageous procedures in the James lawsuit. (*In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at p. 329, citing *Stolz v. Bank of America* (1993) 15 Cal. App.4th 217, 222; see also Rest.2d Judgments, § 28 [listing various exceptions to the general rule of issue preclusion].) Accordingly, to determine whether principles of collateral estoppel can properly be applied in this proceeding, we must first determine whether there are any issues that are common to the James lawsuit and the present disciplinary proceeding. If there are, we must then determine whether they were previously adjudicated against respondent by the jury in the James lawsuit under the clear and convincing standard of proof and whether they are necessary to support the civil judgment against respondent. If there are any issues meeting these requirements, we can give them preclusive effect and use them in this proceeding to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances.

[6a] Our independent review of the record in the James lawsuit discloses that the only *common* issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10.[7] **[6b-see fn. 7]** Special finding 10 asked the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud."[8] **[6c-see fn.8]**

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7. **[6b]** With respect to special finding 10, the jury was instructed that "[i]f you find that [James] suffered actual injury, harm, or damage caused by [respondent's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there was oppression, malice or fraud in the conduct on which you base your finding of liability." Because the jury found that James suffered actual damages as the result of respondent's breach of fiduciary duty and fraud, it went on to answer special finding 10.

8. **[6c]** The jury was instructed to use the following definitions when answering special finding 10 (all of the original internal brackets in the following definitions have been omitted as unnecessary).

"'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of the that person's rights."

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he [or] she is aware of the probable dangerous consequences of his [or] her conduct and willfully and deliberately fails to avoid those consequences." (Brackets added.)

"'Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

"'Fraud' means an intentional misrepresentation, deceit, or concealment of 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."

[6d] Because the superior court used the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" in special finding 10, we cannot determine whether the jury found respondent guilty of (1) malice, (2) oppression, (3) fraud, or (4) some combination of malice, oppression, and fraud when it answered "yes" to that special finding. (Compare *In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at p. 330 [where the civil judgment recites that the jury found Applicant A guilty of fraud by clear and convincing evidence]; *In the Matter of Berg, supra,* 3 Cal. State Bar Ct. Rptr. at p. 730-732 [where the civil jury found, by clear and convincing evidence, that Berg guilty of oppression, malice, *and* fraud with respect to his submitting false bills to an insurance company].) Similarly, because the superior court used the disjunctive correlative conjunction of "either . . . or" in the phrase "either breach of fiduciary duty or fraud" in special finding 10, we cannot determine whether the jury found that respondent was guilty of "malice, oppression or fraud" with respect to (1) his breach fiduciary duty to James, (2) his commission of fraud on James, or (3) both when it answered "yes" to that special finding. Nevertheless, as discussed below, we conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106, but that their commission does not establish that respondent violated former rule 3-300.

1. Section 6106

Section 6106 provides that an attorney's "commission of any act involving moral turpitude. . . , whether 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." Moral turpitude has long been defined as an act "of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It has been described as any crime or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and the test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all." (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

Moreover, "[c]onduct which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude. [Citation.]" (*In re Strick* (1983) 34 Cal.3d 891, 901.) Thus, an attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) Furthermore, an attorney's deliberate breach of a fiduciary duty or a breach resulting from the attorney's gross carelessness and negligence involves moral turpitude even in the absence of an attorney-client relationship. That is because "[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341; see also *Beery v. State Bar* (1987) 43 Cal.3d 802, 813.)

[6e] In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud, as those terms were defined for the jury in the James lawsuit, with respect to the attorney's breaching a fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as matter of law. Similarly, we conclude that an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law. (*In re Hallinan* (1954) 43 Cal.2d 243, 247-248 ["Although the problem of defining moral turpitude is not without difficulty (citations), it is settled that whatever else it may mean, its includes fraud . . . . (Citations.) It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. (Citations.)"].) Accordingly, we hold that, under the final judgment in the James lawsuit, the jury's answer to special issue 10 is a conclusive legal determination by clear and convincing evidence that respondent committed acts involving moral turpitude in his dealings with James and that that legal determi-

nation is binding on respondent and preclusive in this proceeding under principles of collateral estoppel. Those acts of moral turpitude establish all the requisite elements of a section 6106 violation.

[6f] However, because the superior court used, in special finding 10, the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" and the disjunctive correlative conjunction "either . . . or" in the phrase "either breach of fiduciary duty or fraud," we cannot determine the factual basis for the jury's unanimous answer of "yes" to special finding 10. Because we cannot determine the factual basis for the jury's answer to special finding 10, we cannot determine the nature and extent of respondent's acts involving moral turpitude under the application of collateral estoppel principles. Nor can we determine the nature and extent of those acts by independently reviewing the record.

[7] Even though the hearing judge properly admitted and judicially noticed the record in the James lawsuit (§ 6049.2; Evid. Code, § 452, subd. (d)), he erred in relying upon it as evidence independent of the application of collateral estoppel principles (i.e., by reweighting the evidence in the civil record under the clear and convincing standard of proof) without first giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in it. (*In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) We, therefore, must reverse the hearing judge's factual findings regarding the section 6106 violation. What is more, because the hearing judge did not give respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in the record in the James lawsuit, we cannot exercise our authority to independently review and reweigh the evidence in that civil record under the clear and convincing standard of proof to determine the nature and extent of respondent's acts of moral turpitude.

We find no merit to respondent's contention that the term "moral turpitude" in section 6106 is unconstitutionally vague. "It is well established that 'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 497.) Thus, even assuming for the sake of argument that the term "moral turpitude" in section 6106 is so broad that people of common intelligence must guess at its meaning, we could not sustain respondent's vagueness challenge because respondent's misconduct as found by the jury in its answer to special finding 10 falls clearly within the scope of section's 6106 proscription of acts involving moral turpitude. (*Ibid.*) Therefore, the term "moral turpitude" as used in section 6106 is not impermissibly vague as applied to respondent in this proceeding.

In sum, we reverse the hearing judge's factual findings regarding the nature and extent of respondent's acts involving moral turpitude and remand the matter for a new trial on those and other issues, which we identify below.

2. Former Rule 3-300

[8] The requisite elements of a former rule 3-300(A) violation are that the transaction is unfair to the client *or* that the attorney failed to fully disclose and transmit the terms of the transaction to the client in writing in a manner that the client should be able to understand. The requisite elements of a former rule 3-300(B) violation are that the attorney failed to advise the client in writing that the client may seek the advice of an independent attorney of the client's choice *or* that the attorney failed to give the client a reasonable opportunity to seek such independent advice. None of these elements was expressly addressed in special finding 10, which, as noted above, inquired of the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud." Furthermore, none of the elements of a former rule 3-300 violation are expressly addressed in the definitions given to the jury with respect to special finding 10, which definitions are quoted above in footnote 10. Thus, the application of collateral estoppel principles does not establish that respondent violated former rule 3-300.

[9a] Moreover, in making his factual findings regarding the former rule 3-300 violations, the hearing judge erred in reweighing the evidence in the James lawsuit under the clear and convincing standard of proof without first giving respondent an opportunity to

attempt to contradict, temper, or explain that evidence. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) Because of that error, we cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our own findings with respect to the charged former rule 3-300 violations.

[9b] In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial on the issue of respondent's culpability on the charged former rule 3-300 violations.

B. Section 6068, subdivision (o)(2)

Respondent does not challenge the hearing judge's factual findings showing that respondent failed to report, to the State Bar, the entry of the judgment against him in the James lawsuit. Nor does respondent challenge the hearing judge's culpability conclusion that respondent's failure to report the judgment violated section 6068, subdivision (o)(2). After independently reviewing the record, we agree with the hearing judge and adopt his factual findings and culpability conclusion regarding this charge.

C. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances are events or factors surrounding the particular misconduct of which an attorney has been found culpable that show that a greater or lesser degree of sanction is warranted. (Stds. 1.2(b) & 1.2(e).) In that regard, aggravating and mitigating circumstances are often directly related to or dependent upon the specific misconduct found to have been committed. (See, e.g., std. 1.2(b)(ii) [found misconduct evidences multiple bad acts]; std. 1.2(b)(iii) [found misconduct surrounded or followed by bad faith]; std. 1.2(e)(ii) [good faith of attorney]; std. 1.2(e)(vii) [objective steps take by attorney to atone for consequences of the found misconduct].) Accordingly, because we have reversed most of the hearing judge's findings and conclusions regarding respondent's culpability, we also reverse the hearing judge's findings as to aggravating and mitigating circumstances. We do so in order to provide both parties with an adequate opportunity to present their aggravating and mitigating evidence with respect to whatever particular misconduct may be found on remand.

In any event, for the reasons stated above, the application of collateral estoppel principles does not provide support for the hearing judge's aggravation findings. As with culpability, in making some of his findings in aggravation, the hearing judge reweighted the evidence in the James lawsuit without first giving respondent an opportunity to contradict, temper, or explain the adverse evidence. In addition, the hearing judge did not give respondent an opportunity to present all of his relevant mitigating evidence. These errors also require that we reverse the hearing judge's findings regarding aggravating and mitigating circumstances and preclude us from exercising our authority to independently reweight the evidence.

D. The Hearing Judge was Impartial

Finally, we address one remaining issue raised by respondent because it is germane to further proceedings in the hearing department on remand. Under the most generous of readings, we construe respondent's contention regarding the hearing judge's impartiality as arguing that the hearing judge was not impartial because the State Bar pays his judicial salary as mandated under section 6079.1, subdivision (d) and because the State Bar was in a funding crisis as a result of the governor's veto of the State Bar's fee bill in 1997. Respondent does not contend and cite to the place in the record where he timely filed a motion seeking to disqualify the hearing judge on these grounds as required by rule 106 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, and where that motion was denied. By not properly raising this issue, respondent has waived any error. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 302(a); State Bar Court Rules of Practice, rule 1320 ; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. at p. 736.) Nonetheless, we exercise our discretion and address respondent's arguments on the merits in the interests of justice.

We have repeatedly rejected as meritless arguments that a hearing judge is not impartial because the

State Bar pays the judge's statutorily mandated salary. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500-501; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 59.) Moreover, the fact that the State Bar might use a portion of the costs that it recovers from disciplined attorneys to pay the hearing judge's salary does not create a disqualifying condition. That is primarily because the vast majority of all costs recovered are recovered in accordance with a Supreme Court disciplinary order (not a State Bar Court order) that includes an award of costs to the State Bar in accordance with the statutory provision for costs in section 6086.10. (Cf. *In re Rose* (2000) 22 Cal.4th 430, 439, citing *In re Attorney Disciplinary System* (1998) 19 Cal.4th 582, 600-601 [before the Supreme Court issues disciplinary order, it exercises its independent and inherent jurisdiction over attorney discipline and independently determines whether to impose the discipline recommended by the State Bar Court].) Respondent cannot plausibly contend that the Supreme Court's independent and statutory award of costs to the State Bar, even if made on the recommendation of the State Bar Court, creates a condition disqualifying the State Bar Court. (Accord *In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. at p. 59.)

The only instance in which the State Bar Court can assess costs on disciplined attorneys is in those cases in which the State Bar Court publicly reproves the attorney. (§ 6086.10, subd. (a).) Respondent was not publicly reproved.

[10] Moreover, the fact that a portion of the hearing judge's salary might conceivably be paid from part of the costs the State Bar recovers from disciplined attorneys does not create a disqualifying condition because the amount of costs actually recovered are relatively nominal to the State Bar's budget. (*In the Matter of Acuna, supra,* 3 Cal. State Bar Ct. Rptr. at p. 501, fn. 2; compare *Ward v. Village of Monroeville, Ohio* (1973) 409 U.S. 57, 60 [where the mayor of Monroeville was disqualified from acting as the judge in ordinance and traffic violation cases because the fines and costs recovered for ordinance and traffic violations made up a major portion of the village's income and because the mayor had executive authority over the village's finances].)

Finally, we also reject as meritless respondent's argument that the hearing judge was not impartial because the State Bar was in a funding crisis in 1998 during part of the trial in this matter and while this matter was under submission for a decision by the hearing judge. Throughout the State Bar's funding crisis in 1998 and early 1999, the State Bar Court Judges voluntarily agreed to temporarily receive a reduced salary from the State Bar. (*In re Attorney Disciplinary System, supra,* 19 Cal.4th at p. 614.) We fail to see how such a voluntary reduction in salary to permit the State Bar to operate within its budgetary constraints until the Supreme Court restored funding of the State Bar's discipline system in 1999 under rule 963 of the California Rules of Court could have plausibly created a financial interest that would have required the recusal of the hearing judge.

IV. REMAND ORDER

Applying principles of collateral estoppel, we conclude that respondent Bolden Bruce Kittrell is culpable of violating Business and Professions Code sections 6106. Moreover, adopting the hearing judge's findings of fact and conclusions of law with respect to the charged violation of Business and Professions Code section 6068, subdivision (o)(2), we conclude that respondent is culpable of that charged violation.

In light of the foregoing conclusions and our reversal of most of the hearing judge's findings and conclusions, we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106; (2) findings of fact and conclusions of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law regarding aggravating and mitigating circumstances; and (4) the appropriate level of discipline.

On remand, the evidence shall be reopened as to both parties with respect to the above issues. However, the evidence that is presently part of the record need not be re-introduced. Moreover, the record of the James lawsuit, which was admitted into evidence in the hearing department, may be properly considered on remand by the hearing judge. However,

respondent must be given a fair opportunity to contradict, temper, or explain that evidence with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. Yet the hearing judge need not retry the civil suit in this disciplinary proceeding as she or he retains the sound discretion to restrict or exclude cumulative evidence and otherwise control the introduction of evidence as in any other case. The hearing judge's decision on remand should, again as in any other case, be based on a balanced consideration of all the competent evidence admitted, whether documentary, hearsay, live testimony, or other.

We concur:

OBRIEN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

NEIL KAUFFMAN

A Member of the State Bar

No. 95-J-14650

Filed March 6, 2001

SUMMARY

Respondent's Illinois law license was suspended for 18 months as a result of respondent's misconduct while practicing there. Such misconduct included settling a case without the client's authority, forging a client's signature on settlement documents, commingling client and personal funds, misappropriating client funds, and issuing an insufficiently funded check. The hearing judge concluded that respondent's culpability warranted discipline in California and recommended, among other things, an 18-month actual suspension. The hearing judge declined respondent's request to recommend that the actual suspension be retroactive to the time of respondent's suspension in Illinois. (Hon. Madge S. Watai, Hearing Judge.)

Respondent requested review. The review department rejected as unsupported by either the law or the facts respondent's contention that the actual suspension imposed in California should be retroactive to the time of respondent's suspension in Illinois. The review department also concluded that respondent's Illinois misconduct constituted grounds for imposing discipline in California and determined, upon considering the aggravating and mitigating circumstances, that the appropriate degree of discipline was a two-year stayed suspension, two years of probation, and a one-year actual suspension.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: R. Gerald Markle

HEADNOTES

[1] **147 Evidence—Presumptions**
162.30 Issues/Proof in § 6049.1
195 Discipline in Other Jurisdictions
1933.40 Section 6049.1 Cases—Limitation of 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.

Business and Professions Code section 6049.1 provides that, with exceptions not applicable here, the Illinois Supreme Court disciplinary order imposed on respondent conclusively established his culpability in California.

[2] **195 Discipline in Other Jurisdictions**
1933.20 Section 6049.1 Cases—California Law
1935.10 Section 6049.1 Cases—Misconduct Found
Respondent's Illinois misconduct, involving misappropriation of client funds, repeated commingling of trust funds with personal funds, settling a case without authority, issuing an insufficiently funded check, and forging a client's name to settlement documents, was serious and a clear ground for imposing lawyer discipline in California.

[3] **195 Discipline in Other Jurisdictions**
1933.50 Section 6049.1 Cases—Degree of Foreign Discipline
In a proceeding under Business and Professions Code section 6049.1, the appropriate degree of discipline is not presumed by the other state's discipline, but is open for determination in this state.

[4a-c] **1931.90 Section 6049.1 Cases—Other Procedural Issues**
In a proceeding under Business and Professions Code section 6049.1, neither the law nor the facts supported respondent's contention that his suspension in California should be retroactive to the time of his suspension in Illinois. The policy of imposing an actual suspension retroactive to the start of interim suspension or inactive enrollment is to avoid a lengthier disqualification from practice than warranted, but unlike those situations, respondent had not yet been barred from practicing in California. Further, although there was a significant delay in implementing an agreement between respondent and the California State Bar for a stipulated disposition, there was no clear evidence that delay was the fault of the State Bar, and respondent's evidence showed that an increase in his legal malpractice premium, which might be considered prejudicial, would likely have occurred even if his California discipline had become effective earlier.

ADDITIONAL ANALYSIS

Aggravation
Found
521 Multiple Acts
551 Overreaching
582.10 Harm to Client
691 Other

Mitigation
Found
710.10 No Prior Record
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution
750.10 Rehabilitation
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
1026 Trust Account Auditing

OPINION

STOVITZ, J.:

Respondent Neil Kauffman requests our review over a narrow question; should his agreed-upon suspension from practice in California be retroactive to the time of a suspension from law practice he received in Illinois as he contends or should it be prospective as urged by the State Bar's Office of Chief Trial Counsel (hereafter State Bar or California Bar)?

The hearing judge determined that respondent should receive the same level of discipline in California, an 18-month actual suspension, as ordered in 1995 by the Supreme Court of Illinois for misconduct occurring while respondent practiced in Illinois. The hearing judge also recommended that respondent's California suspension should be prospective and not retroactive to 1995 as respondent had requested. Respondent contends on review that unnecessary delay by the State Bar prevented his suspension from becoming effective earlier. The State Bar argues that neither the facts nor the law warrant imposing his discipline in California retroactively.

Exercising our independent judgment on the record, we determine that a one-year prospective actual suspension as a condition of probation is appropriate discipline, and we adopt it as our recommendation to the Supreme Court.

I. STATEMENT OF THE CASE.

Respondent was admitted to practice law in California in 1978 and in Illinois in 1979. He has no prior discipline in California.

In May 1995, the Supreme Court of Illinois adopted the report of the Review Board of the Illinois Attorney Registration and Disciplinary Commission and suspended respondent for 18 months and until he completed a law office management course.

Although the facts underlying respondent's Illinois discipline are not disputed, a brief summary is appropriate. The Illinois Supreme Court found that, in a client matter arising out of an automobile accident in July 1984, respondent settled his client's case without authority, forged her signature on settlement papers, later commingled the settlement funds with his personal funds and misappropriated his client's $1,500 share of those funds, issuing an insufficient funds check before finally paying his client. In another client matter[1] arising out of an accident on Chicago's public transit system in November 1984, respondent commingled his client funds with his office operating funds and misappropriated the funds he should have held for his client. Finally, the Illinois Supreme Court found that respondent commingled trust funds with personal funds many times between June and November 1988. During that period, respondent deposited the trust funds of 78 clients in his office operating account.

In June 1995, respondent notified the California Bar of his Illinois discipline. Over the next two years, respondent was represented by different counsel than at present. The record shows that, as early as November 1995, the California Bar offered, prior to the filing of this formal proceeding to discipline respondent based on the Illinois discipline,[2] to stipulate to the facts and the same degree of discipline as imposed on respondent in Illinois. The record is unclear as to why a written stipulation was not filed promptly. There is some indication in the record that the parties were exploring added conditions of proba-

1. Although respondent was found culpable in Illinois of this second client matter, the charges in the present, California matter inexplicably failed to specifically allege this matter, although they did recite his discipline by the Supreme Court of Illinois. The hearing judge therefore considered this second matter only in aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) At oral argument, respondent conceded that he had proceeded at trial as if the facts of the second matter were in issue in this proceeding. (E.g., *Crooks v. State Bar* (1970) 3 Cal.3d 346, 356-357.) In any case, the parties agree that it would make little difference if these facts were considered as part of respondent's culpability or solely as evidence in aggravation. We concur.

2. See Bus. & Prof. Code, § 6049.1 (hereafter § 6049.1); *In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 162.

tion. By October 1997, the matter was still unresolved. On November 3, 1997, a State Bar deputy trial counsel sent respondent a proposed written stipulation to finalize the parties' discussions. The next day, that deputy trial counsel and respondent's counsel at the same time spoke by phone and agreed to some changes. That same day, the deputy trial counsel sent respondent's counsel a revised stipulation and asked for counsel's prompt review so that it could be filed before deputy trial counsel departed on a planned leave.

This November 4, 1997, revised stipulation also provided for the same degree of discipline imposed in Illinois, prospective to the California Supreme Court's order.[3] Just after this time, another deputy trial counsel took over this matter on behalf of the State Bar and proposed another stipulation making other changes in probation conditions. In December 1997, respondent's counsel apparently sought to have the 18 months' suspension imposed without any probation conditions. Deputy trial counsel advised on December 16, 1997, that the State Bar could not agree to dispense with probation conditions and enclosed a revised stipulation which contained a probation period and the other changes agreed to by respondent's counsel and the previous deputy trial counsel.

The December 1997 stipulation was never signed, and on January 26, 1998, this formal proceeding was started in the State Bar Court. The next day, respondent's present counsel commenced representing him. For the first time, respondent requested that the discipline be made retroactive to coincide with the suspension imposed by the Illinois Supreme Court. The parties were unable to agree to that provision, and the matter was tried below on the sole issue of whether the Illinois discipline should be imposed prospectively or retroactively.

At trial, the State Bar conceded that delay had occurred in the case, but contended that there had been no prejudice to respondent. Respondent argued that to suspend him prospectively would be to suspend him twice for the same conduct. He also contended that his discipline should be retroactive since he did not practice in California during his Illinois suspension, he promptly reported his Illinois discipline, he endured delays caused by the State Bar and his malpractice insurance premium would climb sharply if he were disciplined prospectively.

In her decision, the hearing judge summarized the foregoing chronology, made findings of respondent's culpability as earlier found by the Illinois Supreme Court,[4] and concluded that those findings warranted discipline in California and that the 18-month suspension imposed in Illinois was appropriate as the discipline to recommend in California. The hearing judge also considered fully respondent's request for a retroactive suspension but declined to recommend it.

As the judge viewed the evidence, respondent did not make his request until January 1998 when he obtained new counsel. Although his Illinois discipline would result in a separate suspension in California, he was licensed in both states and agreed that he was subject to discipline in both. Moreover, according to the judge, he could have practiced in California while suspended in Illinois had he wished to and his California suspension would still appear to allow him to practice in Illinois, since he had completed his Illinois suspension.

The hearing judge concluded that there was no legal or factual reason why the 18-month actual suspension in California should be retroactive, and she declined to so recommend.

II. DISCUSSION.

Although issues of culpability and overall degree of discipline are not disputed in this review, we exercise an independent judgment on the record. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184,

3. The parties' focus on the revised stipulation was to limit the applicability of some proposed probation conditions to respondent's practice of law when in California.

4. As noted ante, the hearing judge treated findings of respondent's second client matter solely as evidence in aggravation of discipline.

207.) [1] As we observed recently in *In the Matter of Jenkins, supra*, 4 Cal. State Bar Ct. Rptr. at page 162, section 6049.1 provides that, with exceptions not applicable here, the Illinois Supreme Court disciplinary order imposed on respondent conclusively establishes his culpability in California. [2] Respondent's Illinois misconduct, involving misappropriation of client funds, repeated commingling of trust funds with personal funds, settling a case without authority, issuing an insufficiently funded check and forging a client's name to settlement documents, was serious and a clear ground for imposing lawyer discipline in California. (E.g., *Levin v. State Bar* (1989) 47 Cal.3d 1140 [settling case without client's authority]; *Friedman v. State Bar* (1990) 50 Cal.3d 235 [misappropriation of client funds]; *Lawhorn v. State Bar* (1987) 43 Cal.3d. 1357 [commingling].)

[3] In a proceeding under section 6049.1, the appropriate degree of discipline is not presumed by the other state's discipline, but is open for determination in this state. (§ 6049.1, subd. (b) (1); *In the Matter of Jenkins, supra*, 4 Cal. State Bar Ct. Rptr. at p. 164.) The hearing judge considered the California Standards for Attorney Sanctions for Professional Misconduct, which are set forth in title IV of the Rules of Procedure of the State Bar (all further references to Standards are to this source), and concluded correctly that the guided discipline could range from reproval to disbarment. She found both substantial mitigating circumstances and also compelling aggravating ones as well.

In mitigation, the hearing judge acknowledged that, in the Illinois proceedings, respondent presented favorable character evidence, including testimony from two judges. There was no evidence that any other disciplinary complaints had been lodged in Illinois against respondent and respondent's failure to properly handle his trust account did not cause a financial loss to anyone. Respondent had no discipline in California other than this proceeding and none since 1988. Elsewhere in her discussion, the hearing judge stated that respondent's misconduct appeared to stem from accounting disarray and not from venality.

In aggravation, the hearing judge also found that respondent's misconduct was serious, repeated and caused significant harm to the two clients, including overreaching against the client in the first matter. At the time of the Illinois hearings, respondent was unaware of the proper procedure for handling settlement funds and no evidence was shown that he had put in place proper trust accounting procedures.

In reviewing caselaw, the hearing judge deemed the case of *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, comparable, but noted that this case presented more aggravating and mitigating circumstances than *Sampson*. The Supreme Court imposed a three-year stayed suspension and an eighteen-month actual suspension in that case, the gravamen of which was misuse of client funds.

Other cases imposing discipline for misconduct found here vary widely. For example, in *Levin v. State Bar, supra*, 47 Cal.3d 1140, a six-month actual suspension was imposed. In one of the two counts, Levin had settled a case without his client's authority, and in the other, he had communicated directly with a party represented by counsel without that counsel's consent. No misuse of funds was involved; however, Levin's practice of deceit was considered aggravating. Mitigating circumstances were also present including Levin's 18 years of practice without prior discipline.

Discipline for cases in which misuse of funds was the central focus varies from stayed suspension to disbarment. In *Lawhorn v. State Bar, supra*, 43 Cal.3d 1357, a two-year actual suspension was ordered for essentially one matter falling between commingling and misappropriation of $1,356 in trust funds with evidence that the attorney used his trust account to pay office expenses.

Respondent reported his Illinois discipline promptly to the California Bar, as he was required to do (Bus. & Prof. Code, § 6068, subd. (o)(6)), but he also sought promptly and willingly to resolve it. In our view, this is a significant mitigating circumstance. (Std. 1.2 (e)(v), (vii); *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111-112.) It has been 12 years since respondent's last act of misconduct for which he was disciplined in Illinois. No evidence of additional misconduct appears. The record does not show the

precise cause of the delay in resolving this matter. From what we can glean, neither respondent personally nor any individual deputy trial counsel was the cause of the considerable passage of time. The passage of considerable time without evidence of further misconduct may be considered a mitigating factor. (Std. 1.2(e) (viii); *Chadwick v. State Bar*, *supra*, 49 Cal.3d at p. 112.)

Balancing all relevant considerations (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666), we conclude that the appropriate degree of discipline is a two-year suspension stayed on conditions of a two years' probation and a one-year actual suspension.

[4a] We now discuss the issue posed in this proceeding, whether the discipline should be retroactive to the date of respondent's discipline in Illinois or prospective. We agree with the hearing judge that neither the law nor the factual record support a retroactive discipline.

[4b] All cases cited by respondent to support his claim deal with situations in which there were underlying disqualifications from law practice in California, either interim suspensions (see, e.g., *In re Leardo* (1991) 53 Cal.3d 1) or inactive enrollments (see, e.g., *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571). The policy of imposing an actual suspension retroactive to the start of interim suspension or inactive enrollment is, in appropriate cases, to avoid a significantly lengthier disqualification from practice than warranted as the appropriate degree of final discipline. Unlike those situations, once respondent was admitted to practice, he has not yet been barred from practicing in California.

[4c] Further, we see no reason from the facts in this case to make a retroactive recommendation; even if, arguendo, caselaw supported it. Although there appears to have been significant delay in implementing an agreement between respondent and the California Bar for a stipulated disposition, we do not see any clear evidence that delay was the fault of the State Bar. The record shows that almost as soon as respondent notified the California Bar of his Illinois discipline, it offered to resolve the matter by stipulated disposition. It repeated that offer as the months passed. As we noted *ante*, the record does not show the precise cause of the delay. However, respondent was apparently content until January 1998 to have the discipline operate prospectively, as indicated by the history of this matter. Respondent has argued that one harm of the delay allegedly occasioned by the California Bar would be an increase in cost of his legal malpractice premium. However, even assuming that an increase in insurance premiums might be considered prejudicial to respondent, the brief statement he submitted from his insurance broker shows only that a premium rise would occur if respondent were to be suspended in California as a result of the Illinois discipline. This evidence shows that his premium would likely rise even if his California discipline were to have become effective earlier.

III. RECOMMENDATION.

For the foregoing reasons, we uphold the decision of the hearing judge and recommend that respondent be suspended from the practice of law for a period of two (2) years, that execution of that suspension be stayed and that respondent be placed on two (2) years of probation on the conditions recommended by the hearing judge in her decision, except that we modify her recommended probation condition number one to provide that respondent be actually suspended from the practice of law in the State of California for one (1) year and we modify the hearing judge's probation condition number six requiring that respondent submit to trust account monitoring by a Certified Public Account so that it provides as follows:

During each calendar quarter in which respondent receives, possesses, or otherwise handles funds or property of a client (as used in this probation condition, the term "client" includes all persons and entities to which respondent owes a fiduciary or trust duty) in any manner, respondent must submit, to the State Bar's Probation Unit in Los Angeles with the probation report for that quarter, a certificate from a Certified Public Accountant certifying:

(a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California (or, with the written consent of the client, in any other jurisdiction where

there is a substantial relationship between the client or the client's business and the other jurisdiction);

(b) whether respondent has, from the date of receipt of the client funds through the period ending five years from the date of appropriate disbursement of the funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name and address of the client,

(b) the date, amount, and source of all funds received on behalf of the client,

(c) the date, amount, payee, and purpose of each disbursement made on behalf of the client, and

(d) the current balance for the client;

(2) a written journal for each bank account that sets forth:

(a) the name of the account,

(b) the name and address of the bank where the account is maintained,

(c) the date, amount, and client or beneficiary affected by each debit and credit, and

(d) the current balance in the account;

(3) all bank statements and cancelled checks for each bank account, and

(4) each monthly reconciliation (balancing) of (1), (2), and (3) and, if there are any differences, an explanation of each difference; and

(c) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of a client through the period ending five years from the date of appropriate disbursement of the securities and other properties, maintained a written journal that specifies:

(1) each item of security and property held,

(2) the person on whose behalf the security or property is held,

(3) the date of receipt of the security or property,

(4) the date of distribution of the security or property, and

(5) person to whom the security or property was distributed.

If respondent does not practice law in California and does not receive, possess, or otherwise handle client funds or property in any manner in California during an entire calender quarter and if respondent includes, in his probation report for that quarter, a statement to that effect that is certified by affidavit or made under penalty of perjury under the laws of the State of California, respondent is not required to submit, to the State Bar's Probation Unit, a certificate from a Certified Public Accountant for that quarter.

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 year.

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 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 that the State Bar be awarded 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.

We concur:
OBRIEN, P. J.
TALCOTT, J.*

*. Hon. Robert M. Talcott, Judge of the Hearing Department, State Bar Court sitting by designation pursuant to the provisions of rule 305(e), Rules of Procedure of the State Bar Court, Title II, State Bar Court Proceedings.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SHERE R. BAILEY

A Member of the State Bar

Nos. 98-O-01442; 98-O-03538

Filed March 16, 2001

SUMMARY

Respondent failed to file a response to the notice of disciplinary charges and her default was entered. In his discipline recommendation, the hearing judge recommended that respondent be actually suspended from the practice of law for two years and until she pays restitution to one of her former clients; she attends the State Bar's ethics school; and establishes her rehabilitation, fitness to practice, and learning in the law. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought review, challenging only the hearing judge's discipline recommendation. The State Bar contended that the discipline recommendation should be modified to include a period of stayed suspension and to further provide that the recommended two-year actual suspension continue until respondent pays restitution to a second former client. Furthermore, the State Bar contended that the discipline should he modified to include a provision requiring respondent to comply with any probation conditions imposed on her by the State Bar Court as a condition for terminating her actual suspension under State Bar Rule of Procedure, rule 205.

The review department agreed with the State Bar's contention that the hearing judge's discipline recommendation was inadequate. The review department recommended a five-year stayed suspension and an actual suspension of two years and until respondent pays restitution to both former clients, files and the State Bar Court grants a motion to terminate the actual suspension under Rule of Procedure, rule 205, and establishes her rehabilitation, fitness to practice, and learning in the law. In addition, the review department recommended, in accordance with Rule of Procedure, rule 205, that the State Bar Court be authorized to place respondent on probation and to impose appropriate probation conditions on her as a condition of terminating her actual suspension.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: No Appearance (default)

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

HEADNOTES

[1 a, b] **613.10 Aggravation—Lack of Candor—Bar—Found but Discounted—Duplicative of section 6068(i) charge**
613.90 Aggravation—Lack of Candor—Bar—Found but Discounted—Other reason
Attorney's failure to participate in State Bar Court disciplinary proceeding before entry of default was aggravating circumstances, but warranted little aggravating weight because it closely equaled conduct that constituted attorney's violation of statutory duty to cooperate with disciplinary investigations and that resulted in entry of attorney's default.

[2] **213.90 State Bar Act—Section 6068(i)**
Attorney's failure to respond to State Bar investigator's letter did not establish attorney's violation of statutory duty to cooperate with disciplinary investigations because State Bar did not mail letter to address that attorney maintained on State Bar's official membership records, but instead mailed letter to address it believed, but did not establish, to be attorney's home address.

[3 a-c] **107 Procedure—Default/Relief from Default**
135.50 Division V, Defaults and Trials (rules 200 - 224)
165 Adequacy of Hearing Decision
176 Discipline—Standard 1.4(c)(ii)
179 Discipline Conditions—Miscellaneous
1099 Other Miscellaneous Issues
In default proceeding, period of stayed suspension and disciplinary provision authorizing probation conditions to be imposed on attorney in the future by State Bar Court ought not to be rejected by hearing judge merely because attorney's actual suspension will continue until attorney establishes rehabilitation under standard 1.4(c)(ii) or until attorney files and State Bar Court grants motion to terminate actual suspension under State Bar Rule of Procedure, rule 205.

[4] **107 Procedure—Default/Relief from Default**
135.50 Division V, Defaults and Trials (rules 200 - 224)
179 Discipline Conditions—Miscellaneous
1099 Other Miscellaneous Issues
In default proceeding, no loss of public protection occurs when specific probation conditions are not immediately imposed on attorney who is placed on actual suspension because such attorney will be prohibited from practicing law for duration of attorney's actual suspension and until attorney files and State Bar Court grants motion to terminate actual suspension under State Bar Rule of Procedure, rule 205.

[5] **135.86 Procedure—Rules of Procedure**
199 General Issues—Miscellaneous
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous
State Bar Court does not have authority to conditionally grant standard 1.4(c)(ii) petitions for relief from actual suspension or to impose probation type conditions on attorneys when granting such petitions.

[6] **179 Discipline Conditions—Miscellaneous**
1091 Substantive Issues re Discipline—Proportionality
1099 Other Miscellaneous Issues

Failure to recommend period of stayed suspension merely because attorney failed to appear in disciplinary proceeding results in marked reduction in public protection and in defaulting attorney receiving less discipline than attorneys who appear and participate in disciplinary process.

[7 a-c] **135.50 Division V, Defaults and Trials (rules 200 - 224)**
173 Discipline—Ethics Exam/Ethics School
179 Discipline Conditions—Miscellaneous
1099 Other Miscellaneous Issues

Despite the mandate in State Bar Rule of Procedure, rule 290(a) that every imposition of discipline (other than reprovals) include a requirement that attorney attend State Bar Ethics School, the appropriate time to consider imposing State Bar Ethics School as a condition of probation in default proceeding in which attorney's actual suspension will continue until the attorney files and State Bar Court grants motion to terminate actual suspension under State Bar Rule of Procedure, rule 205, is at the time of ruling on the rule 205 motion to terminate the actual suspension

[8 a, b] **173 Discipline—Ethics Exam/Ethics School**
179 Discipline Conditions—Miscellaneous
1099 Other Miscellaneous Issues

Disciplinary recommendation in a default proceeding in which attorney's actual suspension will continue until attorney files and State Bar Court grants motion to terminate actual suspension under State Bar Rule of Procedure, rule 205 may, in appropriate cases, require that attorney's actual suspension continue until attorney attends State Bar Ethics School.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
214.01 Section 6068(j)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
290.01 Rule 4-200 9 (former 2-107)

Aggravation
Found
521 Multiple Acts
582.10 Harm to Client

Standards
802.30 Purpose of Sanctions

Discipline
1013.11 Stayed Suspension—5 years
1015.08 Actual Suspension—2 years

Probation Conditions
1021 Restitution
1029 Other Probation Conditions
1030 Standard 1.4(c)(ii) Requirement
1093 Inadequacy of Discipline

Other
2321 Section 6007—Inactive Enrollment for Failure to Answer—Imposed

OPINION

OBRIEN, P. J.:

The principal issue we address in this matter is whether or not the total absence of participation in the disciplinary process in this court by an attorney charged with misconduct should have an effect on the discipline recommended, particularly the imposing of conditions of probation as a part of a stayed suspension in light of recently adopted rule 205 of the Rules of Procedure of the State Bar (rule 205).[1] As a part of that issue, we also address the requirement of rule 290 of the Rules of Procedure of the State Bar (rule 290) directing that State Bar Ethics School shall be required in all disciplinary recommendations of this court.

For the reasons we shall outline, we conclude that neither the existence of a default nor the requirement that an attorney make a motion under rule 205 prior to being relieved of actual suspension constitute valid reasons for a failure to recommend a specific period of stayed suspension or conditions of probation, if the facts and circumstances of the misconduct otherwise demonstrate the propriety of such recommendations. We further note that the imposition of a requirement that a suspended attorney show rehabilitation under Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) (all further references to standards are to this source) does not alter this view. **[1a]** We do note, as the hearing judge determined, that an attorney's failure to participate in his or her disciplinary proceedings is a factor to be considered in aggravation under standard 1.2(b)(vi).

STATEMENT OF THE CASE

In this default matter the hearing judge found, as we determine from the culpability conclusions set forth under the individual counts of charged misconduct in his second amended decision, respondent Shere R. Bailey culpable of four counts of withdrawing from client employment without taking reasonable steps to avoid prejudice to the rights of the client in violation of rule 3-700(A)(2) of the Rules of Professional Conduct, all occurring in the latter part of 1997 or the first part of 1998. In addition, he found respondent culpable of one count of collecting an illegal fee in violation of rule 4-200 of the Rules of Professional Conduct, one count of failing to return a client's papers and file in violation of rule 3-700(D)(1) of those rules, one count of failing to perform competently and diligently in violation of rule 3-110(A) of those rules, one count of failing to respond to reasonable status inquiries from her client in violation of Business and Professions Code section 6068, subdivision (m),[2] and one count of failing to maintain a current business address with the State Bar in violation of section 6068, subdivision (j). Finally, the hearing judge found respondent culpable of one count of violating her duty, under section 6068, subdivision (i), to cooperate with State Bar investigations because she failed to respond to a letter that a State Bar investigator sent her regarding the complaints that three of her clients had made against her.[3]

Although the State Bar does not challenge the culpability findings of the hearing department, in its opening brief it does seek review of the hearing judge's disciplinary recommendation[4]. That recommendation included two years' actual suspension,

1. Rule 205 provides, inter alia and in effect, that a disciplined attorney who has been placed on actual suspension by the Supreme Court following the attorney's default in this court will remain on actual suspension until the conclusion of that suspension and until this court grants a motion to terminate the attorney's suspension.

2. All further references to "section" are to the Business and Professions Code unless otherwise indicated.

3. In the introduction of the hearing judge's decision he fails to note a number of the culpability findings. This recital of found culpability is determined from the body of the decision.

4. The State Bar waived oral argument before the review department.

continuing until respondent shows her rehabilitation under standard 1.4(c)(ii) and until she makes restitution in the sum of $4,000 to her former client Mia Heard. The State Bar asks that we modify the recommended discipline to include (1) a specific period of stayed suspension, (2) a requirement that respondent be ordered to comply with such probation conditions as are reasonably related to her found misconduct as may be imposed by the State Bar Court as a condition for terminating her actual suspension, (3) a requirement that she attend the State Bar Ethics School and (4) an order that respondent pay restitution to her former client Nola Seidel.

The Notice of Disciplinary Charges (NDCs) in both of the consolidated cases involved in this matter were properly served on respondent during the month of August 1999. Respondent failed to file a response to the NDCs and has made no appearance in response to those notices, nor has she undertaken any effort to vacate her default. Because she failed to file a response to either of the NDCs, respondent's default was entered and she was involuntarily enrolled as an inactive member of the State Bar. (§ 6007, subd. (e); Rules Proc. of State Bar, rule 500.) Respondent will remain on involuntary inactive enrollment until her default is set aside or this proceeding is completed. (§ 6007, subd. (e)(2); Rules Proc. of State Bar, rule 501.)

Respondent was admitted to practice in June 1991. No evidence of prior discipline was introduced. The case was submitted on the well pleaded facts contained in the NDCs[5] and four exhibits including the declaration of Seidel. Although there is no dispute as to the evidence, we briefly summarize the evidence giving rise to the hearing judge's findings of culpability, which we adopt. In spite of this brief summary, we have reviewed the record de novo as we are obligated to do. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.)

Respondent's misconduct involved four separate clients, three of whom had engaged respondent to handle the probate of estates in which they had an interest and one of whom sought the preparation of estate planning documents. Respondent's employment in the three probate matters commenced in June 1994 in the first matter, June 1996 in the second matter, and August 1997 in the third matter. In the first matter, respondent collected a $1,500 fee without authority of court, demanded additional fees to complete the probate and then failed to respond to calls from the client, followed by respondent vacating her office in either December 1996 or January 1997 and not leaving her clients any means of contacting her. It became necessary for the client to complete the probate herself.

In the second probate matter, respondent was hired to prevent secured creditors from foreclosing on real property standing in the name of the decedent. In spite of the client being able to raise the money necessary for a stay on the foreclosure by one creditor a foreclosure sale by that creditor was set for December 2, 1997. An additional foreclosure sale was scheduled for November 20, 1997, by a separate creditor. Despite the repeated efforts of the client, he was unable to communicate with respondent concerning the foreclosure sale of November 20. Although the client appeared at that sale with sufficient funds available to satisfy the creditor, the property was sold to a third person because the client had only a personal check. On that same day and following the sale, the client met respondent in the lobby of her office building. Because respondent was moving she advised the client to call her in a few days. Thereafter, the client was unable to communicate with respondent. Despite demands, respondent failed to deliver the file to either the client or his subsequent attorney.

In the third probate matter, Mia Heard hired respondent in June 1996 and gave her $275 for filing fees and costs at that time. Respondent commenced

5. The well pleaded allegations of fact are deemed admitted in a default matter. (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).)

the probate in December 1996, and she collected $4,000 in advanced attorney's fees and costs from Heard without a court order in that same month. Commencing in April 1997, there was no contact between respondent and the client until January 1998, when the client was able to reach respondent on the telephone. Thereafter, the client wrote, faxed, and telephoned respondent, all without success. The client's correspondence was returned with a notation from the United States Postal Service: "attempted, not known." On going to respondent's office in March 1998 the client was informed that respondent had moved two or three months earlier. The client was forced to complete the probate of the estate herself. In its final order, the probate court denied any attorney's fees.

In the estate planning matter, Nola Seidel paid the sum of $1,990 to respondent in April 1996, after having been quoted a fee of $1,500. Between March 1997 and November of that year, Seidel complained of errors in the disposition of assets made in the documents and was informed in October or November that it would cost an additional $550 to make the corrections. That sum was sent to respondent. After reaching respondent in January 1998, the client was unable to reach respondent, nor did she have an address to which she might send correspondence. The client's attempt to write respondent was returned by the Postal Service, marked: "Return to sender."

On April 7, 1999, a State Bar investigator wrote and mailed a letter to respondent at her official address of record with the State Bar, inquiring about each of the three probate matters described above. No response to that letter was received from respondent, nor was the letter returned as undeliverable by the Postal Service. **[2]** Even though the investigator's April 7, 1999, letter to respondent was not returned as undeliverable by the Postal Service, the investigator sent respondent another letter on May 12, 1999, giving respondent a second opportunity to respond to the complaints made against her with respect to the three probate matters. The investigator did not, however, mail that May 12 letter to respondent's address of record, but instead, mailed it to respondent at an address which the investigator believed to be respondent's home address. Respondent did not respond to that letter; nor was it returned as undeliverable by the Postal Service. Because the May 12 letter was not sent to respondent's address of record and because there is no clear and convincing evidence that the address to which that letter was mailed was actually respondent's home address, we do not consider her failure to respond to the May 12 letter to be sufficient evidence of her failure to cooperate in a State Bar investigation in violation of section 6068, subdivision (i). We base our determination of culpability on this count solely upon her failure to respond to the investigator's April 7, 1999, letter.

On June 15, 1999, the same State Bar investigator wrote and mailed a letter to respondent at her address of record with the State Bar, inquiring about the events surrounding the estate plan described above. That letter was returned by the Postal Service marked: "Return to Sender, Unable to Forward, No Forward Order on File." This establishes that respondent failed to maintain a current address with the State Bar.

In addition to the culpability found, as outlined above, the hearing judge found an absence of mitigation. In aggravation, he found that respondent's misconduct harmed one of the probate clients (std.1.2(b)(iv)) and that respondent committed multiple acts of wrongdoing (std.1.2(b)(ii)). We agree with and adopt these findings. **[1b]** The hearing judge further found that respondent failed to participate in this disciplinary proceeding before the entry of her default (std. 1.2(b)(vi)). We agree with this finding, but note that the conduct relied on for this finding so closely equals the misconduct giving rise to the finding of culpability under section 6068, subdivision (i) and the entry of respondent's default that it warrants little weight.

The hearing judge recommended that respondent be actually suspended for a period of two years and until (1) she has shown proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice and present learning and ability in the general law in accordance with standard 1.4(c)(ii), (2) she pays $4,000 to her former client Mia Heard or the Client Security Fund if it has paid, together with interest at the rate of 10 per cent per annum from December 9, 1996, (3) she attends a session of the

State Bar's Ethics School and passes the test given at the end of such session, (4) she pass the Multistate Professional Responsibility Examination and, (5) respondent brings a rule 205 motion to terminate her actual suspension.

Following our independent review of the limited record before us we adopt as our own the hearing judge's findings of fact and conclusions as to culpability, aggravation and mitigation, as modified above.

DISCUSSION OF DISCIPLINE

Our principal concerns in disciplinary matters are "the protection of the public and the courts, the preservation of confidence in the legal profession [citation], and the maintenance of the highest possible professional standards for attorneys." (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 503; std.1.3.) As we noted in *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299, "[i]n determining the nature and degree of discipline, our Supreme Court instructs us that we must examine the facts in each case and consider the gravity of the misconduct, including the mitigating and aggravating evidence, in light of the purposes of discipline. [Citations.] These relevant factors are balanced on a case-by-case basis. [Citation.] Nevertheless, the Supreme Court has often expressed the need to assure consistency in disciplinary cases. [Citations.]"

Following our review of discipline imposed in like cases, we find the greatest guidance from *Young v. State Bar* (1990) 50 Cal.3d 1204 and *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074. In *Young* the attorney was found to have abandoned "several" clients by moving to Florida after approximately six years in practice. The misconduct was not found to constitute a pattern, having all occurred in a four month period. In that contested matter, Young's illness was found to contribute to mitigation. Young was suspended for three years, stayed on conditions including, inter alia, that he serve two years' actual suspension.

In *Bledsoe*, in a five-to-two decision, the Supreme Court found the absence of a pattern of misconduct where the attorney abandoned or failed to perform for four clients, failed to return fees to two clients and failed to cooperate with the State Bar investigation into his misconduct. There, Bledsoe defaulted, although he thereafter unsuccessfully sought to set the default aside. The Supreme Court imposed a five-year suspension, stayed, and placed Bledsoe on probation for five years, including among the conditions of probation two years' actual suspension. In neither of those cases did the Supreme Court address the issue of requiring a showing of rehabilitation under standard 1.4(c)(ii).

Included in the array of available discipline are conditions of probation that rely on stayed suspension to provide a mechanism to enforce those conditions. That is, on the violation of such a condition of probation an attorney may suffer further discipline, including actual suspension up to the period of stayed suspension. The history of probation as a disciplinary tool in matters involving attorney misconduct has been carefully set forth in *In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. 291 at pages 298-299. As we there remarked: "The Supreme Court has noted the rehabilitative aim of probation in disciplinary matters (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 319; *In re Nevill* (1985) 39 Cal.3d 729, 738, fn. 10) [fn.omitted], as well as noting implicitly the benefits of probation monitoring (*Rodgers v. State Bar, supra*, 48 Cal.3d at p. 319). Unlike the criminal justice system, punishment is not one of the objectives of attorney discipline. (*Id.* at p. 318.)" (*In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. at p. 299.)

As the State Bar points out, it is not uncommon for the Supreme Court to include stayed suspension in those cases where they have required a standard 1.4(c)(ii) hearing. (E.g., *In re Morse, supra*, 11 Cal.4th at p. 213; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1023; *Rhodes v. State Bar* (1989) 49 Cal.3d 50, 61.) In each of the cases relied on by the State Bar, the Supreme Court imposed a five-year suspension that was stayed on the condition that the attorney be placed on probation with a condition imposing a period of actual suspension of two or three years and until the attorney showed rehabilitation under standard 1.4(c)(ii). This court has regularly made recommendations to the Supreme Court containing similar proposed discipline. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 860 [5 years' suspension, stayed, 3 years' actual

suspension and a std. 1.4(c)(ii) condition]; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 482 [3 years' suspension, stayed, 2 years' actual suspension with a std.1.4(c)(ii) condition]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 245 [5 years' suspension, stayed, 2 years' actual suspension with a std.1.4(c)(ii) condition].). In the present proceeding, however, no such stayed suspension was included in the hearing judge's discipline recommendation.

The hearing judge rejected the State Bar's contention that *Young v. State Bar, supra*, 50 Cal.3d 1204, was the most analogous case, presumably because Young appeared in the disciplinary process and perhaps because it involved more clients. But the hearing judge did agree that *Bledsoe v. State Bar, supra*, 52 Cal.3d 1074, was persuasive in assessing discipline, and he recited that *Bledsoe* would be followed. However, in *Bledsoe*, the attorney was suspended for five years, stayed, and placed on probation for five years on conditions including that he actually be suspended for the first two years, that he make restitution during the first year of probation, that throughout the entire period of his probation he comply with two additional terms of probation and that he pass a professional responsibility examination within the period of his actual suspension. (*Id.* at pp. 1080-1081.) We note that similar probationary conditions were imposed in *Young*. (*Young v. State Bar, supra*, 50 Cal.3d at p. 1222.)

In neither *Bledsoe* nor *Young* did the Supreme Court address the issue of a showing of rehabilitation under standard 1.4(c)(ii); nor could it have addressed rule 205, which was only recently adopted and which requires that a defaulting attorney, who is placed on actual suspension, remain on that suspension until this court grants a motion to terminate the actual suspension. (See *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103.) As noted, the hearing judge in this proceeding did not include in his discipline recommendation a period of stayed suspension as did the Supreme Court in *Bledsoe* and *Young*. Nor did the hearing judge recommend that the State Bar Court be authorized, in accordance with rule 205, to place respondent on probation and impose upon her such probation conditions that the State Bar Court deems necessary or appropriate in the event that respondent files and this court grants a rule 205 motion to terminate her actual suspension.

The hearing judge stated in his decision: "It is not recommended that respondent's actual suspension be accompanied by probationary terms because she failed to appear in this matter and probation, as a result, would probably serve no purpose. And, to some extent, the mini-reinstatement hearing, at which respondent must establish her rehabilitation, will compensate for the absence of probation by requiring respondent to show that she has undergone positive changes and corrected the causes of her misconduct. Further, a period of stayed suspension is unnecessary because respondent shall remain suspended until she meets the guidelines of standard 1.4(c)(ii). Alternatively, if she satisfies that standard, there is no need for the imposition of stayed suspension."

We disagree. Rule 205(a) provides that when an attorney is in default and this court recommends actual suspension "the Court's recommendation shall include each of the following: (1) a specific period of actual suspension; (2) a period of stayed suspension, if appropriate . . . ." Thus, the issue to be determined in the present case is whether a period of stayed suspension is "appropriate."

[3a] In both *Bledsoe* and *Young* the Supreme Court determined that the appropriate discipline was a period of suspension, stayed, followed by actual suspension of two years as one of several conditions of probation. This, combined with the Supreme Court's observations on the rehabilitative nature of probation, persuades us that neither a period of stayed suspension, nor provisions authorizing the future imposition of conditions of probation, ought to be rejected by a hearing judge merely because the default of an errant attorney results in the attorney's actual suspension continuing until he or she makes a showing of rehabilitation under standard 1.4(c)(ii) or until the attorney files and the State Bar Court grants a rule 205 motion to terminate the actual suspension.

[4] As we noted in *In the Matter of Stansbury, supra*, 4 Cal. State Bar Ct. Rptr. at page 110, "[t]he entire purpose of rule 205, as derived from the legislative history, is to eliminate the necessity of multiple proceedings against an attorney who is

unwilling to participate in the disciplinary process and evidences no interest in maintaining his or her membership in the bar. [Fn. Omitted.] Under rule 205 the burden is placed on a defaulting attorney to bring forward to the State Bar Court his or her interest in continuing the right to practice." We see no loss of protection to the public by not immediately imposing specific conditions of probation on a defaulting attorney found culpable of ethical violations, for that attorney is prohibited from practicing for the duration of the period of actual suspension imposed by the Supreme Court and until such time as he or she files and this court grants a rule 205 motion to terminate the actual suspension. At that time, the appropriate conditions of probation, including attendance at the State Bar Ethics School, should be imposed.

As the opinion in *In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. at pages 299-300 points out, the hearing judge is often unable to determine the source of any problem when the charged attorney refuses to appear in the disciplinary process, and is therefore at a disadvantage when searching for appropriate conditions of probation. This issue was also addressed in *In the Matter of Stansbury, supra*, 4 Cal. State Bar Ct. Rptr. at pages 110-111, where we held that, when a defaulting attorney seeks termination of his or her actual suspension by filing a motion under rule 205(c) the State Bar Court may, with the approval of the Supreme Court and in accordance with rule 205(g), place the attorney on probation and impose on him or her such conditions of probation that are reasonably related to the found misconduct and that are deemed necessary or appropriate by the State Bar Court. Upon making such a rule 205 motion, the disciplined attorney will be before the State Bar Court and, as a part of the consideration of such a motion the underlying reasons for the previously found misconduct can, and should, be explored by the hearing judge.

[3b] Nor do we find that a hearing to show rehabilitation under standard 1.4(c)(ii) is a full substitute for recommending a period of stayed suspension or a provision authorizing the State Bar Court to place a defaulting attorney on probation with conditions in accordance with rule 205. **[5]** This court has no authority to conditionally grant a petition for relief from actual suspension under standard 1.4(c)(ii) or otherwise impose probation type conditions on an attorney when granting a standard 1.4(c)(ii) petition. (Cf. Cal. Rules of Court, rule 951(f); *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1097-1098; see also Rules Proc. of State Bar, rule 630 et seq.) Any number of factual situations can be anticipated under rule 205 in which a defaulting attorney, otherwise eligible to resume practicing law after making an adequate showing of rehabilitation under standard 1.4(c)(ii), ought to be subject to conditions of probation and probation monitoring for the protection of the public (e.g.. a recovering alcoholic, or former drug abuser).

[6] We also note that, by eliminating a period of stayed suspension, in appropriate cases, a marked reduction in the protection of the public results. In each of the cases we have considered instructive, *Bledsoe* and *Young*, periods of stayed suspension and conditions of probation were imposed. These provisions insured that the disciplined attorney remained under the authority of the discipline system for greater periods of time than recommended here by the hearing judge. While it is true that the requirement of a showing of rehabilitation under standard 1.4(c)(ii) assures the public that respondent will not practice law without further evaluation by this court, it affords no protection beyond that point. In the case of an attorney appearing before this court and participating in the disciplinary process the expectation is generally that the attorney will be subject to probationary conditions attendant to a stayed suspension. It is inappropriate that the mere fact that an attorney fails to appear in the disciplinary process should result in the elimination of that stayed suspension, which is one of the tools of public protection available to the discipline system. The ultimate effect of such a holding is that a defaulting attorney receives less discipline than does an attorney who fulfills his or her obligation under section 6068, subdivision (i), to participate in the disciplinary process.

[3c] We reiterate our observation made in *In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. at page 299: "We are not prepared as a matter of policy to preclude all attorneys who fail to respond to disciplinary charges from receiving discipline containing probation conditions." Neither the imposition of a requirement of showing rehabilitation under

standard 1.4(c)(ii), nor the adoption of rule 205, which requires a defaulting attorney to bring a motion to end his or her actual suspension, alter this observation. The plain language of rule 205(a) makes this clear.

[7a] As a final issue raised by the State Bar, it argues that rule 290 mandates that in all cases where discipline is imposed the respondent be required to attend the State Bar Ethics School. Rule 290(a) provides: "Except as provided by order of the Supreme Court, a member shall be required to satisfactorily complete the State Bar Ethics School in all dispositions or decisions involving the imposition of discipline, unless the member previously completed the course within the prior two years." (But see *In the Matter of Respondent Z* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85, 88 [rule 290 not applicable in cases in which a reproval is imposed].) We agree with the State Bar's reading of the language of the rule, but disagree that the imposition of a requirement for attendance at the State Bar Ethics School is mandated at this point.

[7b] The provisions of rule 290 are most often carried out by recommending attendance at the State Bar Ethics School as a condition of probation.[6] **[8a - see fn. 6]** We note that the imposition of discipline on a defaulting attorney is not complete when the imposition of conditions of probation is delayed until the attorney files a rule 205 motion to terminate his or her actual suspension. "The entire purpose of rule 205, as derived from the legislative history, is to eliminate the necessity of multiple proceedings against an attorney who is unwilling to participate in the disciplinary process and evidences no interest in maintaining his or her membership in the bar. [footnote omitted] Under rule 205 the burden is placed on a defaulting attorney to bring forward to the State Bar Court his or her interest in continuing the right to practice. ¶ It is our judgment that the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding." (*In the Matter of Stansbury*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 111.)

[7c] Consistent with the views expressed in *Stansbury*, we conclude that the appropriate time to consider the imposition of a condition of probation requiring respondent to successfully complete the State Bar Ethics School is at the time of ruling on a rule 205 motion to terminate her actual suspension. **[8b]** We do note, however, that in an appropriate case the recommended discipline could properly contain a defined period of actual suspension and provide that such actual suspension continue until such time as the attorney successfully completes the State Bar Ethics School.

We agree with the hearing judge that respondent is not entitled to retain the $4,000 fee she collected in the Heard probate matter. The fee was taken without obtaining the approval of the probate court, as required by Probate Code, section 10501, and on final distribution that court disallowed any attorney's fees.

The hearing judge declined to recommend the inclusion of any restitution in the Seidel matter, pointing out there is no evidence of the terms of the employment agreement nor evidence of the work preformed by respondent. The State Bar argues that, as a condition of probation in the Seidel matter, respondent should be required to make restitution to Seidel of both the $1,990 paid in April 1997 and the $550 paid in November 1997, plus interest on both amounts, relying on this court's opinions in *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229, 231, and *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 40, 46. In the former case all sums paid to an attorney who ultimately abandoned the client were ordered reimbursed even though the attorney had done some preliminary work. In the latter case,

6. **[8a]** When appropriate, our discipline recommendations have included a period of actual suspension "and until respondent successfully completes the State Bar Ethics School." (E.g., *In the Matter of Stansbury*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 111.)

restitution was ordered in an amount shown to have been required to complete the matter for which Aguiluz had been hired and paid.

In the Seidel matter, we have no evidence of what work was completed nor what was necessary to finish or correct the work done. We do know that in November 1997, respondent received $550 from her former client Seidel and that Seidel received no benefit or communication from respondent in response to that payment. For that reason we include in our disciplinary recommendation a provision providing that respondent's actual suspension shall continue until she makes restitution to Seidel in the sum of $550, plus interest.

DISCIPLINE RECOMMENDATION

For the reasons set forth herein and the reasons set forth in *In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. 291, we recommend that respondent Shere R. Bailey be suspended from the practice of law in the State of California for a period of five years, that execution of the five-year suspension be stayed, and that she be actually suspended from the practice of law for two years and until:

(1) she makes restitution to Mia Heard, or the Client Security Fund if it has paid, in the sum of $4,000 plus interest thereon at the rate of 10 percent simple interest per annum from December 9, 1996, until paid, and she provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles;

(2) she makes restitution to Nola Seidel, or the Client Security Fund if it has paid, in the sum of $550 plus interest thereon at the rate of 10 percent simple interest per annum from November 11, 1997, until paid, and she provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles;

(3) she files and the State Bar Court grants a motion to terminate her actual suspension under rule 205 of the Rules of Procedure of the State Bar; and

(4) she shows proof satisfactory to the State Bar Court of her 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.

We also recommend, in accordance with rule 205 of the Rules of Procedure of the State Bar, that the State Bar Court be authorized to place Bailey on probation for a specified period of time and that Bailey be ordered to comply with such probation conditions that are reasonably related to the misconduct found in this proceeding and that are imposed on her by the State Bar Court as a condition for the termination of her actual suspension.

MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Bailey be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of her 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.

RULE 955 OF THE CALIFORNIA RULES OF COURT

We further recommend that Bailey 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 in this proceeding.

COSTS

It is further recommended that the State Bar be awarded its costs in this proceeding in accordance with Business and Professions Code section 6086.10 and that those costs be ordered payable in accordance with Business and Professions Code section 6140.7.

We concur:

STOVITZ, J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RODOLFO ENRIQUE PETILLA

A Member of the State Bar

No. 96-O-05725

Filed May 14, 2001

SUMMARY

Respondent incurred credit card debts by obtaining cash advances on two of his credit cards, which he used and lost while gambling. Shortly thereafter, respondent sought to discharge those debts in bankruptcy. The two credit card companies obtained bankruptcy court judgments declaring respondent's debts to them to be nondischargeable because respondent engaged in actual fraud when he obtained them. The hearing judge found that respondent incurred the debts without intending to repay them in violation of the statutory duty not to engage in acts of dishonesty and moral turpitude. The hearing judge recommended two years' stayed suspension, two years' probation, and an actual suspension of 60 days and until respondent made restitution. The hearing judge also recommended that respondent be required to attend Gamblers Anonymous. (The Hon. Eugene E. Brott, Hearing Judge.)

On review, respondent contended that the evidence was insufficient to warrant discipline, that the hearing judge's decision was void because it was not timely filed and not properly served on him, that the restitution requirement was illegal, and that there was no basis to support the requirement that he attend Gamblers Anonymous meetings. The review department rejected all of respondent's contentions except the contention regarding the Gamblers Anonymous meetings. Further, the review department found that the record adequately supported the hearing judge's findings and conclusions and adopted the hearing judge's discipline recommendation with modifications.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Rodolfo Enrique Petilla, in pro. per.

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

HEADNOTES

[1] **162.19 Proof—State Bar's Burden—Other/General**
164 Proof of Intent
204.20 Culpability—General Substantive Issues
At least in absence of admission by attorney, proving that an attorney borrowed money without intending to repay it is rarely capable of being proved with direct evidence. Circumstantial evidence is sufficient, however, if it is clear and convincing.

[2 a, b] **147 Evidence—Presumptions**
164 Proof of Intent
204.20 Culpability—General Substantive Issues
Objective inferences drawn from consideration of the 12 factors often considered in bankruptcy proceedings to determine whether a debtor incurred credit card debts with fraudulent intent are also highly probative in determining whether attorney incurred credit card debts without intending to repay them. But 12 factors are not exclusive, none is dispositive, and attorney's conduct need not satisfy a minimum number to find that attorney lacked intent to repay debts.

[3 a, b] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
162.11 Proof—State Bar's Burden—Clean and Convincing
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
Because bankruptcy court's findings that attorney engaged in actual fraud when attorney incurred credit card debts were made under preponderance of the evidence standard and not clear and convincing standard applicable in disciplinary proceedings, hearing judge correctly (1) declined to apply principles of collateral estoppel to bind attorney with bankruptcy court's findings that attorney engaged in actual fraud; (2) reweighed evidence from bankruptcy court proceedings under clear and convincing standard after giving attorney fair opportunity to contradict, temper, and explain that evidence; and (3) permitted State Bar to present additional evidence regarding attorney's culpability.

[4] **162.19 Proof—State Bar's Burden—Other/General**
164 Proof of Intent
204.20 Culpability—Intent Requirement
221.00 State Bar Act—Section 6106
Because attorney's act of borrowing money without intending to repay it involves dishonesty and moral turpitude as a matter of law, State Bar need only prove that attorney borrowed money without intending to repay it to establish that attorney violated statutory duty not to engage in acts of dishonesty or involving moral turpitude.

[5] **221.00 State Bar Act—Section 6106**
Regardless of whether amount of money is small, act of borrowing money without intending to repay it is dishonest and involves moral turpitude.

[6 a, b] **162.20 Proof—Respondent's Burden**
164 Proof of Intent
204.20 Culpability—Intent Requirement

221.00 State Bar Act—Section 6106

Intent to repay debt requires some factual underpinning that would lead person to a degree of certainty that he or she would have ability to repay. Mere hope and unrealistic or speculative sources of income are insufficient. This is particularly true where respondent obtained large cash advances on the same day he was repaying gambling debts in the form of casino markers. And it is particularly true where respondent did not proffer any documentary evidence to support his claims that he was an experienced and successful or winning blackjack player. Moreover, in light of the fact that respondent never kept any records of his gambling winnings and losses, any hope of repaying any portion of his credit card debts with gambling winnings was unreasonable.

[7 a, b] **147 Evidence—Presumptions**
162.19 Proof/State Bar's Burden—Other/General
164 Proof of Intent
165 Adequacy of Hearing Decision
204.20 Culpability—Wilfulness Requirement
221.00 State Bar Act—Section 6106

Hearing judge's findings that attorney incurred credit card debts totaling $19,327 without intending to repay them and thereby committed acts of dishonesty and moral turpitude were supported by clear and convincing circumstantial evidence where, despite his meager and unpredictable income, and monthly living expenses in excess of $2,200, respondent continued to obtain cash advances totaling $32,054 on his four credit cards in the face of staggering gambling losses and lack of adequate liquid assets to repay his debts. Respondent could not have possibly have failed to perceive the hopelessness of repaying his mounting cash advances in the face of his gambling losses and lack of assets and current income.

[8 a-c] **101 Procedure—Jurisdiction**
135.50 Division V, Defaults and Trials (rules 200 - 224)
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
165 Adequacy of Hearing Decision
192 Due Process/Procedural Right

Rule of Procedure requiring hearing judges to file decisions within 90 days after taking cases under submission is neither mandatory nor jurisdictional. Thus, respondent's contention that the hearing judge's decision was void because it was filed four days after the expiration of the ninety-day time limit was rejected. Furthermore, because respondent failed to establish that he suffered any actual harm or prejudice, he was not entitled to any relief for the hearing judge's failure to file his decision timely.

[9 a-d] **106.50 Procedure—Pleadings—Answer**
135.20 Division II, Commencement/Venue/Filing/Service/Time (rules 50 - 64)
136.10 Procedure—Rules of Practice—Division I, General Provisions
139 Procedure—Miscellaneous

Except for service of initial pleading in a proceedings, State Bar Rules of Procedure and State Bar Court Rules of Practice require that attorney's response to notice of disciplinary charges contain an address of service for the attorney. Thus, clerk properly served copy of hearing judge's decision on attorney by mailing it to attorney at the address listed in the attorney's response to notice of disciplinary charges even though that address was not address that attorney maintained on State Bar's official membership records, particularly since attorney never notified clerk that he wished to be served at any address other than the address listed on the response.

[10] **211.00 State Bar Act—Section 6002.1**
214.00 State Bar Act—Section 6068(j)
Unless no office is maintained, every attorney has statutory duty to maintain his or her current office address on State Bar's official membership records (official address). Attorney violated this duty by maintaining his home address on State Bar's official membership records instead of maintaining his office address.

[11 a-d] **165 Adequacy of Hearing Decision**
171 Discipline—Restitution
1099 Other Miscellaneous Issues
Even if credit card cash advances that attorney obtained and lost while gambling in Nevada casinos were "gambling debts" and therefore not enforceable debts in California, hearing judge's recommendation that attorney be required to make restitution to credit card company was not only legal, but appropriate and necessary to respondent's rehabilitation and for protection of public in light of hearing judge's findings that attorney obtained the cash advances without intending to repay them. Requiring attorney to make restitution will force attorney to confront his misconduct in concrete terms.

[12 a-c] **162.19 Proof—State Bar's Burden—Other/General**
179 Discipline Conditions—Miscellaneous
1099 Other Miscellaneous Issues
Where State Bar neither impeached nor rebutted attorney's testimony that he had not gambled for more than five years, where State Bar did not proffer any expert testimony that attorney suffered from compulsive gambling, and where there was no evidence that attorney currently suffered from compulsive gambling, record did not support hearing judge's recommendation that attorney be required to attend Gamblers Anonymous meetings while on disciplinary probation.

[13] **745.51 Mitigation—Remorse/Restitution—Declined to Find—Insufficient Number of References**
745.59 Mitigation—Remorse/Restitution—Declined to Find—Other
To give attorney mitigating credit for restitution he made to credit card company under pressure of State Bar's investigation and disciplinary proceedings and of credit card company's money judgement against him would inappropriately reward attorney for merely doing what he was already legally required to do.

[14 a-d] **833.30 Standards—Moral Turpitude—Suspension**
833.90 Standards—Moral Turpitude—Declined to Apply
Where attorney engaged in acts of dishonesty and moral turpitude by repeatedly incurring credit card debts totaling $19,327 without intending to repay them, the magnitude of attorney's misconduct was substantial, but did not involve or relate to his practice of law. Appropriate discipline was two years' stayed suspension, two years' probation, sixty days' actual suspension.

ADDITIONAL ANALYSIS

Culpability
Found
211.01 Section 6002.1
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.19 Section 6106—Other Factual Basis

Aggravation
Found
591 Indifference
Mitigation
Found
710.10 No Prior Record
Discipline
1013.08 Stayed Suspension—2 years
1015.02 Actual Suspension—2 Months
1017.08 Probation—2 years
Probation Conditions
1021 Resitution
1024 Ethics Exam/School
1029 Other Probation Conditions

OPINION

WATAI, J.:

Respondent Rodolfo Enrique Petilla[1] seeks our review of a hearing judge's decision finding that respondent incurred credit card debts of $19,327 without intending to repay them. Respondent incurred those debts almost exclusively by obtaining cash advances on two of his credit cards. He admittedly used and lost those cash advances while gambling. Almost immediately after losing the money, respondent attempted to discharge the debts in bankruptcy. The hearing judge concluded that, by incurring those debts without intending to repay them, respondent committed acts in violation of the proscription of committing acts involving moral turpitude, dishonesty, or corruption set forth in Business and Professions Code section 6106.[2]

In light of the found acts of moral turpitude,[3] the hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be placed on probation for two years with conditions, including that he be actually suspended during the first sixty days of his probation and until he makes restitution to the credit card company that he has still not repaid. The hearing judge also recommended that, while respondent is on probation, he be ordered not to gamble and to attend Gamblers Anonymous meetings at least two times a week.

On review, respondent asserts the following four points of error: (1) that the evidence is insufficient to warrant discipline; (2) that the hearing judge's decision is void because it was not timely filed and because it was, according to respondent, not properly served on him; (3) that the hearing judge's recommended restitution requirement is illegal; and (4) that there is no rational basis to support the hearing judge's recommended requirement that respondent attend Gamblers Anonymous meetings. If we sustain either or both of his first two points of error, respondent requests that we reverse the hearing judge's decision and dismiss this proceeding. If we do not sustain either of his first two points, respondent alternatively requests that we modify the hearing judge's discipline recommendation to delete either or both of the requirements that respondent make restitution to his unpaid creditor and that he attend Gamblers Anonymous meetings.

The State Bar argues that all of respondent's points of error are meritless and urges us to adopt the hearing judge's findings and discipline recommendation.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a);[4] *In re Morse* (1995) 11 Cal.4th 184, 207), we agree with and sustain respondent's fourth point of error in which he contends that there is no rational basis to support the recommendation that he be ordered to attend Gamblers Anonymous meetings, but we reject his other three points of error. We adopt the hearing judge's findings of fact (with minor modifications) and conclusion that respondent is culpable of violating section 6106 as charged. In addition, we adopt the hearing judge's conclusions as to aggravating and mitigating circumstances.

Because there is no basis to support the recommended requirement that respondent attend Gamblers Anonymous meetings, we delete that requirement from the hearing judge's discipline recommendation.

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1. Respondent was admitted to the practice of law in the State of California on December 12, 1983, and has been a member of the State Bar since that time.

2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. The State Bar also charged that this same conduct violated respondent's statutory duty, under section 6068, subdivision (a), to support the laws of the United States and this state, but the hearing judge dismissed the charge as duplicative of the section 6106 violation. (See *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369.) The State Bar does not challenge this dismissal on review, and we adopt it on de novo review, but clarify that it is with prejudice (Rules Proc. of State Bar, rule 261(a)).

4. All further references to rules are to these Rules of Procedure of the State Bar unless otherwise indicated.

We also independently delete from the hearing judge's discipline recommendation the provision recommending that respondent remain on actual suspension until he makes restitution to the credit card company that he has still not repaid and, instead, recommend that respondent be required to make restitution to that company within the first 90 days of his probation. With these two modifications and a few additional modifications of a minor nature, we adopt the hearing judge's discipline recommendation.

I. THE EVIDENCE IS SUFFICIENT TO WARRANT DISCIPLINE.

After independently reviewing the evidence, we adopt the hearing judge's findings of fact with minor modifications and hold that the evidence is sufficient to warrant discipline. Accordingly, we reject respondent's first point of error.

The key issue in this proceeding is whether, from May 28, 1994, to July 4, 1994, respondent made charges and obtained cash advances on two credit cards totaling $19,327 without intending to repay the charges and advances. Unquestionably, the act of borrowing money without intending to repay it is dishonest and involves moral turpitude. Section 6106 provides that an attorney's commission of an act of dishonesty or of an act involving moral turpitude or corruption is the basis for the attorney's suspension or disbarment regardless of whether the attorney committed the act while acting in the capacity of an attorney or while engaged in the practice of law.

[1] At least in the absence of an admission by the attorney, proving that he or she borrowed money without intending to repay it is rarely, if ever, capable of being proved with direct evidence. Such intent may be proved by direct or circumstantial evidence. (*Geffen v. State Bar* (1975) 14 Cal.3d 843, 853, citing *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) Likewise, an attorney's culpability is not required to be established by direct evidence; circumstantial evidence is sufficient so long as it is clear and convincing. (*Medoff v. State Bar* (1969) 71 Cal.2d 535, 550-551; *Utz v. State Bar* (1942) 21 Cal.2d 100, 103 ["charges of professional misconduct may be established upon circumstantial evidence"].)

In the present proceeding, the only direct evidence on the issue of whether or not respondent intended to repay the $19,327 in credit card debts at the time he incurred them is respondent's testimony. Respondent testified that, when he made the charges and obtained the cash advances totaling $19,327, he intended to repay them in full with either his gambling winnings, his earned income, or both. He also testified that, at the time he incurred the debts, he had sufficient "liquid resources" with which to repay them in full. In addition, respondent asserts that, at the time, his home was worth more than $100,000 and that his mortgage balance was only $69,373 so that he had home equity of a little more than $30,000.

In his decision, the hearing judge did not expressly state whether he believed or rejected respondent's testimony that he intended to repay the credit card debts when he incurred them. Nonetheless, because the hearing judge found that respondent incurred the credit card debts without intending to repay them, it is clear that he rejected respondent's testimony, albeit implicitly. After independently reviewing the record and giving deference to the hearing judge's implicit rejection of respondent's testimony (rule 305(a)), we also reject respondent's testimony that he intended to repay the $19,327 in credit card debts when he incurred them. Of course, our rejection of respondent's testimony does not, in itself, create affirmative evidence to the contrary. (*In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 785, and cases there cited.)

Because we have rejected respondent's testimony and because there is no other direct evidence in the record regarding whether or not respondent intended to repay the $19,327 in credit card debts when he incurred them, we must review the record and determine whether the hearing judge's findings that respondent incurred the debts without intending to repay them is supported by clear and convincing *circumstantial* evidence. Because we find such clear and convincing evidence, we shall adopt the hearing judge's findings.

From approximately late 1983 to early 1992, respondent practiced law in a law firm or partnership type of practice. Then, in April 1992, he began practicing law as a sole practitioner. Respondent's

practice is primarily criminal defense. He is a State Bar certified specialist in criminal law.

Even though respondent was never licensed as a Certified Public Accountant (CPA) in California, he took and passed the California CPA Examination before he incurred the $19,327 in credit card debts.[5] Furthermore, before he incurred the credit card debts in question, respondent was licensed as a CPA in the Philippines. In addition to his extensive knowledge of accounting and financial matters as evidenced by his passage of the California CPA Examination and CPA licensing in the Philippines, respondent is and was before he incurred the questioned credit card debts very sophisticated in accounting and financial matters. Respondent was formerly employed as the chief accountant for Longs Drug Store; district accountant of East Bay Municipal Utility District; director of finance and accounting of the Federal Land Bank in Berkeley; and a director, treasurer, chief accountant, and vice president of various major corporations in the United States including Bicoastal Financial Corporation, a corporate "trading company" that has purchased other companies for as much as $1.6 billion.

In addition, respondent is a "twice-certified college instructor" and has taught part-time at a community college in California for many years -- both before and after he incurred the questioned credit card debts.

Respondent claims that his gambling was limited to playing blackjack, that he gambled only in various Nevada casinos, and that he went gambling no more than three or four times a year except in 1994 when he went at least ten times from January to July 4. In respondent's related bankruptcy proceeding, which is discussed below, he testified that he went gambling at Nevada casinos at least once or twice a week in May to July of 1994.

Respondent also testified that he usually took with him $5,000 or $10,000 in cash for gambling each time he went to Nevada and that he once took as much as $24,000. When respondent would lose all of the gambling money he took with him, it would ordinarily not upset him. He opines that a $2,000 to $3,000 gambling loss at Lake Tahoe or Las Vegas was the equivalent to the cost of a boat cruise for him and his wife.

Respondent claims that, except in 1994, he has always been able to pay his debts (including his gambling debts). In fact, before the summer of 1994, respondent routinely paid off large credit card balances in full when he received the bills (according to respondent, he did this to avoid having to pay any interest); he did not ordinarily make installment payments. On July 20, 1994, respondent filed a voluntary petition for bankruptcy under chapter 7 of the Bankruptcy Code in which he sought to discharge $57,054 in debts (almost all of which were gambling debts). As we understand respondent's position, respondent was forced to file for bankruptcy at the age of 54 because of a "free fall" that he experienced at the blackjack tables in late May 1994 to early July 1994. From the record, respondent's "free fall" may appropriately be described as a losing streak during which he lost tens of thousands of dollars.

The record does not disclose how much money respondent actually lost during his "free fall." Presumably, this is because respondent failed to keep records of his winnings and losses. What the record does disclose is that, during the 12-month period preceding his bankruptcy filing, respondent repaid *at least* $114,611 in gambling debts, which is calculated as follows: (1) approximately $62,111 in cash advances that respondent obtained on his credit cards (see Exhibit B to respondent's "Appellant's Opening Brief"); and (2) $52,500 in "gambling markers" from three Nevada casinos (see Exhibit C to respondent's "Appellant's Opening Brief").[6] In addition, the record

5. According to respondent, he never received his California CPA license because he did not want to complete the accounting experience requirement (i.e., the requirement that he practice public accounting under the supervision of a licensed CPA for a specified number of years).

6. A marker is the functional equivalent of a cash advance from a casino. Casinos do not make actual cash advances (i.e., advances of United States currency); instead they issue casino chips that have specific dollar amounts assigned to them, which they accept in lieu of cash when the borrower places a bet.

establishes that respondent incurred gambling losses of at least $111,000 during that same 12-month period.[7] The record does not clearly disclose whether this $111,000 in gambling losses includes all or part of the $57,054 in debts that respondent listed for discharge on his bankruptcy petition.

In addition, the record discloses that respondent incurred the $57,054 in debts that he listed on his bankruptcy petition during a 37-day period from May 28, 1994, to July 4, 1994. Of this $57,054 in listed debts, $25,000 was for gambling markers from three Nevada casinos and the remaining balance of $32,054 was for debts he incurred on four of his credit cards. Of the $32,054 in credit card debts, approximately $30,464 was for cash advances and related charges and fees and approximately $1,590 was for miscellaneous charges and purchases. According to respondent, he did not borrow the $25,000 in gambling markers until after he had obtained the cash advances totaling approximately $30,464 and lost them gambling.

After respondent filed for bankruptcy, three of the four credit card companies filed adversarial proceedings against him in bankruptcy court alleging that his debts to them were nondischargeable under title 11 United States Code section 523(a)(2)(A) (hereafter section 523(a)(2)(A)). Section 523(a)(2)(A) provides that debts incurred by false pretenses, false representations, or actual fraud are to be declared nondischargeable. To establish a debt's nondischargeability under section 523(a)(2)(A), a creditor must establish five elements. (*American Express Travel Related Services Co. v. Hashemi* (*In re Hashemi*) (9th Cir. 1996) 104 F.3d 1122, 1125, hereafter *Hashemi*.) Those five elements are identical to the elements of common law fraud and are as follows: (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the debtor made the false representation with the intent and purpose of deceiving the creditor (this element is commonly referred to as "fraudulent intent"); (4) that the creditor relied on the debtor's false representation; and (5) that the creditor sustained a loss as a proximate result of the false representation. (*Ibid.*) A creditor is required to establish these elements only by a preponderance of the evidence. (*Grogan v. Garner* (1991) 498 U.S. 279, 291.)

One of the three credit card companies moved to dismiss its adversarial proceeding. The bankruptcy court granted that company's motion to dismiss, and respondent's debts to that third credit card company and his debts to the fourth credit card company as well as his gambling markers to three casinos were thereafter discharged when the bankruptcy court filed its order of discharge on October 10, 1994.

The other two credit card companies maintained their adversarial proceedings against respondent and pursued their claims against him to judgment. Those two companies are Bank One and First Card. Between May 28, 1994, and July 4, 1994, respondent made charges and obtained cash advances totaling $12,268 on his credit card from Bank One and totaling $7,059 on his credit card from First Card. Respondent's debts to these two companies total $19,327 and are the subject of this disciplinary proceeding. Respondent's remaining debts of $37,727, which were discharged in bankruptcy, are not questioned or otherwise challenged in this disciplinary proceeding.[8] Nonetheless, as noted below, we do consider respondent's debts on the third and fourth credit cards for purposes of determining whether he had the intent to repay the $19,327 in questioned debts on his credit cards from Bank One and First Card.

Respondent was the only witness in each of the adversary proceedings. Because there is no right to jury trial in dischargeability proceedings (*Hashemi, supra*, 104 F.3d at p. 1124), the bankruptcy court was the finder of fact in each of these proceedings. **[2a]** In determining whether respondent's debts to Bank One and First Card were nondischargeable, the

7. Respondent states on form 7 of his bankruptcy petition that this figure of $111,000 is an estimate of his gambling losses based on a method he denominates as "a net worth method."

8. Respondent's remaining $37,727 in debts are calculated as follows: $4,015 in debts on the third credit card, $8,712 in debts on the fourth credit card, and $25,000 in gambling markers.

bankruptcy court applied the 12 non-exclusive factors that the Bankruptcy Appellate Panel of the Ninth Circuit set forth in *In re Dougherty* (Bankr. 9th Cir. 1988) 84 B.R. 653, 657.[9]

In Bank One's adversarial proceeding, the bankruptcy court applied the 12 factors and found that respondent engaged in actual fraud when he incurred the $12,268 in debts on his Bank One credit card and, accordingly, entered a judgment declaring respondent's debts to Bank One nondischargeable under section 523(a)(2)(A).[10]

In First Card's adversarial proceeding, the bankruptcy court also found that respondent engaged in actual fraud when he incurred the $7,059 in debts on his First Card credit card and, accordingly, entered a judgment declaring respondent's debts to First Card nondischargeable under section 523(a)(2)(A).[11] Even though Bank One did not do so, First Card sought a money judgment against respondent from the bankruptcy court. Consequently, the bankruptcy court awarded First Card a money judgment against respondent in the amount of $7,059.[12] The bankruptcy court also awarded First Card its costs and statutory interest.

Respondent appealed the two bankruptcy court judgments to the United States District Court for the Eastern District of California. But the district court affirmed both judgments. Respondent then appealed to the Ninth Circuit Court of Appeals. And, in separate unpublished memorandum opinions, the Ninth Circuit affirmed both of the bankruptcy court's judgments. Respondent sought reconsideration in the Ninth Circuit, which was denied. Thereafter, the Ninth Circuit's memorandum opinions became final and the bankruptcy court's judgments against respondent became final.

[3a] Because the bankruptcy court's findings that respondent committed actual fraud when he incurred the $19,327 in debts on his Bank One and First Card credit cards were made under the preponderance of the evidence evidentiary standard, and not the clear and convincing evidentiary standard that is applicable in attorney disciplinary proceedings, the hearing judge correctly declined to apply principles of collateral estoppel to bind respondent with those civil findings in this proceeding. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 205; *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 329.) Nonetheless, because the bankruptcy court's findings are supported by substantial evidence, they are entitled to a strong presumption of validity in the State Bar Court. (*Lefner v. State Bar* (1966) 64 Cal.2d 189, 193; *In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at p. 325.)

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9. The 12 *Dougherty* factors are (1) the length of time between the credit card charges and the filing for bankruptcy, (2) whether the debtor consulted an attorney before making the credit card charges, (3) the number of charges made, (4) the amounts of the charges, (5) the debtor's financial condition at the time the charges were made, (6) whether the debtor's charges exceeded the card's credit limit, (7) whether the debtor made multiple charges on one day, (8) whether the debtor was employed at the time the charges were made, (9) the debtor's continuing prospects for employment, (10) the financial sophistication of the debtor, (11) whether there was a sudden change in the debtor's buying or spending habits, and (12) whether the purchases were for necessities or luxuries. (84 B.R. at p. 657.)

10. Respondent attacks this fraud finding on the asserted grounds that the bankruptcy court did not address or find each of the five elements of fraud. (See *Hashemi, supra*, 104 F.3d at p. 1125 [creditors must establish each of the five elements of common law fraud].) Respondent contends that, because the bankruptcy court's fraud finding is defective, it is unfair to use it against him in this disciplinary proceeding. We do not address respondent's attacks on the bankruptcy court's fraud finding because the hearing judge did not and we do not give it preclusive effect under principles of collateral estoppel. In addition, as noted below, reliance upon the bankruptcy court's fraud finding is not necessary to establish respondent's culpability for the charged section 6106 violations.

11. Respondent also attacks this fraud finding on the asserted grounds that the bankruptcy court did not address or find each of the five elements of fraud. (See our discussion in footnote 10 above.)

12. The bankruptcy court's judgment was actually for $7,038.87. We obtained the $7,059 figure from the "schedule of current position on certain dates" that respondent prepared and which was admitted in the hearing department as Exhibit 2. We consider the $20.13 difference between the two figures to be immaterial and, therefore, do not address the issue further.

[3b] Contrary to respondent's contention, the hearing judge, in making his culpability findings, correctly reweighed the evidence and testimony from the two adversarial proceedings under the clear and convincing evidentiary standard and gave respondent a fair opportunity in this proceeding to contradict, temper, or explain the evidence and testimony from the adversarial proceedings with additional evidence. (*In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 205-207.) In addition, the hearing judge correctly permitted the State Bar to present additional evidence on the issue of respondent's culpability. (*Ibid.*)

As we noted above, the dispositive issue in this proceeding is whether respondent made the charges and obtained the cash advances totaling $19,327 on his Bank One and First Card credit cards without intending to repay them. **[4]** As we also noted above, the act of borrowing money without intending to repay it involves dishonesty and moral turpitude as a matter of law. Thus, to establish respondent's culpability for the charged section 6106 violations, the State Bar need only prove that he incurred these $19,327 in credit card debts without intending to repay them. Unlike Bank One and First Card who were required to prove the five elements of common law fraud to obtain a judgment declaring that respondent's debts to them are nondischargeable under section 523(a)(2)(A), the State Bar is not required to establish each of the five elements of common law fraud to establish the charged violations of section 6106.

After he weighed all the evidence, the hearing judge was "clearly convinced that Respondent borrowed without an intent to repay the money, which is an act of dishonesty." Our independent review of the record also leads us to this conclusion.

[2b] While this is not a dischargeability proceeding under the bankruptcy code, we do consider the 12 *Dougherty* factors to be a helpful guide in determining whether respondent incurred the $19,327 in credit card debts without intending to repay them. "[T]he *Dougherty* factors provide a useful means of objectively discerning intent based on the probabilities of human conduct." (*Household Credit Serv. v. Ettell* (*In re Ettell*) (9th Cir. 1999) 188 F.3d 1141, 1145.) Even though we view the objective inferences drawn from a consideration of the *Dougherty* factors to be highly probative of whether an attorney incurred a debt without intending to repay it, we do not view them as dispositive. (Cf. *Ettell, supra,* 188 F.3d at p. 1145.) The 12 factors "are non exclusive; none is dispositive, nor must [an attorney's] conduct satisfy a minimum number in order to prove [lack of] intent [to repay]." (*Hashemi, supra*, 104 F.3d at p. 1125.)

The length of time between the credit card debts and the filing of bankruptcy.

Respondent incurred all but a small portion of the $19,327 in questioned debts on his Bank One and First Card credit cards by obtaining seven cash advances on those cards between May 28, 1994, and July 4, 1994. Those seven cash advances total $18,828.[13]

Respondent correctly points out that he obtained most of these seven cash advances during the three-day period from June 10, 1994, to June 12, 1994. During that three-day period, respondent obtained five out of the seven advances. Those five advances total $15,302. Respondent had previously obtained one of the seven advances on May 28, 1994. That advance was for $3,001. Thus, at the end of the three-day period on June 12, 1994, respondent had obtained six of the seven advances totaling $18,303 ($15,302 plus $3,001) on his Bank One and First Card credit cards. Respondent obtained the seventh and last advance on July 4, 1994. That advance was for $525.

With respect to the debts totaling $12,727 that respondent incurred on his other two credit cards between May 28, 1994, and July 4, 1994, all but a small portion of the $12,727 were for cash advances. Specifically, respondent obtained five cash advances totaling $11,350 on those two credit cards.

Respondent testified that, by early July 1994, he had lost not only all of the $18,828 in cash advances

13. The remaining portion of the $19,327 total consists of a miscellaneous charge of $141 on June 21, 1994, a miscellaneous charge of $134 on June 24, 1994, and interest and service charges of $224.

he obtained from his Bank One and First Card credit cards, the $11,350 in cash advances he obtained from his other two credit cards, and the $25,000 in gambling markers listed on his bankruptcy petition, but also all of his remaining funds and liquid assets. Respondent claims that, after he received his July credit card billing statements, he concluded that he was forced to file for bankruptcy. And he did so on July 20, 1994, without attempting to work out a repayment plan with even one of his creditors.

When respondent was asked in the hearing department whether he contacted any of the credit card companies in an attempt to work out a repayment plan before he filed for bankruptcy, he answered: "No. They were contacted by the bankruptcy court." And, when he was asked whether he considered paying off the credit card debts in installments before he filed for bankruptcy, he also answered: "No." Moreover, respondent testified that he was not aware that he could make minimum monthly payments on his credit card debts instead of paying them off in full when he received the bills; he testified that he did not finally become aware of the monthly payment option "until all of this came to a head. When we were preparing for trial, then I began to look at this." He further testified that he "was not fully conscious of [the credit card companies' minimum pay provisions]. I don't know how else to put that. And my not being fully conscious of it is probably because I didn't care. I owed the money. I paid it in full." Not only is respondent's testimony not believable, it is inconsistent with his claim that he always paid his credit cards bills in full to avoid having to pay any interest. It is also inconsistent with his testimony in the bankruptcy court.

Respondent testified in Bank One's adversarial proceeding: "And you notice on [Bank One's billing] statement, and I would represent that on all these statements until I got into real serious trouble in June and July [1994] I never even had to pay any late fees, a late charge. I always paid the thing on time. Okay. According to the billing cycle. [¶] Now, not only that [Bank One's] bills as well as bills of all the other credit companies *always had* an amount called a minimum payment small amount, and I didn't even do that. I always paid the entire statement when due . . . . " (Emphasis added.)

In his closing arguments in Bank One's adversarial proceeding, respondent argued: "Now, on the date that I borrowed from [Bank One] I had enough funds to pay them and I have habitually, habitually paid [Bank One] and all the other credit card companies on time in full although their statements *always said* that I could pay the small minimum payment every month and that they would be satisfied with that. [¶] I always paid them in full until the really serious problem came up [in June and July 1994], and that is [evidence] of my intention, Your Honor, to pay. It's a habit, it's a custom and I habitually pay them on time in full even though under the terms of their own statements that they gave me, I could have paid just a little bit at a time." (Emphasis added.) Respondent's testimony and closing arguments in bankruptcy court simply don't make sense unless respondent knew for years that when he got a credit card billing statement (including Bank One's statements) he had the option of either paying the amount due in full to avoid having to pay any interest[14] or making at least the stated minimum payment and thus incur interest charges on the unpaid balance.

Whether respondent consulted another attorney concerning bankruptcy before the debts were incurred, and respondent's financial sophistication.

There is no evidence that respondent consulted a bankruptcy attorney before he incurred the $19,327 in questioned credit card debts. Nevertheless, we find that, at a minimum, respondent knew that he could attempt to avoid repaying these debts by filing a bankruptcy petition. Furthermore, in light of respondent's legal training and extensive accounting and financial experience as outlined above, his claim of being completely ignorant of bankruptcy law is simply implausible.

14. As we noted above, respondent even claims that, before the summer of 1994, he always paid his credit cards off as soon as he received the statements to avoid having to pay any interest.

The number and amount of respondent's charges.

As indicated above, on his credit cards from Bank One and First Card, respondent obtained seven cash advances totaling $18,828 and made two miscellaneous charges totaling $275 ($141 plus $134) right before filing for bankruptcy. Six of those seven cash advances were for more than $3,000. Furthermore, three of the seven advances totaling $9,201 were obtained on the same day – June 11, 1994.

And, as indicated above, respondent also obtained five cash advances totaling $11,350 on his other two credit cards. Three of the five cash advances were for more than $3,000. Furthermore, three of the five advances totaling $7,725 were obtained on the same day – June 11, 1994. Thus, on June 11, 1994, respondent obtained six cash advances totaling $16,926 on his four credit cards.

Whether respondent's charges and cash advances were above his credit limits.

After obtaining the seven cash advances totaling $18,828 on his Bank One and First Card credit cards, respondent had only $1,350 of his $8,500 credit limit remaining on his Bank One credit card and had exceeded his $9,500 credit limit on his First Card credit card by $2,770. Furthermore, after obtaining the five cash advances totaling $11,350 on his third and fourth credit cards, respondent had exceeded his credit limits on each of those cards.

Respondent's financial condition at the time of the charges and cash advances.

Respondent also argues in his "Appellant's Opening Brief" that he "always had sufficient liquid resources in Fresno Banks on each date that he received cash advances from Bank One and First Card. On [June 12, 1994], the total owed to these two credit card companies was $18,362.69 against $35,432.45 in liquid resources. (Exhibit A). Even considering all credit card charges, including those whose dischargeability in bankruptcy were not questioned, on June 12, 1994, Respondent had a total of $29,293.50 versus liquid resources of $35,432.45." According to respondent, the fact that he allegedly had sufficient liquid resources with which to repay the cash advances from Bank One and First Card on the day he obtained them, strongly supports his claim that he intended to repay the debts in full. We cannot agree. Respondent's factual assertion itself is misleading. Respondent did not have $35,432.45 "in liquid resources in Fresno Banks." Of this $35,432.45, $14,700 was only a line of credit at First Interstate Bank. Yet, on "Exhibit A" to his "Appellant's Opening Brief" and on State Bar Exhibit 2, respondent lists that line of credit as though it were a bank account at First Interstate Bank in which he had $14,700 on deposit. (While respondent testified that his "liquid resources" included a $14,700 credit limit, he also testified that "liquid resources" were his "cash assets" and that "liquid resources" are what was in his bank accounts.)

Moreover, respondent's comparison of his $18,362.69 in cash advances from Bank One and First Card as of June 12, 1994, to his alleged $35,432.45 in liquid resources on June 12, 1994, does not provide an accurate picture of his financial condition on that date. Using respondent's liquid asset comparison method, an accurate picture of respondent's financial condition on June 12, 1994, may be obtained by comparing his *total credit card debts* (i.e., his debts on all four of the credit cards; not just his debts on his Bank One and First Card credit cards) to his *total liquid assets* (i.e., cash on hand, cash in the bank, and marketable securities). On June 12, 1994, respondent's *total credit card debts* were $29,293.50,[15] and his *total liquid assets* were $20,732.45 ($35,432.45 less $14,700). Thus, on June 12, 1994, respondent's debts on all four of his credit cards exceeded his liquid assets by $8,561.05. In other words, excluding the alleged equity in respondent's home, respondent had a negative net worth of $8,561.05 on June 12, 1994.

15. This figure includes respondent's $18,303 total cash advances on his credit cards from Bank One and First Card as of June 12, 1994, plus $10,931 in charges and cash advances that respondent had incurred on his third and fourth credit cards as of June 12, 1994.

According to respondent's bankruptcy petition, he incurred the $25,000 in gambling markers listed in his bankruptcy petition during the 10-day period between June 25, 1994, and July 3, 1994, which was after he had obtained all but the seventh of the questioned cash advances on his Bank One and First Card credit cards. Thus, respondent argues that we should not consider these $25,000 in markers when determining his financial condition when he obtained the first six of the seven questioned cash advances. We agree. The fact that respondent borrowed an additional $25,000 days after he had already obtained the first six cash advances is irrelevant to respondent's financial condition when he obtained those first six advances.

However, the $25,000 in markers are relevant to determining respondent's financial condition on July 4, 1994, when he obtained the seventh and last of the questioned cash advances. According to Exhibit A to his "Appellant's Opening Brief," respondent's liquid resources totaled $20,082 on July 4, 1994; accordingly, his liquid assets on that day totaled only $5,382 ($20,082 less $14,700). Thus, before respondent obtained the seventh cash advance on July 4, 1994, his total debts of $56,529 *exceeded* his actual liquid assets of $5,382 by $51,147. In other words, excluding the alleged equity in respondent's home, respondent had a negative net worth of $51,147 before he obtained the questioned cash advance, which as noted above was for $525.

[5] We reject respondent's description of the $525 cash advance as small and not material. Regardless of the amount, obtaining a cash advance without intending to repay it is dishonest and involves moral turpitude.

We also consider highly relevant the facts that, on June 10, 1994 (which was the same day that respondent obtained a $3,001 cash advance from Bank One), respondent repaid a $5,000 marker to a Las Vegas casino; and (2) that, on June 11, 1994 (which is the same day on which respondent obtained six cash advances totaling $16,926 on his four credit cards), respondent repaid markers totaling $10,000 to two Las Vegas casinos. Thus, it is clear that respondent "effectively" used, if not actually used, all or part of these advances to repay preexisting gambling debts.

[6a] Moreover, respondent's claim that he intended to repay the cash advances with his gambling winnings is not convincing. Respondent's alleged intent or hope to repay the cash advances from his gambling winnings is too speculative and unreasonable to constitute or evidence intent to repay. (See *American Express Travel Related Servs. Co. v. Nahas* (*In re Nahas*) (Bankr. S.D.Ind.1994) 181 B.R. 930, 934; *In re Hansbury* (Bankr. D.Mass.1991) 128 B.R. 320; but see *AT&T Universal Card Servs. v. Alvi* (*In re Alvi*) (Bankr. N.D.Ill.1996) 191 B.R. 724, 734 [debtor's hope to repay debts from gambling winnings is evidence of intent to repay].) This is particularly true in this case where respondent is obtaining large cash advances on the same day he is repaying gambling debts in the form of casino markers. And it is particularly true in this case where respondent has not proffered any documentary evidence to support his claims that, before his "free fall," he was an experienced and "successful" or "winning" blackjack player. Moreover, in light of the fact that respondent never kept any records of his gambling winnings and losses, any hope of repaying any portion of his credit card debts with gambling winnings is unreasonable.

We do not find respondent's claim that he intended to repay the cash advances with his income to be convincing evidence of intent to repay. Without question, his income was inadequate and unpredictable in relation to the large amount of debt and net gambling losses he was incurring for, at least, the 12 months prior to the filing of his bankruptcy petition. This strongly suggests that respondent incurred the $19,327 in debts to Bank One and First Card without intending to repay them.

During the last eight months of 1992 (which was the first year in which respondent began practicing law as a sole practitioner), respondent earned a net income from practicing law of $6,358.15, which is approximately $795 per month. In 1993, his net income from practicing law rose to $34,615.85, which is approximately $2,885 per month. For the period of January 1994 until July 18, 1994 (which was two days before respondent filed his bankruptcy petition), respondent's *gross* income (i.e., income before business expenses – law office rent, telephone, etc.) was $21,617.63, which is approximately $3,325.79 per

month. And, for the four months immediately before he filed for bankruptcy (i.e., April, May, June, and July 1994), his *gross* income was only $1,620 per month.

In other words, before respondent filed his bankruptcy petition in July 1994, his approximate gross monthly income was either $3,325.79 or $1,620. However, his personal living expenses alone were, at least, $2,200 per month. Even if respondent could reasonably have expected that his net income from his law practice would double from $34,615.85 (or $2,885) per month in 1993 to $69,231.70 (or $5,769.31 per month) in 1994, his income would still have been insufficient and inadequate to repay the large debts and gambling losses he was incurring.

During a short period, respondent obtained multiple cash advances on his credit cards either almost meeting or exceeding his credit limits, continued to obtain credit in the form of gambling markers from various casinos, and then apparently lost all of his remaining "liquid assets" during his "free fall" from late May 1994 to early July 1994. He argues that he was then *forced* to immediately file bankruptcy in mid July 1994 without even considering or attempting to work out a repayment plan with his creditors or, if he is really totally ignorant of bankruptcy law as he claims, without seeking the advice of a bankruptcy attorney to determine if there were alternatives to immediately filing a chapter 7 petition for complete discharge (i.e., a chapter 13 petition under which respondent could have had a court ordered workout plan with respondent's creditors).

In summary, respondent incurred debts totaling $57,054 within a period of 37 days, all but exhausting his credit line with the credit card companies and receiving substantial credit from the casinos, and then filed to have them discharged in bankruptcy within just 16 days after he obtained his last credit card cash advance. Respondent claims not to have consulted an attorney, but rather was persuaded to seek bankruptcy protection by Donald Trump, who spoke of his bankruptcy experience on television. We do not lose sight of the fact that it is respondent, himself an attorney and a CPA who is very sophisticated financially, who would have this court believe that he was ignorant of bankruptcy laws. We are not persuaded.

[6b] "Intent to repay requires *some* factual underpinnings which lead a person to a degree of certainty that he or she would have the ability to repay. Mere hope, or unrealistic or speculative sources of income, are insufficient." (*Chemical Bank v. Clagg* (Bankr. C.D.Ill. 1993) 150 B.R. 697, 698, emphasis added.) **[7a]** The record clearly establishes respondent's hopeless financial condition, at least, from May 28, 1994, through July 4, 1994, if not during the entire 12-month period preceding his bankruptcy petition. Despite his meager and unpredictable income and monthly living expenses in excess of $2,200, respondent continued to make charges and obtain cash advances totaling $32,054 on his four credit cards in the face of staggering gambling losses and lack of adequate liquid assets to repay his debts.

[7b] In sum, respondent could not have possibly failed to perceive the hopelessness of repaying his mounting cash advances in the face of his gambling losses and lack of assets and current income. The circumstantial evidence clearly and convincingly establishes that respondent incurred the $19,327 in credit card debts to Bank One and First Card without intending to repay it.

II. THE HEARING JUDGE'S DECISION IS NOT VOID.

In his second point of error, respondent contends that the hearing judge's decision is void (1) because the hearing judge did not file the decision within 90 days after he took the case under submission as required by rule 220(b)[16] and (2) because, according to respondent, the Clerk of the State Bar Court did not properly serve a copy of the hearing judge's decision on him. For the reasons stated below, we reject both of respondent's arguments and hold that the hearing judge's decision is valid although it is superseded by this opinion on review (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 87

16. Respondent incorrectly cites rule 220(c) in his appellant's brief.

[on de novo review, review department opinions supersede hearing department decisions]).

A. The 90-day time limit in rule 220(b) is neither mandatory nor jurisdictional.

[8a] In 1998, the State Bar Board of Governors amended rule 220. It adopted a new subdivision (b) to that rule. That new subdivision (b), which applies in all cases in which the matter was taken under submission on or after February 1, 1999, provides that "[t]he Court shall file its decision within ninety (90) days of taking the matter under submission, unless a shorter period for filing the decision in an expedited proceeding is required by statute, by Supreme Court rule, or by these rules." In the present case, the hearing judge took the matter under submission on November 15, 1999.[17] Therefore, under rule 220(b), he should have filed his decision no later than February 14, 2000.[18] However, he did no do so. He filed his decision four days late on February 18, 2000.

[8b] First, respondent cites no authority for his novel proposition that a late filed decision is void. And, clearly, we are unaware of any. Second, construing the 90-day time limit in rule 220(b) as mandatory or jurisdictional would be unjustifiably inconsistent with the long-standing Supreme Court precedent that, once it has been established that an attorney has engaged in professional misconduct, the misconduct will not be disregarded because of irregularities in the disciplinary proceeding unless the irregularities reasonably can be seen to have resulted in *actual unfairness or specific prejudice* to the attorney. (See, e.g., *In re Gross* (1983) 33 Cal.3d 561, 566-567.) Third, such a construction would be inconsistent with our own Rules of Practice that have long provided (in relevant part) that no proceeding *shall* be dismissed, nor *shall* the recommended discipline be reduced, nor *shall* the disposition of a State Bar Court proceeding be influenced in any manner solely because of a hearing judge's failure to comply with the filing deadlines set forth in the Rules of Practice. (Former Provisional State Bar Ct. Rules of Prac., rule 1130(d), now State Bar Ct. Rules of Prac., rule 1130(e).)

[8c] In sum, we hold that the 90-day time limit in rule 220(b) is neither mandatory nor jurisdictional, but directory. Accordingly, we reject respondent's contention that the hearing judge's decision is void because it was filed four days after the expiration of the ninety-day time limit. Furthermore, because respondent has failed to establish that he has suffered any actual harm or prejudice, he is not entitled to any relief for the hearing judge's failure to file his decision within the time prescribed in rule 220(b). "The claimed 'injustice' done to [respondent] is that because of the delay his future was made uncertain . . . . Undoubtedly this created a period of pressure and tension for [respondent], but this fact alone does not require a dismissal of these proceedings." (*Arden v. State Bar* (1959) 52 Cal.2d 310, 316.)

B. The clerk properly served a copy of the hearing judge's decision on respondent.

[9a] Respondent contends that the hearing judge's decision is void because, according to respondent, the Clerk of the State Bar Court did not properly serve a copy of the decision on him. In support of this novel contention, respondent claims that the clerk was required to serve a copy of the hearing judge's decision on him by mailing a copy to him at the address he maintains on the official membership records of the State Bar (official address). Respondent further claims that the clerk did not mail a copy of the decision to him at his official address,[19] **[10 - see fn. 19]** but instead improperly mailed it to the address of his old office, which he describes as "an old, abandoned, vacant business suite."

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17. Respondent erroneously recites in his appellant's brief that the hearing judge took the case under submission on November 12, 1999.

18. The 90th day was actually February 13, 2000; however, that day was a Sunday. Accordingly, the hearing judge's decision was not due until the following Monday, February 14, 2000.

19. **[10]** Respondent admits to using his home address as his official address. Section 6002.1, subdivision (a)(1), expressly requires an attorney to use his current office address as his official address unless he does not have an office address. Throughout these proceedings, respondent has admittedly maintained a law office. Accordingly, it is clear that respondent has used his home address as his official address in violation of section 6002.1, subdivision (a)(1).

[9b] Not surprisingly, respondent cites no authority to support his novel theory that a clerk's failure to correctly serve a copy of a court's decision renders the decision void. And we are unaware of any. In any event, we reject respondent's contentions because we find that the clerk properly served a copy of the hearing judge's decision on respondent.

[9c] Rule 61(b) clearly provides that, except with respect to the initial pleading in a proceeding, a respondent shall be served at the respondent's official address "unless, with respect to the proceeding in connection with which the service is made, the [respondent] has counsel of record or *has designated a different address for service in the response* . . . ." (Emphasis added.) Moreover, rule 103(c)(1) clearly requires that a respondent's response (or answer) to the notice of disciplinary charges (NDC) must contain "an address on service of the respondent in the proceeding." And that address for service is the address listed in the upper left-hand corner of the first page of the response. (Cf. State Bar Ct. Rules of Prac., rule 1110(b)(1); see also State Bar Ct. Rules of Prac., rule 1110(h) ["A party who is not represented by counsel shall sign the party's pleading and state the party's address and telephone number on the first page of the pleading."].)

On May 27, 1999, a copy of the NDC in this matter was properly served on respondent at his official address. Thereafter, on June 14, 1999, respondent, appearing in propria persona, filed and served his response (answer) to the NDC.

[9d] In the top left-hand corner on the face page of his response and directly below his name, his State Bar membership number, and his title "Attorney at Law," respondent listed his address as: 2115 Kern Street, Suite 103-M, Fresno, CA 93721 (the Kern Street address).[20] By listing the Kern Street address on the face page of his response to the NDC, respondent designated the Kern Street address as his address for service in this proceeding. (Rules 61(b), 103(c)(1); State Bar Ct. Rules of Prac., rule 1110(b)(1) & (h).) Respondent's contentions to the contrary are not only meritless, but frivolous.

Respondent listed the Kern Street address as his address on every pleading that he filed in this matter before the hearing judge filed his decision. And every document or notice that the clerk served on respondent after respondent filed his answer to the NDC and before the hearing judge filed his decision was served on respondent at the Kern Street address. There is no evidence that respondent ever complained to the clerk or notified the clerk that he wanted to be served at a different address. Nor is there even an allegation by respondent that he did not receive the copy of the hearing judge's decision that was *properly* served on him at the Kern Street address.

III. THE HEARING JUDGE'S RESTITUTION RECOMMENDATION IS NOT ILLEGAL.

[11a] In April 1999, which was eight months before the trial in this proceeding, respondent finally repaid the $7,059 in purchases that he charged and the cash advances he obtained on his First Card credit card between May 28, 1994, and July 4, 1994. However, respondent has still not repaid the $12,268 in cash advances he obtained on his Bank One credit card between May 28, 1994, and July 4, 1994.

[11b] Respondent contends that, because he used the $12,268 in cash advances that he obtained on his Bank One credit card to play blackjack, they are gambling debts. Citing *Metropolitan Creditors Service v. Sadri* (1993) 15 Cal.App.4th 1821, respondent further contends that, because his debts to Bank One are "gambling debts," they are not enforceable in California. Respondent then argues that, because his "gambling debts" to Bank One are not enforceable in California, the hearing judge's recommendation that he be ordered to make restitution to Bank One in the amount of $12,268 is illegal. We disagree.

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20. On June 14, 1999, respondent also filed a "Status Conference Statement" form that he filled out and signed. That form contains a specific section in which the respondent (or his attorney if he has one) is to write his name and address. In that section, respondent wrote his name and again listed the Kern Street address as his address for service.

[11c] In California, it is well established that restitution in attorney disciplinary proceedings is not a form of debt collection. (Cf. *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008-1009 [restitution is not imposed solely because the attorney has not paid a debt discharged in bankruptcy].) Nor is it used as a means of compensating the victim of wrongdoing. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) However, restitution is an important part of rehabilitation and public protection because it forces errant attorneys to confront, in concrete terms, the harm that their misconduct has caused. (*Brookman v. State Bar, supra,* 46 Cal.3d at p. 1009.) Because the responsibilities of a lawyer differ from those of a layman, a lawyer 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.)

[11d] In sum, we not only conclude that the hearing judge's recommendation that respondent be required to make restitution to Bank One is legal, we also conclude that it is appropriate and necessary to respondent's rehabilitation and for protection of the public. Accordingly, we too shall recommend that respondent be ordered to make restitution to Bank One.

IV. THERE IS NO RATIONAL BASIS TO SUPPORT THE RECOMMENDATION THAT

Respondent be Required to Attend Gamblers Anonymous Meetings.

[12a] We agree with respondent's contention that there is no factual basis to support the hearing judge's recommendation that he be required to attend Gamblers Anonymous meetings. We addressed a similar issue in *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 629. In that case, we held that, before a mental health treatment condition may be recommended, there must be either expert *or* other clear evidence of a mental or other problem requiring such treatment. (*Ibid.*, citing *In re Bushman* (1970) 1 Cal.3d 767, 777, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)

[12b] The State Bar neither impeached nor rebutted respondent's testimony that he has not gambled since 1994. The State Bar did not proffer any expert testimony that respondent suffers from compulsive gambling. Nor is there any other evidence in the record establishing or indicating that respondent currently suffers from compulsive gambling.

The State Bar's reliance on *In re Kelley* (1990) 52 Cal.3d 487 to support the hearing judge's recommendation that respondent be ordered to attend Gamblers Anonymous meetings is misplaced. In *Kelley* the Supreme Court rejected Kelley's "contention that referral to the State Bar alcohol abuse program [was] unsupported by the evidence and unnecessary to protect the public. As the State Bar points out, the first step after referral is evaluation and screening for suitability of enrollment in the program. We agree with the review department that two drunk driving convictions, the second involving a violation of a court order based on the first, warrant this measure even absent an evidentiary finding that petitioner in fact suffers from such a problem." (*Id.* at pp. 498-499.) Kelley's two drunk driving convictions, the second of which was committed in violation of the terms of the criminal probation imposed on her as a result of her first conviction, distinguish *Kelley* from the present case. Another distinguishing factor is that in *Kelley* the Supreme Court noted that Kelley's drunk driving convictions and the circumstances surrounding them indicated that she had a problem of alcohol abuse. (*Id.* at pp. 495-496, 498.)

[12c] In sum, there is no basis to support the requirement that respondent attend Gamblers Anonymous meetings. In our view, the hearing judge's recommended probation condition requiring that respondent refrain from all gambling will adequately serve the purposes of attorney disciplinary proceedings.

V. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A. Aggravating circumstances.

We adopt the hearing judge's finding that respondent's failure to repay any portion of his 1994 debts to First Card until 1999 establishes respondent's

indifference towards rectification of and atonement for the consequences of his misconduct, which is an aggravating circumstance under standard 1.2(b)(v) of the Standards for Attorney Sanctions for Professional Misconduct.[21] Similarly, we adopt the hearing judge's findings that respondent's failure to repay any portion of his $12,268 nondischargeable debt to Bank One is also an aggravating circumstance and supports our finding that respondent had no intention to repay.

B. Mitigating circumstances.

Respondent has been practicing law for more than 16 years without any prior record of discipline. We adopt the hearing judge's finding of this mitigating circumstance pursuant to standard 1.2(e)(i).

[13] However, respondent is not entitled to any mitigation for making restitution to First Card in April 1999 because it was made under the pressure of the State Bar's investigation and initiation of disciplinary proceedings against him and the pressure of First Card's money judgment against him. (*Warner v. State Bar* (1983) 34 Cal.3d 36, 47 [an attorney is not entitled to any mitigation for restitution made as a matter of expediency or under pressure]; cf. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 490 ["compliance with a criminal restitution order, no matter how timely, is not a mitigating circumstance"].) To conclude otherwise would inappropriately reward respondent with mitigation merely for doing what he was already legally required to do.

VI. THE APPROPRIATE LEVEL OF DISCIPLINE.

In determining the appropriate level of discipline, we first look to the standards for guidance. (*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 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.)

[14a] The applicable sanction in this proceeding 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. In the present proceeding, the magnitude of the misconduct is substantial because it involves dishonesty with respect to money. We agree with the hearing judge that "Respondent's dishonesty in repeatedly borrowing money with no intention of repaying the same is serious and simply inexcusable."

[14b] 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.) The parties have not cited any cases, and we are unaware of any, involving an attorney's borrowing money from credit card companies without intending to repay it.

[14c] Even if there is no clear and convincing evidence that respondent made actual misrepresentations to Bank One or First Card in order to obtain the credit cards and to make purchases and obtain cash advances on them, respondent's use of the credit cards to obtain goods and cash without intending to repay the debts is, at worst, akin to embezzlement and, at best, akin to abusing one's position of trust for personal gain. Accordingly, like the hearing judge, we conclude that a period of actual suspension is required. The hearing judge cited *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332. In that case the attorney misrepresented his educational background on his resume, which he used while he was seeking employment as a lawyer. (*Id.* at p. 339.) We viewed the attorney's "willingness to repeatedly use false and misleading means to

21. The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

secure a perceived advantage in the employment process [to be] a matter of serious concern, despite the lack of misconduct during the 'practice of law.' [Citation.]" (*Ibid.*) In *Mitchell* we recommended and the Supreme Court imposed a 60-day period of actual suspension on the attorney. (See *id.* at p. 342.) At a minimum, respondent's misconduct was as serious as the attorney's in *Mitchell*; accordingly, we shall not recommend less than a 60-day period of actual suspension in this case. Moreover, because the misconduct was unrelated to and, apparently, did not adversely affect any of respondent's clients, we shall not recommend more than a 60-day period of actual suspension.

[14d] After carefully reviewing the record independently and weighing all the appropriate factors, we conclude that the hearing judge's recommendation of a two-year period of stayed suspension and a two-year period of probation on conditions, including a 60-day period of actual suspension, is the appropriate level of discipline.

VII. DISCIPLINE RECOMMENDATION.

We recommend that respondent Rodolfo Enrique Petilla be suspended from the practice of law in the State of California for a period of two years; that execution of the two-year period of suspension be stayed; and that Petilla be placed on probation for a period of two years on the following conditions.

1. Petilla shall be actually suspended from the practice of law in the State of California during the first 60 days of this probation.

2. Petilla must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

3. Petilla 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 Petilla is on probation ("reporting dates"). However, if Petilla's probation begins less than 30 days before a reporting date, Petilla may submit the first report no later than the second reporting date after the beginning of Petilla's probation. In each report, Petilla 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 Petilla 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 Petilla 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, Petilla 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, Petilla 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, Petilla must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit and any assigned probation monitor referee that are directed to Petilla, whether orally or in writing, relating to whether Petilla is complying or has complied with the conditions of this probation.

5. Within one year after the effective date of the Supreme Court order in this matter, Petilla must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) 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 Petilla's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Petilla is ordered not to claim any MCLE credit for attending and completing this course. (Accord Rules Proc. of State Bar, rule 3201.)

6. Petilla must abstain from all gambling.

7. Within 90 days after the effective date of the Supreme Court order in this matter, Petilla must: (1) make restitution to Bank One, or the Client Security Fund if it has paid, in the amount of $12,268 plus interest thereon at the rate of 10% simple interest per annum from June 11, 1994, until paid; and (2) provide satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles.

If Petilla contends that he is unable to pay this amount, he must (1) ask, within the first 30 days after the effective date of the Supreme Court order in this matter, the State Bar's Probation Unit in Los Angeles to assign to him a probation monitor referee and (2) submit to that referee, within 30 days after being notified of the referee's assignment, a written plan for the prompt payment of as much of the amount as he is able to pay. The submission of any such plan by Petilla must include satisfactory proof of his financial condition and the amount he is able to pay. On the motion of Petilla or the State Bar, any decision by the referee to approve or reject any payment plan proposed by Petilla is subject to de novo review by the State Bar Court.

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION.

We recommend that Petilla 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 same year.

IX. COSTS.

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 those costs be payable in accordance with section 6140.7 of the Business and Professions Code.

We concur:
OBRIEN, P. J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RONALD ROBERT SILVERTON

A Member of the State Bar

No. 95-O-10829

Filed May 22, 2001; reconsideration denied July 18, 2001

[Editor's Note: Supreme Court Review Granted (S123042, filed 9/1/2004). The State Bar Court Review Department opinion previously published at pp. 252 - 262 has been deleted from the *California State Bar Court Reporter*.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KUOJEN FELIX WU

A Member of the State Bar

No. 95-O-16652

Filed June 5, 2001

SUMMARY

After a trial on the merits, a hearing judge filed a decision in which he found respondent culpable of one count of professional misconduct. Respondent sought and obtained plenary review of the hearing judge's decision. In an unpublished opinion, the review department reversed the hearing judge's single culpability finding, thereby exonerating respondent of all disciplinary charges. Because respondent was exonerated of all charges after trial, he was statutorily entitled to reimbursement from the State Bar for the reasonable expenses (other than fees for attorneys and experts) that he incurred in preparation for trial. Respondent filed a motion for reimbursement. Thereafter, the hearing judge awarded respondent $2,569.50 in reimbursements from the State Bar, which included $1,260 for the expense respondent incurred in obtaining the transcript of the trial so that he could seek plenary review of the hearing judge's decision finding respondent culpable of misconduct. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought review challenging only the hearing judge's allowance of $1,260 in transcript costs. The review department agreed with the State Bar's argument that the hearing judge's allowance of transcript costs was inconsistent with the plain language of the State Bar's Rule of Proceeding dealing with exonerated attorneys' right to reimbursement for reasonable expenses.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Kuojen Felix Wu, in pro. per.

HEADNOTES

[1 a-c] **178.90 Costs—Miscellaneous**
199 General Issues—Miscellaneous
Right to recover costs is purely statutory. That is courts have no discretion to award costs that are not statutorily authorized. However, because Supreme Court retains inherent and original jurisdic-

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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.

tion over attorney disciplinary proceedings, Supreme Court might well adopt rules providing for or regulating recovery of costs in State Bar Court proceedings, but has not yet done so. Accordingly, right of attorneys to recover costs from the State Bar is granted solely by statute, which statute State Bar Court must strictly construe.

[2 a, b] **125 Procedure—Post-Trial Motions**
135.60 Procedure—Revised Rules of Procedure—Dispositions and Costs
139 Procedure—Miscellaneous
178.90 Costs—Miscellaneous
199 General Issues—Miscellaneous

Statutory provision granting attorneys the right to recover costs from State Bar provides that attorneys who have been exonerated of all disciplinary charges following a trial are entitled to reimbursement from the State Bar "in an amount determined by the State Bar to be the reasonable expenses, other than fees for attorneys or experts, of preparing for [trial]" without defining "reasonable expenses" (other than expressly excluding fees for attorneys and experts) and without prescribing the method by which State Bar is to determine what they are. Accordingly, State Bar Board of Governors properly exercised its statutory rule making authority and adopted State Bar Rule of Procedure 283 to define what expenses (or costs) are allowable as "reasonable expenses" for which exonerated attorneys may obtain reimbursement under statute and to provide the procedure by which exonerated attorneys are to seek reimbursement from the State Bar for those expenses. In absence of Supreme Court authority to the contrary, the State Bar Court may award exonerated attorneys reimbursement from the State Bar for reasonable expenses only if they are specified as allowable expenses in Rule of Procedure 283.

[3 a-e] **125 Procedure—Post-Trial Motions**
135.60 Procedure—Revised Rules of Procedure—Dispositions and Costs
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
139 Procedure—Miscellaneous
178.90 Cost—Miscellaneous
199 General Issues—Miscellaneous

Under clear language of State Bar Rule of Procedure 283(b)(5), State Bar Court may award attorneys exonerated of all disciplinary charges after trial reimbursement for expenses incurred in obtaining transcripts of court proceedings only if the court ordered that the transcripts be prepared. Fact that exonerated attorney could not obtain plenary review of hearing judge's decision finding him culpable of professional misconduct without first obtaining and paying for trial transcript is not synonymous with the court ordering the preparation of a transcript. In fact, requirement of obtaining trial transcript for plenary review is not imposed by court, but by State Bar Rule of Procedure 301(a)(2), which makes clear that it is the party seeking review that orders the trial transcript.

ADDITIONAL ANALYSIS

none

OPINION

WATAI, J.:

In a petition for review under rule 300 of the Rules of Procedure of the State Bar,[1] the State Bar seeks review of a hearing judge's order awarding respondent Kuojen Felix Wu reimbursement for the costs he incurred in obtaining the trial transcript in seeking review in this matter. (See rule 283(h) [reimbursement orders are reviewable only under rule 300].) Respondent is entitled to reimbursement for his reasonable expenses (other than fees for attorneys and experts) because he was exonerated of all charges (1) after a trial in the hearing department and (2) after review before the review department. (Bus. & Prof. Code, § 6086.10, subd. (d); rule 283(a).)[2]

In its petition, the State Bar challenges only that portion of the hearing judge's order that awards respondent reimbursement for the $1,260 that respondent paid to obtain the transcript of the trial in the hearing department. Respondent was required to obtain and pay for the trial transcript because he sought our review of the hearing judge's decision on the disciplinary charges in this matter. (Rule 301(a)(2).) According to the State Bar, the hearing judge abused his discretion and committed an error of law when he awarded respondent reimbursement for the cost of the trial transcript. (See rule 300(k) [standard of review under rule 300 is abuse of discretion or error of law].) For the reasons discussed below, we hold that the hearing judge erred as a matter of law in awarding respondent reimbursement for the cost of the trial transcript and, therefore, modify his reimbursement order to delete that award.[3]

UNDERLYING DISCIPLINARY TRIAL AND RULE 301 REVIEW

In the notice of disciplinary charges (NDC) on which this matter went to trial, the State Bar charged respondent with three counts of misconduct. After trial, the hearing judge filed a decision in October 1997 in which he found that respondent committed the misconduct that was charged in count two. In that same decision, the hearing judge found that the evidence was insufficient to prove that respondent committed the misconduct charged in counts one and three. Accordingly, he dismissed counts one and three with prejudice.

Respondent timely filed a request for review under rule 301 (plenary review)[4] and, as noted above, was required to and did obtain and pay for a transcript of the trial in the hearing department (rule 301(a)(2)). In that prior review, respondent alleged, inter alia, that the evidence was insufficient to support the hearing judge's finding that respondent committed the misconduct charged in count two of the NDC. In an unpublished opinion, we adopted the hearing judge's dismissals of counts one and three with prejudice, but reversed his finding that respondent committed the misconduct charged in count two because we concluded that the evidence was insufficient to support it. Accordingly, we dismissed count two with prejudice. After we adopted the hearing judge's dismissals of counts one and three and then independently dismissed count two, respondent was exonerated of all of the charges. Our prior opinion in this matter is now final.

RESPONDENT'S MOTION FOR REIMBURSEMENT

After respondent was exonerated of all charges, he filed, in the hearing department, a motion for reimbursement from the State Bar for the reasonable expenses, other than fees for attorneys and experts, that he incurred in preparation for trial in this matter. (Rule 283(a) & (d).) Thereafter, on December 22, 1999, the hearing judge filed an order in which he granted respondent's motion in part and denied it in part.

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1. All further rule references are to the Rules of Procedure of the State Bar unless otherwise indicated.

2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. The State Bar's February 17, 2000, request to supplement the record on review is granted.

4. Under rule 301, we independently review the record and may adopt findings, conclusions, and recommendations at variance with those of the hearing judge. (Cal. Rules of Court, rule 951.5; rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.)

In his order, the hearing judge found that respondent was entitled to reimbursable expenses totaling $2,569.50. Included in the expenses totaling $2,569.50 is a $1,260 expense that respondent incurred to obtain the transcript of the trial in the hearing department so that he could seek our review. As we noted above, the State Bar challenges only that portion of the hearing judge's order that awards respondent reimbursement for the $1,260 cost of the trial transcript.

In support of its position, the State Bar argues that, when the hearing judge awarded respondent reimbursement for the cost of the trial transcript, he violated an alleged legislative "mandate" proscribing reimbursement awards for transcript costs to exonerated attorneys and acted in excess of his statutory authority for making cost reimbursement awards to exonerated attorneys (§ 6086.10, subd. (d)). The State Bar further argues that the hearing judge's reimbursement award to respondent for transcript costs is inconsistent with the plain language of the rule of procedure governing cost reimbursements to exonerated attorneys (rule 283). Finally, the State Bar argues that the facts (1) that many states do not allow exonerated attorneys to recover costs (or expenses) and (2) that the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement contain a provision providing for state bars to recover their costs from disciplined attorneys, but do not contain a provision providing for exonerated attorneys to recover their costs from the state bars support its contention that the hearing judge abused his discretion and committed an error of law when he awarded respondent reimbursement for transcript costs. Because we agree with the State Bar's argument that the hearing judge's reimbursement award to respondent for transcript costs is inconsistent with the plain language of the rule of procedure governing cost reimbursements to exonerated attorneys, we need not and do not address any of its other arguments.

DISCUSSION

[1a] The issue before us is one of first impression under our State Bar Rules of Procedure. We begin our discussion by noting "'that the right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party.' [Citations.]" (*Davis v. KGO-TV., Inc.* (1998) 17 Cal.4th 436, 439.) Moreover, a court has no discretion to award costs that are not statutorily authorized. (*Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948, citing *Davis v. KGO-TV., Inc., supra*, 17 Cal.4th at p. 442.) Finally, such cost statutes are to be strictly construed. (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 289.)[5] **[2b - see fn. 5]**

[1c] The statutory authorization for the recovery of costs in State Bar Court proceedings is set forth in section 6086.10. The Legislature added section 6086.10 to the Business and Professions Code in 1986. Before that time, costs were not recoverable by either party in State Bar Court proceedings. The authorization for respondent attorneys to recover costs from the State Bar is contained in subdivision (d) of section 6086.10.

[2a] Subdivision (d) of section 6086.10 provides that "[i]n the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State Bar in an amount determined by the State Bar to be the reasonable expenses, other than fees for attorneys or experts, of preparation for the hearing." Other than expressly excluding fees for attorneys and experts, the statute does not define "reasonable expenses" or prescribe the method by which the State Bar is to determine what they are. Accordingly, the State Bar's Board of Governors (hereafter Board of Governors) properly exercised its statutory rulemaking authority (§§ 6086, 6086.5) and adopted rule 283 to

5. **[2b]** Our statements regarding the necessity of statutory authorization for awarding and recovering costs must be read in light of the well established principles that the State Bar is a sui generis arm of the Supreme Court (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301) and that the Supreme Court retains its inherent and original jurisdiction over attorney disciplinary proceedings (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336, 338-339; accord § 6075). In light of those principles, the Supreme Court might well adopt rules providing for and regulating the awarding and recovery of costs in State Bar Court proceedings. However, it has not done so. Therefore, we confine our discussion only to the statutory authority.

define "reasonable expenses" and to provide the procedure by which exonerated attorneys may seek reimbursement from the State Bar for those expenses. (Cf. *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 277 [State Bar appropriately exercised its rulemaking authority to develop a formulaic method of determining and calculating costs to be imposed on disciplined attorneys under section 6068.10, subdivision (h), instead of making complicated individualized cost assessments based on actual expenses].)

[2b] In rule 283(b), the Board of Governors set forth an exclusive list of nine categories that are allowable expenses (or costs) of preparation for trial for which exonerated attorneys may obtain reimbursement from the State Bar under section 6086.10, subdivision (d). Accordingly, and in the absence of Supreme Court authority to the contrary, the State Bar Court may award an exonerated attorney reimbursement from the State Bar for an expense only if the expense falls within one of the nine allowable categories set forth in rule 283(b). (See, generally, § 6086.5 [State Bar Court's jurisdiction may be limited by rules adopted by the Board of Governors].) And, even then, the State Bar Court may award the attorney reimbursement only to the extent that the allowable expense is reasonable.

[3a] In the present matter, the hearing judge found that the $1,260 expense respondent incurred to obtain the trial transcript is an allowable expense under rule 283(b)(5). Rule 283(b)(5) provides that an exonerated attorney's expense in obtaining "[t]ranscripts of Court proceedings ordered by the Court" is an allowable expense that is subject to reimbursement under section 6086.10, subdivision (d). (Emphasis added.)

[3b] In his order, the hearing judge correctly acknowledged that "the trial transcript was not technically 'ordered' by either the Review Department or the Hearing Department." Nonetheless, the hearing judge found as follows: "that the necessity of the trial transcript in order for Respondent to pursue review in this matter compels the conclusion that the transcript was required by the court. In this context, whether the transcript was required or ordered is essentially synonymous. The court therefore finds that Respondent is therefore entitled to reimbursement of the costs of the trial transcript in this proceeding."

[3c] We conclude that the hearing judge's finding that respondent's necessity of the trial transcript for the plenary review in this matter is synonymous with the court ordering the transcript is inconsistent with rule 283(b)(5). Accordingly, because the trial transcript was not ordered by the court, we reverse the hearing judge's reimbursement award of $1,260 for the cost of the transcript.

[3d] "It is clear rules of procedure adopted by the Board of Governors are not legislative acts. However, we deem it appropriate to apply the rules for statutory interpretation to such rules." (*In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 97, fn. 5.) The first fundamental rule of statutory interpretation is to examine the language of the statute. (*Id.* at p. 97, citing *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239; see also *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) If the meaning is clear, then the language controls and no further analysis is necessary. (*In the Matter of Sheppard, supra*, 4 Cal. State Bar Ct. Rptr. at p. 97.) We hold that the meaning of the participle phrase "ordered by the court" in rule 283(b)(5) is clear and unambiguous. Under the clear meaning of that rule, an exonerated attorney may obtain a reimbursement award for his or her expense in obtaining transcripts of court proceedings only if the court orders that the transcripts be prepared.[6]

[3e] Even though respondent could not have obtained plenary review of the hearing judge's October 1997 decision without first obtaining and paying for the trial transcript as the hearing judge pointed out in his order, the requirement of obtaining the tran-

6. The term "Court" in the State Bar's Rules of Procedure refers to: "the State Bar Court, Hearing Department, Review Department, or any judge thereof." (Rule 2.32.)

script is not imposed by the court; it is imposed by rule 301(a)(2) -- which, like all the Rules of Procedure of the State Bar, was promulgated and adopted by the Board of Governors. And, under that rule, it is clear that it is the party seeking review that "orders" the transcript of the trial and not the court, which is consistent with our construction of rule 283(b)(5).

Furthermore, our construction of rule 283(b)(5) is consistent with the construction of similar language that was contained in former section 274 of the Code of Civil Procedure[7] by the court in *Peoples Ditch Co. v. Foothill Irr. Dist.* (1932) 123 Cal.App. 257, 259-260. Former section 274 provided as follows: "In civil cases, the fees for reporting and for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and in either case all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case." After adding emphasis to the phrase "ordered by the court" in former section 274, the court in *Peoples Ditch* held that "[f]rom the above-quoted language of [former section 274] it is clear that it is a condition precedent to the inclusion in an award of costs of the fees of the court reporter for the preparation of a transcript that the court shall have ordered it to be prepared. [Citations.]" (*Peoples Ditch Co. v. Foothill Irr. Dist., supra*, 123 Cal.App. at p. 260; accord *Walton v. Bank of California* (1963) 218 Cal.App.2d 527, 547-548 [construing nearly identical language that was found in Government Code section 69953 (the "successor" to former section 274) before section 69953 was amended by Stats. 1986, c. 823, § 3].)

Finally, arguments similar to the conclusions of the hearing judge were rejected by the court in *Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946. In that case, plaintiff Sanchez (and her children) obtained a medical malpractice judgment against defendant Bay Shores Medical Group and others. Accordingly, plaintiff Sanchez was entitled to recover her costs from defendants. (Code Civ. Proc., § 1032, subd. (b).) Sanchez argued that she was entitled to recover the cost of expert witnesses under Code of Civil Procedure section 1033.5, subdivision (a)(8), which provides that the "[f]ees of expert witnesses ordered by the court" are allowable costs. As the court in *Sanchez* stated, "Sanchez argues that medical experts are necessary in medical malpractice actions in order for a plaintiff to meet its burden of proof as to the standard of care and breach of the standard of care elements. Thus, Sanchez asserts medical experts in medical malpractice actions have effectively been ordered by the court. This is incorrect. The fact that an expert is necessary to present a party's case does not mean that expert has been ordered by the court for purposes of recovery of expert witness fees as costs. [Citation.]" (75 Cal.App.4th at p. 950.)

SUMMARY

In our view, awarding respondent reimbursement for the cost of the trial transcript is fair. This is particularly true in light of the fact that, in every case in which discipline of a public reproval or greater is imposed on the attorney, the State Bar is awarded reimbursement for the cost of a trial transcript not ordered by the court, but acquired solely for the purpose of obtaining review of the hearing judge's decision (§ 6086.10, subd. (b); rule 280). Thus, we invite the Board of Governors to consider providing for, or seeking legislative or Supreme Court authorization for, reimbursement awards to exonerated attorneys for the costs of trial transcripts acquired solely for the purpose of obtaining review of hearing judges' decisions.

But under the current law, the hearing judge erred as a matter of law by awarding respondent $1,260 as reimbursement for the cost of the trial transcript. Accordingly, we hereby modify the hearing judge's December 22, 1999, order to delete the $1,260 reimbursement award to respondent for the cost of the trial transcript.

We concur:

OBRIEN, P. J.
STOVITZ, J.

7. The provisions of former section 274 were transferred to Government Code section 69953 until it was amended by Statutes 1986, chapter 823, section 3. The relevant civil transcript cost recovery statute is now Code of Civil Procedure section 1033.5, subdivisions (a)(9) and (b)(5).

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JUSTIN R. DAHLZ

A Member of the State Bar

No. 96-O-03184

Filed July 9, 2001

SUMMARY

A hearing judge found that, during a time span of more than six years, respondent engaged in multiple acts of misconduct in a single client matter in which respondent was the client's attorney of record in a case she had pending before the California Workers' Compensation Appeals Board. The specific acts of misconduct found by the hearing judge are that respondent (1) failed to competently perform legal services, (2) failed to respond to the client's status inquiries, (3) improperly withdrew from representation, (4) abandoned the client, (5) failed to return the client's file, and (6) engaged in an act of moral turpitude when he lied to the opposing party by stating that his client no longer wanted to pursue her workers' compensation case. In aggravation, the hearing judge found that specified portions of respondent's testimony in the hearing department were not credible or forthright, that respondent fabricated an entry in his client telephone log and introduced that log into evidence in the hearing department in defense of the disciplinary charges brought against him, that respondent made false representations to a State Bar investigator during the State Bar's initial investigation of the client's complaints against respondent, and that respondent's misconduct harmed his client. The hearing judge gave respondent mitigating credit for respondent's pro bono and community service and recommended that respondent be suspended for three years and until he established his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that the suspension be stayed, and that respondent be placed on probation for four years on conditions, which included a period of actual suspension of one hundred fifty days. (Hon. Eugene E. Brott, Hearing Judge.)

Respondent sought review and contended that the evidence was insufficient to support the hearing judge's aggravation finding that respondent's misconduct harmed his client; that the hearing judge erred in recommending that respondent be required to establish his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii); and that the hearing judge's discipline recommendation was excessive.

The review department rejected respondent's contentions. In addition, the review department adopted most all of the hearing judge's findings, but reject or modified a number of his culpability conclusions. Moreover, the review department concluded that respondent's act of moral turpitude in lying to the opposing party and

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the lack of candor aggravation were substantially more serious than the hearing judge concluded. The review department adopted the hearing judge's recommended four-year period of probation, but increased the recommended period of stayed suspension from three years to four years and increased the recommended period of actual suspension from one hundred fifty days to one year. (Stovitz, J., concurred and dissented and filed a separate opinion.)

COUNSEL FOR PARTIES

For State Bar: Cydney Batchelor Strickland

For Respondent: Michael E. Wine

HEADNOTES

[1] **139 Procedure—Miscellaneous**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Because Rules of Professional Conduct 3-700(A)(2) (prohibiting prejudicial withdrawal from employment) and 3-700(D)(1) (mandating return of client property) have not been amended or modified since they were first adopted and became effective on May 27, 1989, there are no "former" versions of those rules. Thus, the review department deemed the charged and found violations that State Bar and the hearing judge incorrectly described as violations of "former" rules 3-700(A)(2) and 3-700(D)(1) to be charged and found violations of rules 3-700(A)(2) and 3-700(D)(1), which became effective on May 27, 1989.

[2] **106.40 Procedure—Pleadings—Amendment**
125 Procedure—Post-Trial Motions
135.30 Procedure—Rules of Procedure—Division III, Pleadings/Motions/Stipulations
139 Procedure—Miscellaneous
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Because respondent failed to competently perform legal services both before and after the September 14, 1992, effective date of the revised version of the Rule of Professional Conduct requiring attorneys to competently perform legal services (rule 3-110), he violated both the "former" and the "current" versions of that rule. Thus, State Bar erred when it amended the charges to "conform to proof" by deleting the charge that respondent violated the "current" rule and replacing it with a charge that he violated the "former" rule. State Bar should not have deleted the charge that respondent violated the "current" rule, but should have added to it a charge that respondent also violated the "former" rule.

[3 a, b] **106.40 Procedure—Pleadings—Amendment**
125 Procedure—Post-Trial Motions
135.30 Procedure—Rules of Procedure—Division III, Pleadings/Motions/Stipulations
139 Procedure—Miscellaneous
192 Due Process/Procedural Rights

204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Even though State Bar erroneously amended the charges to "conform to proof" by deleting the charge that respondent violated the revised (i.e., "current") version of the Rule of Professional Conduct requiring attorneys to competently perform legal services (rule 3-110 as amended eff. Sept. 14, 1992) and replacing it with a charge that respondent violated the "former" version of that rule instead of correctly amending the charges by adding, to the charged violation of the "current" rule, a charge that respondent also violated the "former" rule, no due process violation occurred when review department held that respondent was culpable of violating both the "former" rule and the "current" rule because (1) the text of both rules was virtually identical, (2) respondent did not argue lack of notice, and (3) the trial in hearing department covered respondent's conduct during the time period in which the "former"rule was in effect and after the effective date of the "current" rule.

[4 a, b] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Respondent's deliberate and unjustified failure to attend a status conference in client's workers' compensation case was reckless failure to competently perform legal services and violated rule regarding attorneys' duty of competence.

[5 a-i] **600 Lack of Candor/Cooperation with Victim (1.2(b)(vi))**
610 Lack of Candor/Cooperation with Bar (1.2(b)(vi))
Respondent's lack of candor; which consisted of respondent (1) falsely stating in letters to a State Bar investigator that he had made an "appearance" before a specified workers' compensation judge and that he had attended the trial/hearing in his client's case before the Workers' Compensation Appeals Board; (2) sending the State Bar investigator a copy of the stipulation under which respondent's client settled her workers' compensation case on her own and without respondent's help which copy respondent signed to indicate his approval when he claimed that he did not know whether he was still representing the client and when he had not signed or approved the original that was executed by the client and the opposing party and that filed with and approved by the Workers' Compensation Appeals Board without respondent's involvement; (3) falsely testifying in State Bar Court that he had a conversation with his client in which she told him that she had moved and gave him her new address; (4) falsely testifying in the State Bar Court that he had been in contact with his client with respect to letter from the opposing party and that the client instructed him to proceed with her claim; (5) knowingly making an entry into his client telephone log that inaccurately indicated that, during the logged telephone conversation, the client implied that she was "basically not interested in pursuing this matter" and introducing this telephone log into evidence in the State Bar Court with knowledge that the statement was not true; and (6) falsely testifying in the State Bar Court that he did not know the trial/hearing date in his client's case before the Workers' Compensation Appeals Board; was more egregious than the found misconduct; which consisted of respondent (1) violating rule regarding attorneys' duty of competence by not performing any substantive work on his client's workers' compensation case for more than five years and deliberately and unjustifiably not attending a status conference in the case; (2) violating statutory duty to respond to client's reasonable status inquiries by not responding to a status request letter from the client; (3) violating rule against prejudicial withdrawal from employment by not advising client of dates of upcoming events, not properly responding to client's request for her file, and not removing himself as client's attorney of record; and (4) violating statute proscribing acts of moral turpitude by lying to the opposing party about his activity on the case and they by later lying to the opposing party that his client no longer wanted to purse her workers' compensation case.

[6] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Respondent's failure to perform any substantive work on client's workers' compensation case for more that five years was clearly repeated and reckless failure to competently perform legal services and violated rule regarding attorneys' duty of competence.

[7 a-c] **204.90 Culpability—General Substantive Issues**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Rule prohibiting prejudicial withdrawal from employment (rule 3-700(A)(2)) is more comprehensive than rule requiring an attorney whose employment has been terminated to release the client's file upon the client's request (rule 3-700(D)(1)). Rule prohibiting prejudicial withdrawal, mandates compliance with rule requiring release of client files. Thus, attorney's failure to properly release a client's file in accordance with rule requiring release of client files may be a portion of the conduct disciplinable as a violation of rule prohibiting prejudicial withdrawal. Because respondent's failure to release the client's file in accordance with the client's request was relied on as part of the basis for finding that respondent violated rule prohibiting prejudicial withdrawal, review department rejected the use that same failure to find a separate violation of rule requiring release of client files.

[8 a, b] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Even though client who respondent was representing in a case before the Workers' Compensation Appeals Board terminated respondent's employment, respondent remained client's attorney of record in her case before the Workers' Compensation Appeals Board and continued to have duty, under rule prohibiting prejudicial withdrawal from employment, to take reasonable steps to avoid foreseeable prejudice to the client's rights until either a substitution of counsel was filed or a motion relieving respondent as attorney of record was granted. After client terminated respondent's employment, respondent violated rule prohibiting prejudicial withdrawal because he did not (1) advise client of dates of upcoming events such as the trial date and briefing schedule, (2) properly respond to client's request for her file, and (3) properly remove himself as client's attorney of record in her case before the Workers' Compensation Appeals Board. Fact that client, without respondent's knowledge, learned dates of the important upcoming events did not relieve respondent of his obligation to advise client of those dates, to properly respond to client's request for her file, and to remove himself as client's attorney of record.

[9 a-d] **165 Adequacy of Hearing Decision**
511 Prior Record
Even though respondent's misconduct in present proceeding did not resemble the serious misconduct to which respondent stipulated in his prior record of discipline and even though respondent's present misconduct began well before State Bar initiated the prior disciplinary proceeding against him, review department gave respondent's prior record of discipline some greater weight in aggravation than did the hearing judge because respondent's present misconduct continued and accelerated during pendency of the prior proceeding, with the more egregious portion of the present misconduct occurring after respondent had stipulated to culpability on the charges of serious misconduct brought against in the prior proceeding.

[10] **135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers**
148 Evidence—Witnesses
159 Evidence—Miscellaneous

162.11 Proof—State Bar's Burden—Clear and Convincing
169 Standard of Proof or Review—Miscellaneous
801.90 Standards—General Issues

There is clear distinction between credibility and candor. The determination of a witness's credibility (i.e., believability) is primarily within province of the hearing judge who saw and heard the witness testify, while the determination that a witness's testimony lacked candor (i.e., that the witness lied) must be found by clear and convincing evidence.

[11] **135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers**
148 Evidence—Witnesses
159 Evidence—Miscellaneous
162.11 Proof—State Bar's Burden—Clear and Convincing
169 Standard of Proof or Review—Miscellaneous
801.90 Standards—General Issues

Even though a witness's candor must ordinarily be shown by clear and convincing evidence, great weight is still give to the hearing judge's findings on candor.

[12 a, b] **582.10 Aggravation—Harm to Client—Found**
801.90 Standards—General Issues

Even though short delays, even if resulting in client harm, standing alone are ordinarily not sufficient to warrant conclusion that a client suffered significant harmed within the context of standard providing that significant client harm is an aggravating circumstance, present case did not involve a short delay, but an inexcusable delay of more than five years during which respondent did not perform any substantive work on a client's workers' compensation case. Even though the delay did not cause the client to lose her cause of action, it had a substantial impact on her. After holding that a reasonable economic measure of harm to the client was the client's lost use of the value of her settlement proceeds for five years, the review department expressly declined to define the extent of the client's economic harm. Nonetheless, it held that the client's economic harm met the requirement of significant harm in standard providing that significant client harm is aggravating circumstance.

[13] **139 Procedure—Miscellaneous**
165 Adequacy of Hearing Decision
176 Discipline—Standard 1.4(c)(ii)
801.90 Standards—General Issues

In the hearing judge's discipline recommendation that respondent "be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii) [of the Standard for Attorney Sanctions for Professional Misconduct], that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: . . ," the provision that respondent's three-year suspension continue until he proves his rehabilitation, fitness, learning, and ability in accordance with standard 1.4(c)(ii) is stayed along with the recommended three-year suspension so that, if the State Bar files a probation revocation proceeding against respondent seeking to have all, or a part, of the three-year stayed suspension imposed on him, a standard 1.4(c)(ii) would be an available condition.

Additional Analysis

Culpability

Found

214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]

Not Found

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

Aggravation

Found but Discounted

523 Multiple Acts

Mitigation

Found but Discounted

740.39 Good Character
765.32 Pro Bono Work

Standards

833.90 Moral Turpitude—Suspension

Discipline

1013.10 Stayed Suspension—4 Years
1015.06 Actual Suspension—1 Years

Probation Conditions

1017.10 Probation—4 Years
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

OPINION

OBRIEN, P.J.:

Respondent Justin R. Dahlz[1] seeks our review of a hearing judge's decision in which the hearing judge found respondent culpable of multiple acts of misconduct in a single client matter. Of at least equal, if not greater concern are the hearing judge's findings of deception by respondent in dealings with (1) the opposing party in the underlying action, (2) the State Bar investigators investigating the complaint of his client and (3) the State Bar Court in the presentation of testimony and exhibits before the hearing department.

More specifically, the hearing judge found that respondent (1) violated rule 3-110(A) of the former Rules of Professional Conduct (effective May 27, 1989, to September 13, 1992) (hereafter former rule 3-110(A)) by failing to competently perform the legal services for which he was retained; (2) violated Business and Professions Code section 6068, subdivision (m)[2] by failing to respond to the client's reasonable status inquiries; (3) violated "former" rule 3-700(A)(2) and rule 3-700(A)(2) of the "current" Rules of Professional Conduct by improperly withdrawing from employment; (4) violated "former" rule 3-700(D)(1)[3] [1 - see fn.3] by failing to give the case file to the client; and (5) committed an act of dishonesty in violation of section 6106 by misrepresenting, to an opposing insurance adjuster, that the client no longer wanted to pursue her claim.[4] In aggravation, the hearing judge did not find "credible" respondent's testimony that his client told him she did not wish to pursue her claim. He further found that respondent offered into evidence a false telephone log entry that was prepared solely for the purposes of trial. Further, that he presented to the State Bar investigator a copy of a stipulation under which his client settled her claim and which bore his signature, when he had not participated in the settlement and was not a signatory to that stipulation, and falsely represented to the State Bar investigator that he had appeared before a Workers' Compensation Appeals Board (WCAB) judge at the time of the settlement of his client's claim, when, in fact, he had not. In addition, the hearing judge found respondent "was less than forthright in his testimony . . . " Finally, the hearing judge found further aggravation in that respondent's misconduct harmed the client.

The hearing judge recommended that respondent "be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;[5] that said suspension be stayed; and that he be placed on probation for four years subject to the following

1. Respondent was admitted to the practice of law in the State of California on June 6, 1989, and has been a member of the State Bar since that time.

2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. [1] Contrary to the State Bar's charges and the hearing judge's finding, there is no "former" rule 3-700(A)(2) or "former" rule 3-700(D)(1). Rules 3-700(A)(2) and 3-700(D)(1) became effective on May 27, 1989, and have not been modified or amended since that time. Accordingly, we deem the charged and found violations of "former" rules 3-700(A)(2) and 3-700(A)(1), as charged and found, violations of rules 3-700(A)(2) and 3-700(D)(1) of the Rules of Professional Conduct (effective May 27, 1989, to present).

4. On the motion of the State Bar, the hearing judge dismissed (1) the violation of rule 3-700(A)(2) of the Rules of Professional Conduct charged in count four of the first amended notice of disciplinary charges and (2) the violation of section 6152, subdivision (a) charged in count six of the first amended notice. We adopt those dismissals, but modify them to provide that the charges are dismissed with prejudice. (Rules Proc. of State Bar, rule 261(a).) The hearing judge also dismissed for want of proof the violations of rule 1-400(C) of the Rules of Professional Conduct charged in count six of the first amended notice. He also found the charge of violation of section 6106, as alleged in count seven, duplicative of count five because of the absence of proof in count six. He found no culpability in count seven. The State Bar does not challenge that finding or those dismissals on review, and after independently reviewing the record, we adopt them, but modify them to provide that the dismissals are with prejudice.

5. These standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

conditions: [¶] 1. That during the first 150 days of said period of probation, Respondent shall be actually suspended from the practice of law. . . ."

On review, respondent does not contest any of the hearing judge's culpability findings. Instead, he raises only the following three points of error; (1) that the evidence is insufficient to support the hearing judge's aggravation finding that his misconduct harmed the client; (2) that the hearing judge's discipline recommendation is excessive; and (3) that the hearing judge erred in including, in his discipline recommendation, a requirement that respondent establish his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii).

The State Bar argues that respondent's first two points of error, in which he challenges the hearing judge's finding of harm and appropriateness of the hearing judge's discipline recommendation, are without merit. Furthermore, the State Bar argues that, if anything, the hearing judge's discipline recommendation is inadequate in that the recommended period of actual suspension of "'less than 6 months -- is generous, perhaps even to a fault. [Fn. omitted.]"

With respect to respondent's third point of error, the State Bar suggests that the hearing judge's recommendation of a standard 1.4(c)(ii) condition is incomplete and ambiguous as written and should be modified on review to correct any such deficiency.

Of course, we independently review the record and may make findings and conclusions at variance with the hearing judge. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.) While we focus primarily on respondent's points of error attacking the hearing judge's finding of harm and discipline recommendation, we must still independently review the record to determine whether all of the hearing judge's findings of fact and conclusions of law are supported by the record. (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 709; cf. *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 902 [even if attorney does not contest the State Bar Court's findings of misconduct, the Supreme Court independently reviews them because their validity bears on its ultimate choice of discipline].)

Following our independent review, we affirm the hearing judge's finding of moral turpitude (section 6106), failure to perform (former rule 3-110(A)) and improper withdrawal (rule 3-700(A)(2)). We reject the hearing judge's separate finding of culpability under rule 3-700(D)(1) because we have used the misconduct alleged under that count as part of the evidence to find culpability under former rule 3-700(A)(2). While we disagree with a portion of the hearing judge's findings in the count charging a violation of section 6068, subdivision (m), we do find culpability under that section because we find that his client Michelle Douglas sent at least one letter to respondent in which she made a reasonable request for information concerning her claim against Pacific Bell. Respondent failed to respond to that request for information. Because of respondent's serious aggravation in lying to the opposing party in the underlying action and to the State Bar investigator and the State Bar Court in the presentation of testimony and exhibits, we increase the recommended discipline to include one year actual suspension as a condition of probation.

THE CHARGES

[2] [3a] Before the conclusion of the culpability phase of the trial in this matter, the State Bar moved to amend the first amended notice "to conform to proof" with respect to the charged violations of the Rules of Professional Conduct. In count one, the State Bar incorrectly amended the charges by deleting the charged violation of rule 3-110(A) of the Rules of Professional Conduct (as amended effective September 14, 1992, to present) (hereafter current rule 3-110(A)). As noted below, respondent's misconduct under count one began in 1989 and ended in 1996; accordingly, respondent's misconduct violated both former rule 3-110(A) and current rule 3-110(A). Therefore, the State Bar should not have deleted the charged violation of current rule 3-110(A), but should have added a charged violation of former rule 3-110(A) to it.

[3b] No due process violation will occur by our holding that, under the facts alleged in count one, respondent violated both former rule 3-110(A) and current rule 3-110(A). First, the text of former rule 3-110(A) is virtually identical to that in current rule 3-110(A). Second, respondent has not argued any

lack of adequate notice. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 381, fn. 13.) Third, the trial was not limited to respondent's conduct during the time period in which former rule 3-110(A) was effective, but covered respondent's conduct after that time period when current rule 3-110(A) became effective.

FINDINGS OF FACT

The record established that, in the fall of 1989, attorney Richard Rodriguez-Ivanhoe referred to respondent a case in which Rodriguez-Ivanhoe represented Michelle Douglas with respect to a workers' compensation claim pending before the WCAB in Walnut Creek against Pacific Bell, Douglas's employer. Pacific Bell is a self-insured workers' compensation employer.

Respondent's first communication with Douglas was in a telephone conversation in the late fall of 1989. In that telephone conversation, they discussed respondent representing Douglas. In December 1989, respondent sent Douglas a substitution-of-attorney form authorizing him to replace Rodriguez-Ivanhoe as Douglas's attorney of record in the WCAB. Douglas promptly signed the form and returned it to respondent. At all relevant times, Douglas not only continuously worked for Pacific Bell, but she continuously lived at the same address and had the same home telephone number.

At trial, Douglas did not independently recall the date or time of making any one of ten alleged calls to respondent between April 1990 and August 1990. Accordingly, she was permitted to testify from a document (exhibit 4) that she claims is a log in which she recorded each of her telephone calls to respondent. According to Douglas, she prepared the "log" by recording in it each telephone call that she made to respondent at (or very near) the time she made the call. Respondent denied receiving any such calls or messages relating to such calls. Our review of Douglas's telephone "log" convinces us that there is an absence of clear and convincing evidence that such calls were made by Douglas. Accordingly, we reject the hearing judge's finding that Douglas telephoned and left messages for respondent on 10 different occasions. Nor do we find clear and convincing evidence that any such calls were made by Douglas.

In addition, Douglas claimed that she had mailed six letters to respondent between August 1990 and February 1991 and that respondent did not reply to those letters. She testified that she hand wrote a letter to respondent in August 1990, duplicated it and sent the original to respondent, and kept the copy. Douglas claims she periodically added an additional date to the letter, duplicated it with the additional date or dates, again duplicated the letter and sent a copy to respondent, repeating that process six times between August 1990 and February 1991. The only evidence of the dates of mailing of those letters is the remaining copy of the letter containing six dates. Respondent denied receipt of any of those letters. We conclude that the evidence that Douglas sent six letters to respondent does not rise to the clear and convincing level. Accordingly, we reject the hearing judge's findings that Douglas sent respondent six letters. However, the record is clear that Douglas sent at least one letter. We further conclude that respondent did not communicate with Douglas during the period of either the alleged phone calls from Douglas or the alleged letters from Douglas.

After respondent substituted in as Douglas's attorney of record in the WCAB, he did virtually nothing on her case for almost a year. In November 1991, Fale Sala Leui, a Pacific Bell workers' compensation claims manager, sent respondent a letter informing him that Pacific Bell intended to file a petition to dismiss Douglas's case for want of prosecution unless respondent contacted her within 30 days. On November 29, 1991, respondent sent Leui a letter in which he stated that his law office had been in contact with Douglas and that Douglas had informed his office that she "fully intends to pursue" her claim against Pacific Bell. Respondent further stated, in this letter to Leui, that his office was in the process of accumulating the data needed to process Douglas's claim and that he would get back to Leui "within the next couple of weeks." We find that in fact respondent had not been in touch with Douglas, and respondent admits that he never got back to Leui.

Respondent testified that, after he or someone in his office contacted Douglas in November 1991

regarding Leui's letter, he was unable to locate Douglas because she had moved. But the hearing judge rejected respondent's testimony and so do we. Douglas credibly testified that she did not hear from nor was she able to contact respondent, after her telephone conversation with him in late fall of 1989 until March 1996, when she spoke with him again in a second telephone conversation. Moreover, as noted above, Douglas did not move or change her telephone number throughout the relevant time period. Further, respondent testified that he didn't remember talking to Douglas between the time she signed the substitution of attorneys and 1996.

In September 1993, Elaine Wazz, another Pacific Bell workers' compensation claims manager, sent respondent a letter in which she noted that respondent had done nothing on Douglas's claim for over a year and that Pacific Bell intended to file a petition to dismiss Douglas's case for want of prosecution unless respondent contacted her within 30 days. Respondent admits that he did not respond to Wazz's letter.

In October 1995, Pacific Bell filed its answer in Douglas's case and served a copy of it on respondent. Then, in February 1996, Rita McPeake, a Pacific Bell workers' compensation hearing representative, sent respondent a letter informing him that a status conference was set in Douglas's case for March 28, 1996. Respondent received McPeake's letter on February 6, 1996. In March 1996, respondent telephoned and spoke with Douglas at her place of employment without any apparent difficulty in locating her. During that telephone conversation, respondent told Douglas something to the effect that "I don't want to be bothered with this" (i.e., Douglas's case).[6]

[4a] Thereafter, on March 15, 1996, respondent telephoned McPeake and unequivocally told her that Douglas did not intend to pursue her claim against Pacific Bell and that he would not be attending the March 1996 status conference in Douglas's case. McPeake told respondent she would send a confirming letter for his signature. Accordingly, McPeake prepared a "confirmation" letter, which she faxed and mailed to respondent for his signature. Responded did not sign and return or otherwise respond to McPeake's confirmation letter. Nor did he attend the March 1996 status conference even though he had actual knowledge of that conference.

Respondent does not completely deny telling McPeake that Douglas did not intend to pursue her claim against Pacific Bell, but asserts that he would have "couched" his language and told McPeake something to the effect that "I'm trying to get a hold of my client. She does not seem to be interested" or that "I think my client does not want to pursue this claim." The hearing judge did not find respondent's testimony credible. Nor do we.

[5a] The hearing judge found that respondent fabricated an entry into his telephone log in Douglas's case file for purposes of defending the charges against him in this proceeding and "not as a record of any conversation that took place with Douglas." That entry is dated March 13, 1996, and contains purported notes from a telephone conversation that respondent allegedly had with Douglas on March 13. The entry includes a statement to the effect that Douglas is "basically not interested in pursuing this matter." While that entry may have been made at or about the time of that telephone conversation, we conclude that Douglas said nothing to the effect that she did not want to pursue her claim. We find, by clear and convincing evidence, that the log entry does not accurately reflect the conversation between respondent and Douglas and that it was offered into evidence by respondent with knowledge of that fact.

Because respondent did not attend the March 1996 status conference, the WCAB judge directed McPeake to serve on respondent copies of the minute order from the status conference and the notice of hearing. McPeake sent respondent copies of those documents, and respondent received them. The notice of hearing clearly notified respondent that the trial in Douglas's case was set for July 2, 1996, at 1:30 p.m. at the WCAB's Walnut Creek venue. More-

6. In a subsequent letter Douglas referred to that conversation as occurring on March 7, 1996, while respondent offered a purported log of telephone calls making reference to a March 13, 1996, telephone call with Douglas.

over, the minute order clearly directed that the "parties *shall* submit briefs 30 days before trial." Because respondent failed to attend the March 1996 status conference, the judge also directed McPeake to begin serving Douglas with copies of Pacific Bell's pleadings as though Douglas were representing herself pro se.

On April 15, 1996, Douglas sent respondent a letter by certified mail. In that letter Douglas referenced the statement that respondent made to her in their March 7, 1996 telephone conversation to the effect that he did not want to be "bothered" with Douglas's case. She then stated that respondent needed to file the necessary papers with the WCAB to remove himself from her case and to send her file to her. Respondent received Douglas's letter on April 16, 1996.

Respondent testified that, on April 22, 1996, he sent Douglas a letter acknowledging her April 15, 1996 letter, asking her to please come into his office and pick up her file, and advising her to hire another attorney. His file, introduced into evidence, contains a copy of that purported letter. Douglas testified that she did not receive this letter or any further communications from respondent. We find no clear and convincing evidence that respondent's testimony in this regard is false. Respondent made no further attempts to communicate with Douglas, to withdraw as her attorney of record in WCAB, or to give Douglas her case file.

Even though he clearly knew that he remained Douglas's attorney of record, respondent did not prepare for trial, did not meet with Douglas in preparation for trial, and did not submit a brief any time before the July 2, 1996 trial, as ordered by the WCAB judge.

At this late date, Douglas could not find another attorney to take over her case, although there is no evidence she attempted to do so. Accordingly, she obtained copies of her medical reports, prepared her own trial brief, and attended the trial by herself. On the day the WCAB case was tried, the parties entered into stipulations with an agreed amount requested for an award (hereafter the stipulation). Douglas and McPeake were the only persons who signed the stipulation before it was filed with the WCAB. However, because respondent remained Douglas's attorney of record, there was a designated space on the stipulation for his signature. The WCAB judge entered an award in favor of Douglas in accordance with the terms of the stipulation. In the award, the judge entered "-0-" in the blank for sum "payable to applicant's attorney as to the reasonable value of services rendered."

Respondent admits that he did not attend the July 2, 1996 trial, but testified that he did not make it because he got lost on his way to court. Respondent testified that, when he finally arrived, he spoke with the WCAB judge and that the judge told him that Douglas's case had been settled. In accordance with respondent's testimony, the hearing judge found that "[r]espondent did not appear for the trial but did arrive after the proceedings were concluded." However, the hearing judge rejected respondent's testimony that (1) he went to the hearing to protect Douglas's interests, (2) he did not know whether he was still Douglas's attorney of record, and (3) he did not remember what time it was when he finally arrived at the WCAB and spoke to the judge. We agree with and adopt these three enumerated findings.

CONCLUSIONS OF LAW

COUNT ONE, RULE 3-110(A) (FAILURE TO PERFORM)

[6] We agree with the hearing judge's conclusion that, at a minimum, respondent violated rule 3-110(A) (both former and current versions) by repeatedly and recklessly failing to perform the legal services for which Douglas retained him. Contrary to respondent's contentions, he did not perform any substantive work on Douglas's case for the more than five years that he represented her. Such a complete failure to act is clearly repeated and reckless. **[4b]** Moreover, respondent's unjustified failure to attend the March 1996 status conference was reckless.

COUNT TWO, SECTION 6068, SUBDIVISION (m) (FAILURE TO RESPOND TO STATUS INQUIRIES)

Although we have reversed most of the hearing judge's findings concerning Douglas's purported at-

tempts to communicate with respondent between April 1990 and February 1991, we do find that she made at least one effort to obtain information by writing respondent a letter. We determine that letter was a reasonable request by Douglas for information concerning her WCAB matter. Respondent failed to respond to that request. We find him culpable of a violation of section 6068, subdivision (m)[7].

COUNTS THREE AND FOUR, RULE 3-700(D)(1) (FAILURE TO RELEASE CLIENT FILE) AND RULE 3-700(A)(2) (IMPROPER WITHDRAWAL)

[7a] We combine counts three and four in our analysis because of the possibility that identical conduct may be the basis for charges under each of the charged rules, and initially address rule 3-700(A)(2) (count four) because it is the more comprehensive. Rule 3-700(A)(2) provides that an attorney "shall not withdraw from employment until [he] has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D)(1), and complying with applicable laws and rules." Accordingly, under the express terms of rule 3-700(A)(2), an attorney's failure to give the file to his client in accordance with rule 3-700(D)(1) after the attorney has withdrawn from employment may be at least a portion of conduct properly disciplinable as a violation of rule 3-700(A)(2). Such is the case before us, and we decline to again use that conduct in finding a separate violation of rule 3-700(D)(1).

[8a] The record is clear that Douglas terminated respondent's employment in her April 15, 1996 letter to him. This did not terminate respondent's responsibilities to Douglas. He remained attorney of record for her until either a proper substitution of attorney was filed with the WCAB or a motion relieving him as attorney of record was granted. He took no action to terminate his position as attorney of record, leaving his client without representation or her file, and the WCAB as well as the opposing party in a dilemma as to how to proceed. Further, respondent had a continuing obligation to comply with rule 3-700(A)(2), or its predecessor, former rule 2-111(A)(2), which prohibits an attorney from withdrawing services until he or she has taken reasonable steps to avoid any foreseeable prejudice to the client, and which also applies when the client fires the attorney. (*In the Matter of Myrdall, supra*, 1 Cal. State Bar Ct. Rptr. at 374.) That same rule, and its predecessor, requires that the attorney "continue representing the client until he or she has taken steps to avoid foreseeable prejudice." (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 574.) An attorney of record in a case remains the client's counsel and continues to have a duty to avoid foreseeable prejudice to the client's interests until a substitution of counsel is filed or the court grants the attorney leave to withdraw. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115; rule 3-700(A)(1).)

[7b] [8b] At an absolute minimum, to effect a proper withdrawal from representation, respondent was obligated to advise his client of the dates of upcoming events, including trial dates, advise her of filing dates for various required documents, including a trial brief, and ensure that she had the ability to retrieve her file. Respondent met none of these minimal requirements. The fact that Douglas, without his knowledge, learned of these requirements elsewhere did not relieve him of these obligations. Respondent claimed he wrote to Douglas, telling her to pick up her file. In that alleged letter he expressed his doubt about whether Douglas would even receive that letter. In summary, respondent made no effort to protect the interests of his client on his de facto withdrawal from representation of Douglas. Respondent willfully violated rule 3-700(A)(2) because he failed to properly remove himself as Douglas's attorney of record in the WCAB, because he failed to give the case file to Douglas in accordance with the request she made in her April 15, 1996 letter, because

7. Respondent was not charged with failing to adequately communicate with Douglas; only with failing to respond to Douglas's status inquiries.

he failed to advise her of the trial date in her case, and because he failed to advise her that she was required to file a trial brief no later than 30 days before July 2, 1996.

[7c] Because we have used the failure of respondent to take reasonable steps to see that Douglas had the ability to receive her file as part of the basis for finding respondent culpable of violating rule 3-700(A)(2) we reject a separate finding of culpability under rule 3-700(D)(1).

The hearing judge determined that respondent was culpable of abandonment. We note that no such charge was made against respondent and reject that finding.

COUNT FIVE, SECTION 6106
(MORAL TURPITUDE)

We adopt the hearing judge's finding that respondent committed an act of dishonesty in violation of section 6106 when in March 1996 he misrepresented to McPeake that Douglas no longer wanted to pursue her claim against Pacific Bell.

AGGRAVATING CIRCUMSTANCES

It is clear that aggravating circumstances must be shown by clear and convincing evidence to have an effect on discipline. (Standard 1.2(b); *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 148.) Each of the indicated areas of aggravation have been found to be true by such clear and convincing evidence.

PRIOR RECORD OF DISCIPLINE

[9a] Under standard 1.2(b)(i) a prior record of discipline is an aggravating factor in measuring discipline. In accordance with a stipulation as to facts and discipline between respondent and the State Bar, that was approved by a State Bar Court hearing judge, the Supreme Court filed an order in June 1996 in which it placed respondent on 12 months' stayed suspension and two years' probation with conditions (but no actual suspension). The Supreme Court also ordered respondent to take and pass the Multistate Professional Responsibility Examination.

[9b] Respondent's prior misconduct involved the mishandling of trust funds in two client matters. More specifically, the balance in respondent's client trust account repeatedly dropped far below the amounts he was to have maintained on deposit. Undeniably, respondent's prior misconduct is serious.

[9c] The hearing judge gave respondent's prior record of discipline "little weight in aggravation" because he found that respondent's prior misconduct "took place in 1990 and 1992, after Respondent had entered into the Douglas case." While we disagree, in part, with that finding we do not totally reject the hearing judge's analysis. Contrary to the hearing judge's finding, respondent's misconduct in the prior proceeding took place from 1992 through 1995. Although the Supreme Court did not file its disciplinary order in respondent's prior case until June 1996, the State Bar filed, and served on respondent, the first notice to show cause in respondent's prior case in the fall of 1994. Respondent signed the stipulation as to facts and disposition in which he admitted committing the misconduct stated above in January 1996. Respondent's misconduct in the present proceeding commenced well before the State Bar had begun disciplinary proceedings in the prior matter in the fall of 1994, but continued and accelerated during the pendency of that prior proceeding and after he had stipulated, in January 1996, to engaging in serious prior misconduct from 1992 through 1995. In fact, the more egregious portion of respondent's misconduct in the present matter occurred after his stipulation to culpability in the prior matter.

[9d] Although respondent's present misconduct does not resemble that addressed in the prior disciplinary proceeding it did occur after issuance of a notice to show cause in the prior proceeding. We do accord some aggravating weight to that prior discipline. (Cf. *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564.) His failure to conform his conduct to the standards of the legal profession after the institution and prosecution of that prior disciplinary case is a factor in aggravation. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80.) We give respondent's prior record of discipline some greater weight than did the hearing judge.

LACK OF CANDOR

[5b] Standard 1.2(b)(vi) determines that a lack of candor is an aggravating factor. The hearing judge found that respondent displayed a lack of candor because respondent was "less than forthright in his testimony and deceptive in his dealing with the State Bar investigators." The hearing judge gave this factor considerable weight. Like the hearing judge, we find that respondent deliberately made misrepresentations to the State Bar investigator and that he deliberately presented false testimony in the State Bar Court. Like the hearing judge, we consider respondent's lack of candor to be a strong aggravating circumstance. In fact, respondent's lack of candor is more egregious than the misconduct found against him in this proceeding. The Supreme Court has repeatedly noted "that deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated." (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.).)

[10] There is a clear distinction between credibility and candor. (See, e.g., *Franklin v. State Bar, supra,* 41 Cal.3d at p. 708 & fn. 4.) The determination of a witness's credibility (i.e., believability) is primarily within the province of the hearing judge because he or she saw and heard the witness testify. (Rules Proc. State Bar, rule 305(a).) On the other hand, the determination that a witness's testimony lacks candor (i.e., the witness is lying) must ordinarily be found by clear and convincing evidence. (Stds. 1.2(b), 1.2(b)(vi); but see *Siegel v. Committee of Bar Examiners* (1973) 10 Cal.3d 156, 178-179 [in cases involving an applicant's exercise of a First Amendment right of free speech, the committee must prove the applicant to be lying beyond a reasonable doubt]). [11] Even though a witness's candor must ordinarily be shown by clear and convincing evidence, great weight is still given to the hearing judge's findings on candor. (*Franklin v. State Bar, supra,* 41 Cal.3d at p. 708.)

Misrepresentations to State Bar Investigator

[5c] After Douglas complained about respondent's conduct to the State Bar, a State Bar investigator sent respondent a letter asking him for an explanation. On October 8, 1996, respondent sent the investigator a letter in which he included the following statement in his list of services that he allegedly performed for Douglas: "Appearance before Hon. George W. Mason on 7/2/96 in Walnut Creek, CA." Furthermore, respondent stated in his letter "[p]lease be aware that complainant's [i.e., Douglas's] case . . . was settled through a Stipulation which resulted in an award of $1,785.00 to claimant and payment of future medical expenses (see Exhibit "D") on July 2, 1996." The "Exhibit 'D'" respondent included in that letter was a copy of the stipulation that contained a signature by respondent in the space provided for his signature. Respondent, however, never signed the original stipulation. As noted above, the original stipulation was signed only by McPeake and Douglas and then filed with WCAB. The original stipulation that is in the WCAB's official file is not signed by respondent.

[5d] On November 25, 1996, respondent sent another letter to the investigator. In that letter respondent made the following statement: "As you have been made aware, I have been to the hearing at WCAB in Walnut Creek on July 2, 1996."

[5e] When respondent wrote his letters of October 8, 1996, and November 25, 1996, he knew that he had not made an "appearance" before Judge Mason and that he had not "been to the hearing . . . on July 2, 1996." The evidence clearly establishes that respondent made these statements knowing that they were false and misleading and made them with the intent to deceive the investigator.

[5f] Moreover, when he sent the investigator a copy of the stipulation with his signature on it, respondent knew that he had never signed the original stipulation that is on file at the WCAB. Respondent's signing of the stipulation is inconsistent with his claim that he did not know whether he still represented Douglas after March or April 1996. The evidence clearly establishes that respondent sent the investigator the copy of the stipulation with the intent to deceive the investigator into believing that respondent had actually appeared at the July 2, 1996 trial and represented Douglas in settling her claim.

False Testimony in the State Bar Court

[5g] As did the hearing judge, we find respondent's testimony in the hearing department to be false in several respects. Respondent initially testified that he did not know if he talked to, or had any communication with, Douglas between the time of her signing the substitution of attorney in late 1989 and the middle of 1996.[8] Dealing with that same period of time, respondent later testified "But [Douglas] told me, I think, that she moved from Benicia to another place, Richmond, I thought it was.... And that's how I got to know her new address. I think she gave it to me by telephone or something like that." In fact Douglas had the same address in Richmond throughout respondent's representation of her, had not moved during that period, and respondent had not talked with her.

[5h] As we have indicated, respondent wrote a representative of Pacific Bell in November 1991 indicating that he had been in contact with Douglas. In fact he had not been in contact with her. When questioned in the hearing department about the truthfulness of this statement in his letter, he testified "I was in contact with her by telephone, I think, not by the letter.... I think I called her, and at that time she told me go ahead and pursue the claim." This testimony was not true and respondent knew it was not true.

[5i] Respondent testified that he did not know the hearing date of the WCAB hearing for Douglas. When confronted with the notice of the hearing from his own file containing the exact date and time of that hearing with his handwritten notes on that notice, he testified that he thought the question had to do with the filing of a trial brief in the WCAB matter. The question was clear and unambiguous. We find that respondent's testimony in this regard was deliberately false.

MULTIPLE ACTS OF MISCONDUCT

Standard 1.2(b)(ii) urges that multiple acts of misconduct be treated as aggravation. We agree, but do note that it occurred in a single client matter. However, we do note that respondent's found lying to the Pacific Bell representative that Douglas did not wish to pursue her claim is similar to the found aggravation under the subheading Lack of Candor, *supra*. We include this factor in the weighing of aggravation.

HARM

Under standard 1.2(b)(iv) significant harm caused by a respondent's misconduct is an aggravating factor in recommending discipline for an errant attorney. The hearing judge found that respondent's misconduct significantly harmed Douglas. In his first point of error, respondent contends that this finding is erroneous or, alternatively, that the hearing judge improperly gave it too much weight in aggravation. We disagree.

[12a] Ordinarily, a short delay, even if it is "harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was 'significantly' harmed thereby." (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217.) However, in the present case, we are not dealing with a short delay. We are dealing with a delay of more than five years.

[12b] In addition, we have held that an attorney's failure to perform for more than five years caused the client harm under standard 1.2(b)(iv) because the client lost her cause of action. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 642, 646.) We recognized such harm even though the client's claim was weak and she could not have reasonably expected to receive a substantial settlement or judgment. (*Id.* at p. *646*.) While Douglas did not lose her cause of action, it is clear that the inexcusable delay in the resolution of her claim did have a substantial impact on her. A reasonable economic measure of the harm caused to Douglas is her lost use of the value of her settlement proceedings for five years. We are not dealing with a short delay, but one of an extended duration. We decline to attempt to define the extent of the economic harm to Douglas, but note that it meets the requirement of significant harm as set forth in standard 1.2(b)(iv).

8. He testified "I don't remember that I talked to her. I don't remember."

MITIGATING CIRCUMSTANCES

The hearing judge gave respondent mitigating credit for his pro bono and community service. (Std. 1.2(e)(vi).) Our review of the record discloses that respondent's pro bono and community involvement was not great and is somewhat remote in time. Accordingly, we give him slight mitigating credit for that pro bono service.

LEVEL OF RECOMMENDED DISCIPLINE

In his second point of error, respondent contends that the hearing judge's discipline recommendation is excessive. In contrast, the State Bar argues that if anything, the recommended discipline errs on the side of too little actual suspension.

In determining the appropriate level of discipline, we first look 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.) 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.)

The applicable sanction in this proceeding 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. In the present proceeding, the magnitude of the misconduct is substantial and it directly relates to and involves respondent's practice of law. Respondent committed multiple acts of dishonesty and moral turpitude. Thus, significant discipline is warranted under standard 2.3.

Both the State Bar and respondent cite cases for our consideration in determining the appropriate level of recommended discipline. However, recommended discipline does not arise from a fixed formula, but should be based on a fair balance of all relevant factors, including mitigation and aggravation. (*Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) Though we look to the standards for guidance, "[i]n determining discipline, the particular facts of each case must be reviewed.... 'There are no fixed standards as to; the appropriate penalty.' [Citations omitted.]" (*Franklin v. State Bar, supra*, 41 Cal.3d 700, 710.). None the less, we look to like cases for guidance in an effort to provide an even hand in our recommendations. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor, supra*, 1 Cal. State Bar Ct. Rptr. at p.580.)

In support of his position that the hearing judge's recommendation of 150 days of actual suspension is excessive, respondent primarily relies on four cases; *Wren v. State Bar* (1983) 34 Cal.3d 81; *Calvert v. State Bar* (1991) 54 Cal.3d 765; *Colangelo v. State Bar* (1991) 53 Cal.3d 1255; and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585. In *Wren* the attorney, in a single client matter, failed to communicate, misrepresented the status of the matter by, inter alia, giving the client a trial date when the action had not been filed. (*Wren v. State Bar, supra*, at pp.86-89.) Wren was suspended for 45 days. (*Id.* at p. 83.) In *Calvert* the attorney was found culpable of a failure to communicate with her client and continuing representation when she did not have time to represent the client with competence, and not culpable of abandonment. (*Calvert v. State Bar, supra*, at pp.782-783.) Although there was a conflict in the evidence between Calvert and her client, (*id.* at p. 771) there was no finding of lying by Calvert. She was suspended for 60 days. (*Id.* at pp. 785-786.)

In *Colangelo*, a default in the State Bar Court proceedings although the respondent appeared before the Supreme Court, Colangelo was found culpable of, inter alia, failure to perform, failure to respond to status inquiries and failure to keep his client reasonably informed of the status of his matter. (*Colangelo v. State Bar, supra*, 53 Cal.3d at pp. 1266-1267.) Taking particular note of the apparent lack of harm and the weakness of the evidence in the default matter (*Ibid.*), the Supreme Court imposed no actual suspension (*id.* at pp. 1258, 1267-1268.). But the dissent urged 60 days actual suspension. (*Id.* at p. 1270, dis. opn. of Baxter, J.) In *Johnston*, also a default, the final case cited by respondent concerning

the length of actual suspension, the attorney was found culpable in a single client matter of a failure to perform, failure to communicate with his client and holding himself out to his client as entitled to practice law when he was not, in fact, entitled to practice and failure to cooperated with a State Bar investigation. (*In the Matter of Johnston, supra,* 3 Cal. State Bar Ct. Rptr. at p. 589.) We recommended an actual suspension of 60 days (*id.* at p.591) which was approved by the Supreme Court.

Each of the cases relied on by respondent has underlying misconduct similar to the found misconduct on the charges brought in the present action. But, none of those cases involved lying by the respondent to the opposing party, to a State Bar investigator or to the State Bar Court. As the Supreme Court has noted an attorney's dishonesty "'violates "the fundamental rules of ethics – that of common honesty– without which the profession is worse than valueless in the place it holds in the administration of justice." [Citations].' (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to State Bar]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

On the other hand, each of the cases relied on by the State Bar involves far more egregious underlying misconduct. However, several of those cases involve misrepresentations to either the investigator for the State Bar or this court. In *Borré v. State Bar,* 1991, 52 Cal.3d 1047, the client Lascano was incarcerated in state prison on a felony conviction and was represented by court-appointed counsel. Lascano's girlfriend and her mother paid Borre' the fee for an appeal. Upon notification of his representation of Lascano the court terminated the court-appointed counsel. Borre' failed to file a brief following several extensions, and because of that failure the court dismissed the appeal on December 26, 1985. Borre' wrote his client on February 11, 1986, and stated he had "abandoned" the appeal. (*Id.* at pp. 1049-1050.) In defense Borre' presented a copy of a purported letter to Lascano's mother dated one month before the dismissal stating that he found no issues for appeal but he had obtained an extension to December 18, 1985, if she wanted to find another lawyer. (*Id.* at p. 1050.) The letter was found to be false. (*Id.* at p. 1052.) The Supreme Court took note of the fact that Borre' abandoned an incarcerated client, and stated that "[p]etitioner's abandonment of his incarcerated client was itself a serious matter warranting substantial discipline." (*Id.* at p. 1053.) We consider Borre's underlying misconduct more serious than that of respondent. (See *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465, 466 [abandoned incarcerated client, six months actual suspension].) However, Borre's false letter demonstrates similar conduct to that of respondent in the matter before us.

In both *Worth v. State Bar* (1978) 22 Cal.3d 707 and *Warner v. State Bar* (1983) 34 Cal.3d 36 the Supreme Court disbarred the attorneys after finding serious misconduct followed by false evidence and testimony before the State Bar. Worth was on probation for mishandling client funds (*Worth* v. *State Bar, supra,* at p. 708) and was found culpable of misappropriation in the instant case along with offering a false letter, lying about it and lying about going to Missouri to obtain his clients signature on an undated disbursal letter (*id.* at pp. 708, 710-711). Warner had two separate proceedings consolidated by the Supreme Court. The first involved unconscionable fees and unilaterally withholding interest on a loan from a client with prior similar misconduct and giving false testimony, (*Warner v. State Bar, supra,* at pp. 40-44) while the second involved misappropriation involving moral turpitude and making false representations involving moral turpitude to the disciplinary panel (*id.* at pp. *44-48).*

In *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, the respondent was found culpable of moral turpitude in signing a client's name to a declaration under penalty of perjury, failure to provide competent service in four client matters, failure to return unearned fees in two client matters, failure to respond to status inquiries, failure to provide an accounting, misrepresenting to a client the status of his case, breaching client confidentiality and failure to comply with the conditions of a prior reproval. (*Id.* at pp. *183-190.)* In aggravation, among

other things, Johnson presented to the State Bar Court false verification forms purportedly signed by a client. (*Id.* at p. 191.) We recommended that Johnson be actually suspended for a period of two years. (*Id.* at p. 193.)

In *Olguin v. State Bar* (1980) 28 Cal.3d 195 the Supreme Court increased the recommended actual suspension from 90 days to six months following Olguin's stipulation that he failed to use reasonable diligence in prosecuting a client matter resulting in the action being dismissed and that he lied to a State Bar investigator about that client matter and fabricated documents for his defense. (*Id.* at pp. 197-200.)

With the exception of *Olguin* we determine that the underlying misconduct in each of these cases was more serious than that in the matter before us. In *Borre´* the respondent "'recklessly represented to the Court of Appeal that he was Lascano's appellate attorney when he knew or should have known that he could not reasonably perform the duties of an appellate attorney . . .' ." (*Borré v. State Bar, supra,* 52 Cal.3d at p.1051.) In *Johnson* the respondent was found culpable in four client matters and a failure to comply with conditions of a prior reproval. The two misappropriation cases (*Worth* and *Warner*) were far more egregious than the matter before us.

[5k] We find no case that directly guides us, but take assistance from each of the cited cases and look to the essential facts of the matter before us. Respondent undertook representation of a client and for a period in excess of five years failed to perform any substantial service for that client. He lied to the opposing party about his activity on the case and later lied again to the opposing party about his client's interest in pursuing her claim, to the potential detriment of the client, for which he has been found culpable of moral turpitude. He failed to respond to the client's reasonable inquiry as to the status of her matter and then improperly withdrew from representation. In substantial aggravation he attempted to mislead the State Bar investigator in at least two instances and was found to lack candor in his testimony before the hearing department. While at the time of his present misconduct, respondent did not have a true record of discipline, he had acknowledged, by stipulation, prior unrelated misconduct at the time a portion of his present misconduct was ongoing. We also note Douglas was harmed by the unconscionable delay resulting from respondent's inaction for in excess of five years.

We conclude that the interests of the public, the courts, and the legal profession will be protected only by increasing the discipline that would otherwise be imposed for the underlying misconduct to a period of actual suspension of one year, as one of the conditions of a four-year stayed suspension. We make this recommendation because of the serious moral turpitude involved in respondent's deliberately attempting to mislead the State Bar investigator, his false testimony before the hearing department of this court, and his lying to the opposing party to the potential detriment of his client.

[13] The last issue respondent raises is the hearing judge's recommendation that respondent "be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), . . . that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: . . ." We read that recommendation to provide that the standard 1.4(c)(ii) provision be stayed along with the stayed three-year suspension, provided, that in the event of a subsequent probation revocation proceeding in which all, or a part, of the period of stayed suspension may be imposed a standard 1.4(c)(ii) would be an available condition.

Finally, we do not recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination because, as noted above, the Supreme Court ordered respondent to take and pass that examination in his prior disciplinary proceeding and because none of respondent's misconduct in this proceeding was committed after that order.

RECOMMENDED DISCIPLINE

We recommend that respondent Justin R. Dahlz be suspended from the practice of law for a period of four years and until he provides proof satisfactory to

the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), that the suspension and the standard 1.4(c)(ii) provision be stayed, and that he be placed on probation for a period of four years on the conditions that he be actually suspended for one year and that he comply with each of the remaining conditions of probation recommended by the hearing judge.

RULE 955

It is 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 that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

COSTS

It is recommended 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.

I concur:
WATAI, J.

CONCURRING AND DISSENTING OPINION OF STOVITZ, J.

I agree fully with the majority's findings and conclusions of respondent's culpability and analysis of the mitigating and aggravating circumstances. I also join the majority's analysis of the cases cited by respondent, agreeing that those cases do not justify the lesser discipline respondent urges. However, even greater discipline than recommended by the majority is warranted for respondent's repeated and reckless failure to perform services for Ms. Douglas over a six-year period, his attempted sabotage of Douglas's WCAB claim, and his eight instances of deceit over more than an eight-year period collectively to the opposing party, to the State Bar investigators, and during his testimony in the State Bar Court. Noting also the weight we properly give to respondent's prior discipline, the public and the courts are entitled to the minimal protection of respondent successfully completing a rehabilitation showing under standard 1.4(c)(ii), incident to a two-year actual suspension from practice.

The majority's opinion documents well respondent's protracted failure to perform any significant services in what appears to be a routine workers' compensation claim. It also shows that respondent lied twice to agents of Pacific Bell, the workers' compensation employer in Douglas's case. He first misled Pacific Bell in November 1991, stating that he had been in contact with Douglas when he had not, in an apparent effort to forestall Pacific Bell's motion to dismiss Douglas's claim. His second lie, in March 1996, that Douglas did not intend to pursue her claim, had the clear effect of attempting to sabotage his own client's case. That it did not succeed is more fortuity than anything for which respondent can claim credit. Finally, at the proverbial "eleventh hour," Douglas was left to her own efforts to see her claim through to some recovery, six years after it was filed.

As the majority finds, after the State Bar started an investigation, respondent repeatedly deceived the State Bar and this court in defending his conduct. His deceit took varied forms over four years: written misrepresentations to State Bar investigators and false testimony in three respects before the State Bar Court which, in part, also rested on respondent's fabrication of an entry within his telephone log.

By whatever framework cited by the majority we use to arrive at an appropriate recommendation of discipline, whether by examining the appropriate Standards, balancing all relevant factors, or looking at past decisions for guidance, this record shows grave misconduct, which, collectively, spanned eight of respondent's twelve years of practice. It shows repeated dishonesty and lack of basic adherence to the fiduciary duties of representing a client. Had that misconduct been extended to additional client matters, it could have justified a recommendation of disbarment, even without regard to respondent's prior discipline for trust account mismanagement. (Compare *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390.)

Almost all cases we decide have factual differences with reported decisions. However, I consider the decision of *Borré v. State Bar* (1991) 52 Cal.3d 1047, to be overall very guiding. Borré abandoned an appeal of an incarcerated criminal defendant and defended himself dishonestly in State Bar proceedings. The Supreme Court characterized as "egregious" Borré's fabrication of an exculpatory letter and his lies about it during State Bar proceedings. Borré had no prior record of discipline, and he had been admitted for 14 years prior to his misconduct in the criminal appeal. The Supreme Court imposed a two-year actual suspension as part of a larger stayed suspension. The majority appears to devalue the guidance of *Borré* primarily because it concludes that Borré's abandonment of his client was more serious than respondent's repeated failure to perform services for Douglas over six years, his deceit of Pacific Bell's agents and his failure to comply with ethical rules on withdrawal from employment. While I do not disagree that Borre's abandonment was extremely serious, as abandonment of an incarcerated defendant's case is presumed to be, the balance of all relevant factors in *Borré*, when measured against the totality of factors in the present case, guide me to conclude that recommendation of the same discipline as in *Borré* is appropriate here. In particular, Borré's lack of a prior record and his much longer practice period before the start of misconduct show more mitigation than in the present case. Also, without condoning Borré's dishonesty, it appears to have been more narrow than this respondent's. In my view, those factors sufficiently equate the seriousness of Borré's misconduct with that of respondent's.

Respondent's practice of deceit in this record is highly unusual in California attorney disciplinary cases for its length and variety. Moreover, his clear disregard of his client's interests covered half of his practice, and his prior record shows that his previously-judged ethical failures also extended to trust account mismanagement. Substantial discipline is warranted. It is needed not as punishment of respondent but as justified protection of the public, courts and legal profession, and to allow respondent "time for introspection so that he will come to appreciate that law is more than a mere business. It is still a profession in which concerns for ethics matter." (*In re Morse* (1995) 11 Cal.4th 184, 210.)

For the reasons stated, I would recommend a two-year actual suspension from practice on conditions of probation recommended by the majority and with a requirement of satisfying the provisions of standard 1.4(c)(ii) before the actual suspension ends.

STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GLENN MATTHEW TERRONES

A Member of the State Bar.

No. 00-V-14393

Filed July 30, 2001

Summary

An attorney, who had previously been disciplined and placed on actual suspension for a period of two years and until he established his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, filed a petition for relief from his actual suspension under standard 1.4(c)(ii). A hearing judge found that petitioner made the requisite showings of rehabilitation, fitness, and learning by a preponderance of the evidence and, therefore, granted the petition. (Hon. Paul A. Bacigalupo, Hearing Judge.)

The State Bar requested review contending that petitioner did not meet his burden of proof. The review department affirmed the hearing judge's decision.

COUNSEL FOR PARTIES

For State Bar: Alan Blumenthal

For Petitioner: Arthur L. Margolis

HEADNOTES

[1 a, b] **135.86 Procedure—Rules of Procedure**
161 Duty to Present Evidence
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
The standard of proof in standard 1.4(c)(ii) proceedings for relief from actual suspension is preponderance of the evidence. (Rules Proc. of State Bar, rule 634.) Thus, to be entitled to relief from actual suspension, petitioners must prove, by a preponderance of the evidence, their rehabilitation, present fitness to practice, and present learning and ability in the general law.

[2 a-c] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers

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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.

135.86 Procedure—Rules of Procedure
165 Adequacy of Hearing Decision
167 Abuse of Discretion
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues

In reviewing a hearing judge's decision on a standard 1.4(c)(ii) petition for relief from actual suspension, the standards of review are abuse of discretion and error of law. (Rules Proc. of State Bar, rules 300(k), 639.) Under abuse of discretion standard, review department does not review hearing judge's decision with the intention of substituting its view for that of hearing judge, but rather with the intention of employing the equivalent of the substantial evidence test by accepting hearing judge's resolution of credibility and conflicting evidence and hearing judge's choice of possible reasonable inferences. Review department reviews the record to determine if hearing judge's findings are supported by substantial evidence and whether any errors of law were committed.

[3 a-c] **116 Procedure—Requirements of Expedited Proceeding**
135.86 Procedure—Rules of Procedure
191 Effect/Relationship of Other Proceedings
2403 Standard 1.4(c)(ii) Proceedings—Expedited

Procedures for ruling on standard 1.4(c)(ii) petitions for relief from actual suspension (Rules Proc. of State Bar, rules 630-641) are expedited to avoid procedural delays that might effectively create a far longer period of actual suspension than that originally ordered by the Supreme Court. Proceedings on standard 1.4(c)(ii) petitions are summary in nature, not full-fledged reinstatement proceedings in which disbarred attorneys seek to be reinstated to the practice of law.

[4 a, b] **159 Evidence—Miscellaneous**
165 Adequacy of Hearing Decision
167 Abuse of Discretion
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

In standard 1.4(c)(ii) proceeding for relief from actual suspension, hearing judge did not abuse his discretion in determining that State Bar's evidence establishing that Client Security Fund had previously paid one of petitioner's former clients more than $3,400 based on the client's claim that petitioner improperly failed to pay that sum to the client's medical care providers did not prevent petitioner from showing his rehabilitation because hearing judge based that determination on his findings that petitioner did not know (1) of the client's claim or (2) of Client Security Fund's actions until petitioner's deposition was taken in standard 1.4(c)(ii) proceeding and because those two findings are supported by substantial evidence consisting of petitioner's own testimony, which was supported with a number of letters from the client's file demonstrating that medical providers had been paid.

[5 a, b] **191 Effect/Relationship of Other Proceedings**
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Even though petitioner in a standard 1.4(c)(ii) proceeding for relief from actual suspension did not know that Client Security Fund had previously paid one of his former clients more than $3,400 based on the client's claim that petitioner improperly failed to pay that sum to the client's medical care providers and even though letters from the client's file demonstrated that medical providers had been paid, petitioner must still reimburse Client Security Fund for the monies it paid the client. (Bus. & Prof. Code, § 6140.5, subd. (c).)

[6 a, b] **161 Duty to Present Evidence**
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

In comparison to a disbarred attorney, who has been found unfit to practice law and whose name has been stricken from the roll of attorneys, the suspended attorney in standard 1.4(c)(ii) proceeding for relief from actual suspension has suffered a more modest negative evaluation of his character by virtue of his prior misconduct. Thus, in marked contrast to the disbarred attorney whose showing of rehabilitation must be made with stronger proof of present honesty and integrity than one seeking admission for the first time and with proof of a sustained period of exemplary conduct, the suspended attorney in standard 1.4(c)(ii) proceeding may show his rehabilitation, even before the completion of the term of his actual suspension, with proof overcoming a reduced prior finding of a danger to the public and with a relaxed showing of exemplary conduct.

[7] **161 Duty to Present Evidence**
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Even though moral shortcomings that previously resulted in discipline of the suspended attorney in standard 1.4(c)(ii) proceeding for relief from actual suspension are proportionally less than moral shortcomings that would result in disbarment, the suspended attorney must still show, by a preponderance of the evidence, that he meets the same high moral standards required of all attorneys in this state.

[8] **191 Effect/Relationship of Other Proceedings**
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

In standard 1.4(c)(ii) proceeding for relief from actual suspension, State Bar Court presumes that the prior discipline imposed on petitioner was, based on the facts as shown in the prior record of discipline, appropriate to accomplish the goals of attorney discipline to protect the public, the courts, and the profession.

[9 a, b] **165 Adequacy of Hearing Decision**
191 Effect/Relationship of Other Proceedings
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Because record in standard 1.4(c)(ii) proceeding for relief from actual suspension established (1) that, when petitioner committed the misconduct in his prior record that resulted in his actual suspension, he was abusing and addicted to alcohol and cocaine, (2) that his abuses of and addictions to alcohol and cocaine causally contributed to his prior misconduct, (3) that he had undergone a meaningful and sustained period of rehabilitation from his abuses and addictions, (4) that, when the discipline was imposed on him in his prior record, these facts were not known to State Bar, State Bar Court, the Supreme Court, and (5) that when discipline was imposed in prior proceeding, petitioner was in denial regarding his abuses of and addictions to alcohol and cocaine, review department found, when it reviewed record to determine whether hearing judge's findings of rehabilitation and present fitness were supported by substantial evidence, that petitioner's addictions were not excuses for, but explanations of his prior misconduct.

[10 a-g] **165 Adequacy of Hearing Decision**
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Substantial evidence supported hearing judge's findings in standard 1.4(c)(ii) proceeding for relief from actual suspension that petitioner established his rehabilitation and present fitness to practice where petitioner proved (1) that he eliminated his abuses of alcohol and cocaine that causally contributed to his prior misconduct; (2) that he openly described his prior misconduct to an insurance company for whom he worked and to his church, Cocaine Anonymous group, friends, and relatives and to the five character witnesses who convincingly testified as to his rehabilitation and good moral

character; and (3) that he became a leader in Cocaine Anonymous and president of his church. State Bar did not impeach petitioner's showings of rehabilitation and present fitness with the incomplete copy of petitioner's application for license to act as a life insurance agent to which State Bar alleged, but did not prove, petitioner attached an addendum that contained a false and misleading description of his prior record of discipline.

[11] **165 Adequacy of Hearing Decision**
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Hearing judge did not abuse his discretion in finding that petitioner in standard 1.4(c)(ii) proceeding for relief from actual suspension established his present learning and ability in the general law where petitioner proved that he recently (1) completed 100 hours of classes dealing with insurance contracts, claims, procedures, and ethics; (2) spent more than 200 hours studying estate planning and taxation for small business; (3) litigated his personal bankruptcy and his own child custody case; (4) obtained a dismissal of criminal charges his child's mother brought against him regarding visitation rights with his daughter; and (5) two attorneys testified that he had extensive knowledge of laws regarding estate and business taxation.

Additional Analysis

Other

2410 Standard 1.4(c)(ii) Proceedings—Suspension Lifted

OPINION

OBRIEN, P. J.:

The State Bar requests review, under rule 300, Rules of Procedure of the State Bar (Rules of Procedure), of a decision of a hearing judge granting Glenn R. Terrones's petition for relief from actual suspension following his disciplinary suspension that included a requirement that he show satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law as required under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct[1]. Proceedings on petitions for relief from actual suspension are governed by rules 630 through 641, Rules of Procedure.

We have previously considered the State Bar's request and have granted review under rule 300, Rules of Procedure. In granting that review, and before oral argument, we invited the parties to focus attention on the circumstances surrounding Terrones's application for an insurance license from the Department of Insurance, State of California, filed in conjunction with his seeking employment as an insurance agent for Cigna Insurance Company (Cigna).

[1a] As set forth in rule 634, Rules of Procedure, Terrones is required to show compliance with the conditions of standard 1.4(c)(ii) by a preponderance of the evidence as distinguished from the usual standard before this court, requiring clear and convincing evidence. Under rule 639, Rules of Procedure, hearing department decisions on petitions for relief from actual suspension are reviewable only in accordance with rule 300, Rules of Procedure. **[2a]** The standard of review under rule 300 is abuse of discretion or error of law. (Rule 300(k), Rules Proc.) "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 [citations omitted].'" (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577-578.)

[3a] The Supreme Court has expressed its concern that the State Bar establish an expedited procedure for hearing and disposing of petitions for relief from actual suspension in the event a standard 1.4(c)(ii) condition be imposed on an attorney's discipline. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1080, fn. 6.) The obvious need was to avoid procedural delays that effectively created a far longer actual suspension than that ordered by the Supreme Court. To meet that concern, the State Bar provided that the proceedings governing relief from actual suspension under standard 1.4(c)(ii) be expedited, including a requirement that the service of all pleadings, decisions and other documents be by personal delivery or overnight mail. (Rule 630(b), Rules Proc.) The State Bar has but 45 days within which to determine whether to oppose the petition, and if it opposes the petition or is unable to decide, the hearing must be set within 35 days. (Rule 633(c), Rules Proc.) The State Bar may take the petitioner's deposition promptly after the filing of the petition for relief, but the deposition may not extend any of the time limits under the rules unless ordered by the court for good cause shown. (Rule 635, Rules Proc.) Other than taking the petitioner's deposition, no discovery is permitted except on order of the court, and even then, the discovery may not extend the time in which a hearing is required as provided under the rules, except for good cause shown to the court. (Rule 635, Rules Proc.) Documentary evidence is limited to that attached to the pleadings except for good cause shown. (Rule 636, Rules Proc.) The hearing department's decision is to be filed within 15 days following the conclusion of the hearing. (Rule 638, Rules Proc.; see also *In the Matter of Murphy, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 578-579.)

[1b] Standard 1.4(c)(ii) requires "proof satisfactory to the State Bar Court of [an attorney's]

1. The standards are found in title IV of the Rules of Procedure. All further references to standards are to this source.

rehabilitation, present fitness to practice and general learning and ability in the general law before the [attorney] shall be relieved of the actual suspension."

For the reasons stated below, we conclude that the hearing judge's decision should be affirmed.

DISCIPLINARY BACKGROUND

Terrones was admitted to practice in February 1983. On or about June 30, 1995, he and the State Bar entered into a stipulation of facts and culpability that included proposed discipline. In that stipulation Terrones acknowledged that on or about June 1992, he settled a personal injury case for $9,000, in which the client had employed a prior attorney. Terrones had agreed to represent the client for the same contingent fee as the prior attorney. Terrones received a draft from an insurance company for $9,000 payable to the client, the prior attorney, and himself. He endorsed the prior attorney's name on that draft and deposited all of the proceeds in his trust account on or about June 10, 1992. A medical provider had a valid lien on the proceeds of the settlement in the sum of $2,000. That medical provider was not paid until August 1, 1992, and the balance in the trust account dropped below $2,000 during the intervening period. Terrones stipulated that signing the prior attorney's name to the check was moral turpitude in violation of Business and Professions Code section 6106 and that he was culpable of moral turpitude in misappropriating funds held in trust for the medical provider.

Terrones further stipulated that in 1991 he represented Ronald Albert on a contingent fee basis in a personal injury claim. Terrones had authority to sign Albert's name to checks and drafts. In February 1992, Terrones received an insurance draft from the opposing parties' insurance carrier in the sum of $25,000, payable to him and his client. That amount represented advance payment under a medical pay provision of the opposing parties' insurance and was to be credited against any future settlement or recovery. Terrones did not inform Albert of the receipt of the $25,000 and caused Albert's name to be endorsed on the draft and deposited the proceeds in his trust account. The Albert case was tried in November 1993, resulting in a judgment in the approximate sum of $26,000. The prior payment of $25,000 was credited against the verdict. During the time between the payment of $25,000 and the judgment, Terrones's trust account balance had fallen as low as approximately $1,740. Albert did not learn of the receipt of the $25,000 until January 1994. In addition, Terrones failed to respond to two letters from State Bar investigators looking into Albert's complaints.

The stipulation included an acknowledgment that Terrones was culpable of a violation of rule 4-100(B)(1) of the Rules of Professional Conduct, requiring an attorney to promptly notify a client of receipt of client funds, moral turpitude (Bus. & Prof. Code, § 6106) by misappropriating the $25,000 and failure to respond to the State Bar's investigative letters (Bus. & Prof. Code, § 6068, subd. (i)).

It was stipulated that Terrones's misconduct was aggravated because of the multiple offenses found, and there was mitigation because there was no discipline between his admission to practice in 1983 and the culpability agreed to. It was stipulated that Terrones should be suspended for a period of five years, that suspension be stayed on the condition, inter alia, that he actually be suspended for two years and until he has satisfactorily shown the State Bar Court his rehabilitation, fitness to practice, and learning and ability in the law as required by standard 1.4(c)(ii). With modifications, that stipulation was approved by a State Bar Court hearing judge. On December 7, 1995, the Supreme Court filed an order in case number SO49112 in which it imposed the stipulated discipline on Terrones. Terrones's two-year actual suspension under that order began on January 6, 1996.

EVIDENCE OF REHABILITATION AND PRESENT FITNESS TO PRACTICE LAW

We have before us, as the record in this review under rule 300, Rules of Procedure, the petition together with its exhibits, the State Bar's opposition to the petition, exhibits introduced at the hearing, and an electronic tape recording of the hearing. **[3b]** Those items together with the hearing judge's decision granting the petition constitute the record on review. At all times in considering the matter before us, we bear in mind the summary nature of the proceedings (*In the Matter of Murphy, supra*, 3 Cal. State Bar

Ct. Rptr. at pp. 578, 581, 584), and **[2b]** we review the record to determine if there is substantial evidence to support the findings and take care not to substitute our judgement for that of the hearing judge. (*Id.* at pp. 577-578.) In addition, we review the record to determine if any errors of law have been committed. (Rule 300(k), Rules Proc.)

Background to Terrones's Prior Misconduct

The following findings were made by the hearing judge, and we hold that they are each supported by substantial evidence. We note that none of the following background history was before the State Bar Court or the Supreme Court in imposing the prior discipline.

Terrones is a native Californian, having been raised in Southern California. No member of his family had attended college. Because of economic need, he was raised by his maternal grandparents until his grandmother died when he was eleven years of age, at which time he came under the supervision of his parents. Terrones attended the University of Pennsylvania and law school at Boalt Hall. He was admitted to practice in July 1983. He immediately commenced practice in a small firm in Beverly Hills. In January 1986 he opened his own office in Beverly Hills.

In both college and law school, Terrones consumed alcohol and marijuana on a regular basis. In 1984 he began using cocaine as his drug of choice, although its use was confined to social occasions until about 1991. In 1989 Terrones was named in a paternity suit by his daughter's mother and, in response, he sought custody of his daughter. The "long, vicious, custody battle that ensued drained [Terrones] emotionally and financially." In May 1991 he married his present wife. By late 1991 Terrones's use of alcohol and cocaine "escalated" and became "far more regular." There followed, in early 1992, serious financial problems in his practice, coupled with his denial of the fact that he was suffering from drug and alcohol problems. In addition to his drug and alcohol abuse, Terrones attributes part of his financial problems at that time to a lack of business acumen. As a result, he began to "commingle funds from [his] client trust account in late 1991 in order to pay [his] bills." This, combined with his "lack of supervision over [his] office staff" resulted in the misconduct underlying the discipline imposed on him by the Supreme Court in case number SO49112.

Terrones's Evidence of Rehabilitation and Present Fitness

In 1996 Terrones began participation in a Twelve-Step recovery program known as Cocaine Anonymous (CA). He has not used either cocaine or alcohol since November 21, 1996, and continues to participate in the CA program. He became the general service representative for that group, responsible for helping to manage the business of the program for his local district in February 1997. In April 1998 he assumed the added responsibility of organizing CA community events and public service announcements addressed to those seeking help from addiction. In January 1999 he became the hospital and institutions representative for that group, requiring that he meet with addicts incarcerated in various institutions and share his addiction problems with those addicts. He is now responsible for the organization of their weekly meetings at a local hospital. The testimony of Terrones's expert, a Diplomate of the American Board of Psychiatry and Neurology with a certificate of Added Qualification in Addiction Psychiatry and a private practice in that field, establishes Terrones's present rehabilitation from drug and alcohol addiction. The State Bar notes that it does not now challenge this portion of Terrones's rehabilitation.

Terrones obtained a license to sell life and disability insurance[2] from the State of California in mid-1997 and is presently employed selling health and life insurance policies. In connection with that employment and as a function of seeking employment in that field, Terrones has devoted over 200 hours studying estate planning, taxation, partnership, corporate law, inter vivos trusts, as well as insurance law

2. The State Bar challenges the propriety of Terrones's application for that license, discussed *post*.

and ethics for insurance agents. The State Bar continues to challenge Terrones's present learning and ability in the law.

In early 1997 Terrones and his wife began attending services at Throop Memorial Church in Pasadena. He, along with his wife, teaches in the church's religious elementary school weekly and serves on the church finance committee. In April 2000 he was elected president of that church by the congregation.

Paul Sawyer, the minister of Terrones's church, has known Terrones since January 1997. Through church activities and other mutual interests, they have become well acquainted. In a church men's group meeting in December 1998, Terrones shared with the entire group his misconduct that commenced in 1992, including the improper endorsement of the settlement draft, mishandling client trust funds, failure to notify a client of the receipt of funds and his failure to respond to the investigation by the State Bar. He provided Sawyer with a copy of the official records of the State Bar Court finding Terrones culpable of moral turpitude. Terrones expressed his contrition and acknowledged learning an important lesson from the pain he inflicted on himself and others. Sawyer was made aware of Terrones's addiction to drugs and the efforts he has made to rehabilitate himself.

Stephanie Wells is the president of Prime Benefits Plus Insurance Service and met Terrones in May 1998. She has served as his manager for over two years. She had reviewed documents from the State Bar Court and believes the conduct demonstrated in that material is "a complete departure from his normal character." Wells believes that, in the years she has been in the insurance business, Terrones is among the most ethical agents she has encountered and "has demonstrated the utmost integrity, honesty, a genuineness in the performance of his duties." She was surprised to learn of Terrones's prior drug problem because of the total absence of any conduct on his part suggesting such a problem. She recommends that he be permitted to return to the practice of law.

Karrin Feemster, a lawyer and chief financial officer of Prime Benefits Plus Insurance Service, met Terrones around January 1999. At their initial meeting, he told Feemster that he had been suspended for professional misconduct. He made no excuses for his misconduct, nor did he attempt to rationalize it, but rather accepted the consequences of those actions. She stated, "I have had occasion to discuss matters of estate and business taxation planning and I am impressed with the extent of his knowledge and understanding of the law in these areas." She supports Terrones's return to active practice.

Benjamin Salazar, a claims analyst for an insurance company, met Terrones over three and one-half years ago at a CA meeting and was present at meetings where petitioner shared not only his prior addiction problems, but the facts and circumstances surrounding his suspension from the practice of law. He has reviewed a copy of the factual stipulations with the State Bar. He believes that Terrones has undergone a thorough rehabilitation from "drugs, his character, and his life. There is no question in [his] mind that [Terrones] is fit to practice law, and will serve the legal community well if afforded the chance."

Warren Kelly is an attorney practicing in Los Angeles and a third cousin of Terrones. He has been in regular contact with Terrones since his suspension. He has reviewed the stipulation leading to the prior discipline and was familiar with Terrones's cocaine addiction and prior misconduct and the effect they had on Terrones's personal life. Kelly describes Terrones as a changed person, no longer using drugs and a person who has fully rehabilitated himself. He further states that "[Terrones] and I have had numerous discussions about the law and particularly about litigation matters. He remains extremely knowledgeable and still has a remarkably keen eye for issues that arise in litigation. In the past year I have had occasion to discuss with [Terrones] on [sic] matters of estate planning and taxation, and it is plainly evident that he has developed a vast amount of expertise in this area."

Terrones has complied with the conditions of his probation requiring him to attend the State Bar's Ethics School and its Client Trust Account Record-Keeping Course and has passed the Multistate Professional Responsibility Examination.

Terrones testified that he has not sought earlier relief from suspension because he wanted to make sure that his personal life was stabilized and that he had sufficient funds to pay the costs that the Supreme Court awarded the State Bar in case number SO49112. He estimated that those costs would be in the neighborhood of $4,000.

STATE BAR'S EVIDENCE IN OPPOSITION TO REHABILITATION AND PRESENT FITNESS

The State Bar placed in evidence a certified copy of a file of the California Department of Insurance, consisting of a copy of Terrones's application, dated April 29, 1997, for a license to act as a life insurance agent. That file indicates that such a license was issued to Terrones on June 20, 1997. Among the questions on that application was number 18, which reads in part: "Have you been the subject of any administrative agency disciplinary action?" Terrones answered that question "yes." The question is followed by a somewhat detailed definition of "administrative action." Between question 18 and the signature line is an "IMPORTANT NOTICE" requiring those who give an affirmative answer to that question to attach a detailed statement of the events leading to that disciplinary action and, if available, to attach certified copies of that action[3]. The only attachment to the application shown in that certified copy of the file is an order of the Supreme Court suspending Terrones for non-payment of State Bar membership fees. The Supreme Court's suspension of an attorney for non-payment of membership fees is not a disciplinary action. The State Bar relies on this application to show that Terrones was not candid or forthcoming in his application to the Department of Insurance, and contends that it shows a lack of rehabilitation.

In rebuttal, Terrones shows that he applied to Cigna Insurance Company (Cigna) for employment as an insurance agent. He advised Harvey Jacobson, the Los Angeles manager of Cigna, of his disciplinary problems with the State Bar. Terrones provided Cigna with a complete copy of his disciplinary record. Although Cigna's "compliance people," located on the east coast, advised Jacobson that it was doubtful they would approve the hiring of Terrones because of those problems, Jacobson wished to pursue that possibility. As a part of his seeking employment with Cigna, Cigna asked Terrones to complete the application to become an insurance agent and to provide a written attachment describing the circumstances leading to his suspension and return it to Cigna. Terrones did complete the application and prepared the addendum. While not false, that addendum was certainly less than a full description of his misconduct[4]. Terrones signed the application under penalty of perjury along with the addendum and delivered it to Cigna, along with a check for the filing fee for that application. Jacobson did not see the document as filed with the Department of Insurance, nor did Terrones. Terrones understood that the assembling and filing of the application was to be done by Jacobson's administrative assistant. She did not testify. Terrones believed that Cigna would attach all of the documentation that he had provided, including the State Bar disciplinary record. Terrones did not see a copy of the application as filed until discovery in preparation for the hearing below.

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3. The full text of that "IMPORTANT NOTICE" is: "If you answered yes to (18), (19), or (20), attach a detailed statement, signed by you, of the events which led to the charges (dates and places). If the matter was heard in court, attach copies, Certified by the Court, of the Criminal Complaint and the Sentencing Minute Order showing the final plea, judgment and sentence. If any disciplinary action was taken by an administrative agency, attach certified copy of the action."

4. That addendum states: "I was disciplined by the State Bar of California in 1995 for transgression that occurred in February and June of 1992. More specifically, the State Bar and I stipulated that I (1) failed to timely and properly notify a client of receipt of client funds; (2) [sic] to cooperate timely with the State Bar's investigation of a matter; (3) failed to manage properly my client trust account fund on two separate and isolated instances in February of 1992 and June of 1992; and (4) endorsed a settlement check without my co-counsel's consent in June of 1992. [¶] It must be noted, however, that the State Bar concluded that allegations against me that I failed to timely disburse funds to my client were unfounded and not supported by the evidence. *There were no allegations* by my client or by co-counsel that I had wrongfully taken or converted money from either of them. [¶] The foregoing stipulations resulted in my agreeing to a suspension of my license commencing January 6, 1996." (Emphasis in original.)

[4a] [5a] The State Bar has shown that the Client Security Fund (CSF) paid $3,445.67 to Sylvia Hernandez based on claims she made against Terrones. The Hernandez claim was made in August 1996 and apparently was based upon alleged non-payment to medical care providers in a matter Terrones had handled for Hernandez. He had closed his file in October 1995. CSF sent a "Notice of Intention to Pay" to Terrones at his address of record in late September 1996. In the absence of any response from Terrones, CSF paid the claim. Terrones was unaware of the Hernandez claim until the taking of his deposition in this matter, which was shortly before the hearing in this matter. He denied ever seeing correspondence from CSF. From his file, Terrones presented a number of letters demonstrating that in fact medical providers on the Hernandez case had been paid.

[4b] [5b] The hearing judge found that "[p]etitioner was not aware of the Hernandez issue until his deposition was taken in this matter." Terrones's testimony that he did not know of the claim of Hernandez is substantial evidence of that fact. We also note, there is no clear and convincing evidence that Hernandez had a valid claim against Terrones. In any event, Terrones will be required to reimburse CSF for funds paid out as a result of his conduct. (Bus. & Prof. Code, § 6140.5, subd. (c).) We find the hearing judge did not abuse his discretion in finding this did not prevent Terrones's showing of rehabilitation.

The State Bar raises three additional issues challenging Terrones's rehabilitation. First, a number of Internal Revenue Service and Franchise Tax Board liens were recorded against Terrones in 1996 and again in 1998 covering taxes due from 1991 through 1995. The record shows that the balance due at the time of the hearing below was approximately $472 to the Internal Revenue Service and $500 to the Franchise Tax Board, and these sums are being paid in installments according to agreements with these agencies. Second, after his suspension, Terrones continued to used the abbreviation "Esq." on his fax machine identifier. He testified that the identifier was included on the fax machine when he was practicing law and that he did not know how to remove it. Third, Terrones had done work for an attorney during his period of suspension without telling that attorney he was suspended from practice. Terrones testified that the work was only preliminary research, that he never met the attorney and assumed he knew of the suspension. We conclude that it was within the hearing judge's discretion to reject each of these contentions as being sufficient to impeach Terrones's showing of rehabilitation and do not further discuss them.

DISCUSSION

[6a] As indicated, we review the record to determine if there is substantial evidence to support the hearing judge's decision and to determine if an error of law has occurred. (Rule 300(k); *In the Matter of Murphy*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 577.) We draw a clear distinction between the showing of rehabilitation required under that standard and that required for the reinstatement of a disbarred attorney. In the latter case, the petitioner "must present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question." (*Kepler v. State Bar* (1932) 216 Cal. 52, 55.) A disciplined attorney seeking relief from actual suspension of the right to practice law remains an attorney, but one whose prior serious misconduct has placed in question that attorney's moral character by virtue of that misconduct. That is, in disbarment cases, the attorney has been found not fit to practice law, and his or her name has been stricken from the roll of attorneys, while in standard 1.4(c)(ii) proceedings, the attorney has suffered a more modest negative evaluation of his or her character. We deem the showing of rehabilitation required under this latter standard to be that of overcoming a reduced prior finding of a danger to the public.

[7] In addressing the required showing of rehabilitation for reinstatement following disbarment, the Supreme Court has stated: "The evidence presented [to show rehabilitation] is to be considered in light of the moral shortcomings that previously resulted in discipline." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092, citing *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) In a proceeding seeking relief from suspension under standard 1.4(c)(ii), "the moral shortcomings that previously resulted in discipline" are proportionally less than is true where the prior moral

shortcomings resulted in disbarment. Nonetheless, one seeking relief from suspension following the imposition of a 1.4(c)(ii) condition must show, by a preponderance of the evidence, that he or she meets the high moral standards required of all attorneys in this state. **[3c]** As we have noted, the proceeding is summary in nature (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 578, 581, 584), is much expedited and is not designed as a full-fledged reinstatement proceeding[5]. **[2c]** Further as we have noted, the parties' right to review of a hearing judge's decision on a petition for relief from actual suspension is limited to review under rule 300, Rules of Procedure, and our standard of review is limited to a consideration of abuse of discretion or error of law on the part of the hearing judge.

[8] The purpose of attorney discipline is not to punish the attorney, but rather to protect the public, the courts and the profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) We presume that the prior discipline was appropriate to accomplish that purpose, based on the facts as shown in that prior record of discipline. That prior discipline did require that Terrones be prepared to show his rehabilitation following a two-year period of suspension. **[9a]** A significant circumstance contributing to Terrones's prior misconduct is now revealed to be his then addiction to illegal drugs and alcohol. That information was unknown to the State Bar and to this court at the time of imposition of the prior discipline. Terrones explains that, at the time of his prior discipline, he was in denial that he had a drug or alcohol problem or that these substances contributed to his misconduct. The psychiatrist testifying on Terrones's behalf confirmed that such denial is a common occurrence among those addicted to illegal drugs or alcohol.

[9b] We have now been presented with clear evidence of Terrones's prior addiction, and his subsequent control of that addiction. The State Bar does not argue to the contrary. "An attorney's rehabilitation from alcoholism or other substance abuse is entitled to significant weight in mitigation if the attorney establishes these elements: (1) the abuse was addictive in nature, (2) the abuse causally contributed to the misconduct, and (3) the attorney has undergone a meaningful and sustained period of rehabilitation." (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 595, citing *In re Billings* (1990) 50 Cal.3d 358, 367-368.) **[6b]** While reinstatement cases arising after disbarment require a sustained period of exemplary conduct, that test must of necessity be somewhat relaxed where an attorney is seeking relief from actual suspension under standard 1.4(c)(ii). *Silva-Vidor v. State Bar, supra,* 49 Cal.3d at page 1080, footnote 6, makes clear that, for the purposes of that standard, an attorney may show his or her rehabilitation even before the completion of the term of actual suspension. This is in marked contrast to the stringent requirements imposed on one seeking a return to the bar after disbarment. (*Tardiff v. State Bar, supra,* 27 Cal.3d at p. 403.) Ultimately, the "question remains whether petitioner is a fit and proper person to be permitted to practice, and that question usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude." (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157, citing *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 453.)

[10a] The State Bar relies on evidence of Terrones's April 1997 application to the Department of Insurance for a license to act as a life insurance agent. The application, as introduced into evidence, was less than complete. There is no competent evidence showing that the addendum purporting to describe Terrones's prior misconduct was attached to the filed copy of the application. Assuming for purposes of discussion that the questioned addendum was attached, the application remained less than complete. However, the hearing judge has determined that, nonetheless, Terrones has met his burden of showing rehabilitation from his prior misconduct resulting in discipline. Only if that determination by the hearing judge involves an error of law or an abuse of discretion will we disturb that finding.

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5. Compare reinstatement proceedings, which are governed by rules 660 through 666 of the Rules of Procedure. In such proceedings, the State Bar is given 120 days for investigation (rule 663(a), Rules Proc.), followed by a 120-day discovery period (rule 663(b), Rules Proc.). The burden of proof is by clear and convincing evidence. (Rule 665(b), Rules Proc.)

[10b] The record is uncontradicted that Terrones gave a full copy of his State Bar disciplinary record to Cigna as a part of his application for employment. Terrones prepared the application and answered truthfully the question concerning his discipline by the State Bar. He signed the application under penalty of perjury and delivered it along with the addendum and his check covering the filing fee to Cigna as a part of his application for employment. Cigna had a regular procedure for filing such applications with the Department of Insurance on behalf of applicants for employment or advancement with the company. He believed that Cigna would attach that full record of discipline along with the addendum to the application he delivered to them. Although the hearing judge did not separately determine the effect of that application on Terrones's showing of rehabilitation he, following his recital of the factual showing including the evidence concerning the application to the Department of Insurance, did conclude Terrones "has demonstrated rehabilitation and present fitness by a preponderance of the evidence."

We review the record to determine if there is substantial evidence to support that finding of rehabilitation and present fitness. **[9c] 10c]** We find, not an excuse for, but an explanation of, Terrones's misconduct leading to his prior discipline: his addiction to alcohol and cocaine. It is uncontested that he has brought those addictions under control. The uncontroverted evidence shows that Terrones has not used either substance since November 1996. The record demonstrates that Terrones has met the three-step test set forth in *Hawes v. State Bar, supra,* 51 Cal.3d at page 595 because (1) the abuse was addictive in nature, (2) it causally contributed to his misconduct and (3) he bas undergone a sustained and meaningful period of rehabilitation. Compliance with the last item in the *Hawes* test is demonstrated by Terrones's participation in his church, his election as president of that organization as well as his candor with employer, friends and church members alike concerning his misconduct as a lawyer and his addiction.

[10d] If Terrones either lied or deliberately misled the Department of Insurance in his application to become an insurance agent that would adversely impact his rehabilitation and present fitness to practice law. (*In re Gossage* (2000) 23 Cal.4th 1080, 1102 [rehabilitation requires "high degree of frankness and truthfulness"].) He did answer the question pertaining to prior discipline truthfully. The addendum, along with the attachment of the order of the Supreme Court showing his suspension for delinquent fees, standing alone, suggest an attempt to mislead the Department of Insurance. However, the record shows Terrones reasonably expected that the application would contain his entire disciplinary record. He presented the entire disciplinary record to Cigna and expected that record to be attached to the application, just as it had been forwarded to the "compliance people" of Cigna on the east coast. He described his misconduct to Jacobson, had been open with his church, CA group, employer, along with friends and relatives about his misconduct and addiction.

The most nearly analogous case called to our attention is *Calaway v. State Bar* (1986) 41 Cal.3d 743, involving a petition for reinstatement following disbarment under which Calaway was required to show his rehabilitation by clear and convincing evidence. There Calaway acted as a conservator for a party whose will named Yale University (Yale) as a beneficiary. Yale brought an action against Calaway, claiming he fraudulently induced his conservatee to remove Yale as a beneficiary of the estate. Calaway notified his malpractice carrier of the claim, and the carrier denied coverage on the grounds that Calaway omitted from his insurance application any mention of misappropriation of funds from the conservatorship estate, his involvement in gambling operations and a federal conviction, along with a failure to mention an existing State Bar recommendation that he be disbarred. Calaway brought an action against the carrier in which the carrier prevailed on a summary judgment motion. Calaway prevailed in the action brought by Yale. In his application for reinstatement, Calaway listed the action brought by Yale, but failed to mention the action he brought against the insurance carrier[6].

6. We note that Calaway's action against the insurance carrier was a part of the court file involving Yale's action against him.

In a split decision the Supreme Court determined that this failure did not constitute a basis for denying Calaway readmission to practice.

[10e] We look to the balance of the evidence before the hearing judge in making his determination that Terrones had shown sufficient rehabilitation and present fitness to practice law. Terrones made a full disclosure of his past misconduct and alcohol and drug addiction to the mens' group at his church long before filing his application for reinstatement. He made a similar full disclosure to Cigna, from whom he was seeking employment. He had made equal disclosures to his present employer and to each of his character witnesses. Based on the totality of the evidence, there is a clear basis for determining that Terrones did not deliberately attempt to mislead the Department of Insurance.

[10f] Through full participation, he has become a leader in the drug rehabilitation program in which he participates as well as becoming president of his church congregation, after making a full disclosure of his past misconduct and drug addiction to the mens' group of that congregation. Although his actual suspension was for a period of two years beginning on January 6, 1996, Terrones withheld seeking relief from suspension until on or about October 23, 2000, more than two and one-half years after his actual suspension could have been terminated upon an adequate showing of rehabilitation. He has used this additional time to make a recovery from drug and alcohol abuse, to establish his religious foundations and secure funds to meet his obligations to the State Bar.

[10g] We conclude that the hearing judge had before him substantial evidence upon which to base a conclusion that Terrones did not attempt to mislead the Department of Insurance with his application, and the State Bar did not impeach Terrones's showing of rehabilitation and present fitness.

[11] As a final challenge, the State Bar argues that Terrones has not adequately shown his present learning and ability in the general law as required by standard 1.4(c)(ii). As the hearing judge noted, "[p]etitioner completed a number of classes required by the Department of Insurance, including insurance contracts, claims, procedures and ethics. Many of the classes included material that involved case law and applicable statutes. Between 1998 through 2000, Petitioner completed 100 hours of an educational program, plus more than 200 hours studying estate planning and taxation for small businesses." He litigated his personal bankruptcy in 1996, his own child custody matter and obtained a dismissal of a criminal charge brought by his child's mother arising out of a scheduled visitation with his daughter. Two of his character declarants commented on his extensive knowledge on the law of estate and business taxation. Kelly commented on Terrones's knowledge and keen eye for issues in litigation. Even if we accord a substantial discount to the educational activities of Terrones because they were oriented to insurance, we cannot find an abuse of discretion in the hearing judge's finding that Terrones has established present learning and ability in the *general* law by a preponderance of the evidence.

CONCLUSION

For the reasons set forth, we find no abuse of discretion or error of law on the part of the hearing judge and affirm his decision filed in this matter on February 16, 2001.

We concur:
STOVITZ, J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TIMOTHY LEE TAGGART

A Member of the State Bar

No. 99-PM-10316

Filed July 30, 2001; as modified August 31, 2001

SUMMARY

In this probation revocation proceeding, respondent failed to make restitution timely as required by one of the conditions of his two-year disciplinary probation. The hearing judge recommended that respondent's probation be revoked, that the stay of the suspension previously ordered be lifted, that respondent be actually suspended for 30 days, and that a new one-year period of probation be imposed, subject to new probation conditions, including that respondent pay the restitution. (Hon. Michael D. Marcus, Hearing Judge.)

Respondent sought review, contending that revoking his probation was a violation of due process and equal protection, and was discriminatory based upon his financial status. The review department concluded that the hearing judge's findings of fact and conclusions of law regarding culpability were supported by the record, including the conclusion that respondent's conduct was wilful, and adopted them with minor modifications. The review department also concluded that the record as a whole, and in particular respondent's indifference to his duty to comply with the restitution condition of his disciplinary probation, warranted increasing the recommended discipline to two years' stayed suspension and two years' probation on conditions, including six months' actual suspension.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Timothy Lee Taggart, in pro per

HEADNOTES

[1 a-e] 130 Procedure—Procedure on Review
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
135.82 Procedure—Revised Rules of Procedure—Probation
167 Abuse of Discretion
1889 Probation—Modification/Early Termination—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 hearing judge did not abuse his discretion or make an error of law in denying respondent's motion to modify his probation on the ground that respondent was dilatory in bringing the motion where respondent was aware or should have been aware of both the factual and legal need to modify the probation long before the motion was filed.

[2 a-c] **192 Due Process/Procedural Rights**
1711 Probation Cases—Special Procedural Issues
1889 Probation—Modification/Early Termination—Miscellaneous
Respondent's argument that the State Bar should be estopped from raising the timeliness of his motion to modify the probation was rejected. It is not at all clear that estoppel is applicable in this disciplinary proceeding. Estoppel will not ordinarily lie against a governmental agency if the result will be the frustration of a strong public policy. The goals of attorney discipline - protection of the public, courts and legal profession - are strong public policy considerations that militate against applying the doctrine. Even if estoppel were applicable, respondent failed to demonstrate a factual basis for the claim as he failed to show that the State Bar's actions were intended to be acted upon by him to his injury and that he was ignorant of the true state of facts.

[3 a, b] **163 Proof of Wilfulness**
191 Effect/Relationship of Other Proceedings
1712 Probation Cases—Wilfulness
Wilfulness for purposes of probation revocation (and other disciplinary) proceedings is simply a general purpose or willingness to commit an act or to make an omission; it does not require any intent to violate the law or the probation condition and does not necessarily involve bad faith. Moreover, wilfulness does not require actual knowledge of the provision violated. Respondent admitted that he did not pay the restitution, and there was no evidence in the record suggesting that this omission was other than a purposeful act. Thus, the failure to pay the restitution was unquestionably wilful under the above definitions. Whether respondent believed that he had no obligation to pay the money because the restitution was discharged in his bankruptcy was simply not relevant to the issue of the wilfulness of his failure to pay, as it need not be shown that respondent intended the consequences of his omission or was even aware of the disciplinary provision he was violating.

[4 a-c] **192 Due Process/Procedural Rights**
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous
Considerations of due process and fundamental fairness require, under the circumstances presented in this case, an examination of both respondent's ability to pay the restitution and his efforts at acquiring the resources to pay. Respondent presented evidence of his income, but not of his assets and expenses. While respondent's income was not significant during the relevant period of time, it was not conclusive or persuasive when considered outside the context of total assets and expenses. The evidence presented regarding respondent's efforts at acquiring the resources to pay the restitution was also lacking. Based on the above, the review department concluded that no circumstances were presented showing that it would be fundamentally unfair to revoke respondent's probation in this case.

[5 a, b] **171 Discipline—Restitution**
192 Due Process/Procedural Rights
1719 Probation Cases—Miscellaneous
Respondent's contention that revoking his probation was a violation of due process and equal protection, and was discriminatory based upon financial status was rejected. The premise upon

which it was based, that respondent's probation was being revoked because of his financial condition, was flawed. The revocation was based on his wilful failure to pay the restitution coupled with his failure to make reasonable efforts to acquire the resources to pay or to make other good faith efforts to satisfy the restitution obligation.

[6] **162.20 Proof—Respondent's Burden**
760.59 Mitigation—Personal/Financial Problems—Declined to Find

Financial difficulties may be considered in mitigation if they are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control. Respondent bears the burden of establishing mitigating circumstances by clear and convincing evidence. Respondent failed to present a complete picture of his financial condition and therefore failed to establish that any financial problems he was facing were extreme or beyond his control. Further, the little evidence that was presented indicated that respondent's income was limited at the time he entered into the stipulation to facts and disposition in the underlying disciplinary case. Thus, respondent also failed to establish that any financial problems he experienced were not reasonably foreseeable.

[7 a-g] **171 Discipline—Restitution**
1714 Probation Cases—Degree of Discipline
1719 Probation Cases—Miscellaneous

In probation revocation proceedings the greatest amount of discipline is warranted for violations 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 or showing the probationer's failure to undertake rehabilitative steps. The significance of restitution is its probative value as an indicator of rehabilitation, not the repayment of the underlying indebtedness. Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct. Thus, a probationer's attitude toward the restitution is a significant factor to be weighed. In the stipulation to facts and disposition in the underlying disciplinary case, respondent asserted that he was financially unable to pay the sanctions. Yet, he agreed to pay restitution as a condition of probation. After the Supreme Court's order was filed and four days before its effective date, respondent sought to discharge the restitution in bankruptcy. Having received the benefit of the bargain provided by the stipulation, respondent promptly sought to relieve himself of one of the obligations of that bargain. In addition, even though respondent has asserted continued financial hardship since before the filing of the stipulation in underlying discipline case, he did not seek a modification of the restitution condition of probation until after he was charged with violating that probation. Further, respondent apparently made no attempt to inform himself of the effect of the bankruptcy discharge on his duty to comply with the Supreme Court's disciplinary order. Respondent's stated belief that the restitution issue was moot because the recipient of the money forgave the debt was also problematic. The important state interests accomplished by restitution are not rendered moot because the underlying indebtedness is forgiven by a private party. The goal is prophylactic, not pecuniary. Respondent's demonstrated failure to recognize these most fundamental concepts causes concern and increases the risk that future similar misconduct may occur. Respondent's attitude toward the restitution shows indifference and warrants increasing the recommended discipline and requiring that the restitution be paid prior to respondent's resumption of active practice.

ADDITIONAL ANALYSIS

Discipline

1021 Restitution

Probation Conditions

1751 Probation Cases—Probation Revoked
1813.08 Stayed Suspension—2 Years
1815.04 Actual Suspension—6 Months

OPINION

OBRIEN, P.J.:

In this probation revocation case, respondent Timothy Lee Taggart seeks review of the hearing judge's decision that found that he failed to make restitution timely as required by one of the conditions of his two-year disciplinary probation. The hearing judge recommended that respondent's probation be revoked, that the stay of the suspension previously ordered be lifted, that respondent be actually suspended for 30 days, and that a new one-year period of probation be imposed, subject to new probation conditions, including that respondent pay the restitution.

Respondent contends on review that revoking his probation was a "violation of due process and equal protection, and was discriminatory based upon financial status." Respondent apparently seeks dismissal of this proceeding or an extension of the previously imposed probation. The State Bar contends that the hearing judge's findings of fact and conclusions of law regarding culpability are supported by the record, but that the discipline should be increased to a "very lengthy suspension."

We have independently reviewed the record and conclude that the hearing judge's findings of fact and conclusions of law regarding culpability are supported by the record, including the conclusion that respondent's conduct was wilful, and we adopt them with minor modifications. We also conclude that the record as a whole, and in particular respondent's indifference to his duty to comply with the restitution condition of his disciplinary probation, warrants increasing the recommended discipline to two years' stayed suspension and two years' probation on conditions, including six months' actual suspension.

FACTS AND FINDINGS[1]

Respondent was admitted to the practice of law in California in June 1976. He has been disciplined twice prior to the present probation revocation proceeding. We shall refer to these prior proceedings as *Taggart I* and *Taggart II*. The present probation revocation case arises from respondent's failure to comply with one of the conditions of probation imposed in *Taggart I*.

Taggart I resulted from a Supreme Court order filed on August 20, 1997, and effective September 19, 1997, in case number S061148 (State Bar Court case number 91-O-03429), suspending respondent from the practice of law for a period of two years, staying execution of the suspension, and placing him on probation for two years subject to conditions, including seven months' actual suspension. This discipline was based on a stipulation to facts and disposition between respondent and the State Bar which was approved by the State Bar Court.

The misconduct for which respondent was disciplined in *Taggart I* involved failing to return unearned fees promptly in violation of rule 3-700(D)(2) of the Rules of Professional Conduct;[2] failing in two separate instances to obey court orders in violation of section 6103 of the Business and Professions Code;[3] failing to perform services competently in violation of rule 3-110(A); providing information to a third party which was adverse to a former client in order to enhance respondent's position in a malpractice case filed against him by the former client in violation of section 6106; disclosing confidential information about the same former client to a third party in violation of section 6068, subdivision (e); and filing a motion to disqualify a superior court commissioner in a civil case without probable cause or legal basis and for the purpose of harassing the commissioner in violation of

1. We have added some factual detail to the hearing judge's findings based on our independent review of the record. Also, the hearing judge stated in his decision that this matter was heard in the hearing department by way of "written declarations and exhibits of the parties." There are declarations and exhibits that are a part of, or attached to, numerous pleadings that have been filed and are a part of the record on review. It is not clear whether the hearing judge considered all or only some of declarations and exhibits submitted. We have considered all declarations and exhibits filed in this case.

2. All further references to rules are to these rules unless otherwise noted.

3. All further references to sections are to this code unless otherwise noted.

rule 3-200(A). In aggravation, respondent had a record of prior discipline in that he was disciplined in *Taggart II* (see below) and the misconduct involved multiple acts of wrongdoing. No mitigating circumstances were found.

One of the conditions of the probation in *Taggart I* required respondent to make restitution in the amount of $1,528 plus interest to the attorney (Linfield) who represented respondent's former client in the malpractice action that the former client filed against respondent. The restitution resulted from discovery sanctions respondent was ordered to pay the attorney and did not. The restitution was to be paid by September 19, 1998. To date, respondent has not paid the restitution or any part thereof.

In September 1997, four days before the effective date of the Supreme Court's discipline order in *Taggart I*, respondent filed a chapter 7 bankruptcy petition and listed the restitution as a debt. Linfield filed a complaint to determine the dischargeability of the restitution debt. Pursuant to stipulation between respondent and Linfield, the complaint was dismissed in December 1997, and the bankruptcy court subsequently discharged all of respondent's debts, including the restitution.

In June 1999, the State Bar filed the present motion to revoke respondent's probation based on his failure to pay the restitution as ordered in *Taggart I*. Thereafter, respondent filed a contempt proceeding in the bankruptcy court against the State Bar attorneys who filed the motion to revoke his probation. Respondent sought to have the State Bar attorneys held in civil contempt for violating the discharge injunction imposed by 11 United States Code section 524, and specifically for violating of 11 United States Code section 525(a) by attempting to revoke respondent's probation based on his failure to pay a discharged debt. In September 1999, the bankruptcy court concluded that the filing of the motion to revoke probation was not a violation of the discharge injunction, or of section 525(a), and that therefore the State Bar attorneys were not in contempt of court. The bankruptcy court found that compelling obeyance of the court order to pay the sanctions by requiring restitution was "part of the rehabilitative process and hence a proper, nondischargeable condition of probation." There is no evidence in the record before us showing that respondent sought review of the bankruptcy court's decision.

In January 2000, respondent filed a motion to modify the probation imposed in *Taggart I* by deleting the restitution requirement. The hearing judge denied the motion because respondent had been "dilatory in bringing it." Respondent did not seek timely review of that order as provided by rule 553(b), Rules of Procedure of the State Bar.

Based on the above, the hearing judge concluded that respondent wilfully failed to comply with the restitution condition of his probation.

In aggravation, the hearing judge found that *Taggart I* and *Taggart II* were prior discipline. *Taggart II* resulted from a Supreme Court order filed August 20, 1997, and effective September 19, 1997, in case number S061220 (State Bar Court case number 91-O-02615), suspending respondent from the practice of law for a period of two years, staying execution of the suspension, and placing him on probation for two years subject to conditions of probation, including 120 days' actual suspension. This discipline followed a trial and decision in the State Bar Court.[4]

The misconduct underlying *Taggart II* involved respondent's failure to disclose to his client that he had a business, financial, professional, and personal relationship with another person who had interests adverse to respondent's client in violation of rule 3-310(B)(3); his failure to disclose to the same client that he had a professional and personal interest in a judgment he obtained for the client in violation of rule

4. The stipulation to facts and disposition in *Taggart I* was filed in the State Bar Court in February 1997, and the hearing judge's decision in *Taggart II* was filed in the State Bar Court in November 1996. Respondent unsuccessfully sought Supreme Court review in each case. The Supreme Court's orders in each case were filed on the same day. The Court ordered the discipline in *Taggart I* to be concurrent with the discipline in *Taggart II*.

3-310(B)(4); his continued representation of the client while representing the conflicting interests of the third party in violation of rule 3-310(C)(2); his acceptance of employment adverse to a client without obtaining the informed written consent of the client in violation of rule 3-310(E); and his act of moral turpitude by delaying the deposit of a check issued for the benefit of the client so that a third party, with whom respondent had a professional and personal relationship, could levy upon the check in violation of section 6106. In mitigation, respondent did not have a record of prior discipline. In aggravation, the misconduct involved multiple acts of wrongdoing; was surrounded by bad faith, dishonesty, and concealment; and significantly harmed his client.

In mitigation in the present probation revocation case, the hearing judge found that respondent faced financial difficulties "over the past couple of years" that were beyond his control. However, the judge noted that this factor would have been given more weight had respondent presented a more complete picture of his financial affairs, in that respondent provided evidence of his income but not his expenses for the relevant years.

DISCUSSION

Although respondent's briefs on review are not a model of clarity, it appears that he is challenging the hearing judge's denial of his motion to modify his probation as well as the hearing judge's conclusion that he wilfully violated the restitution condition of his probation.

1. Motion to Modify Probation

[1a] Motions to modify probation are governed by rules 550 through 554 of the Rules of Procedure of the State Bar. Rule 553(b) specifically provides that a ruling by a hearing judge on a motion to modify probation "shall be reviewable only pursuant to rule 300." Rule 300(k) of the Rules of Procedure of the State Bar provides, as applicable here, that the standard of review under rule 300 is abuse of discretion or error of law. Before turning to the merits, we note that respondent did not seek timely review of the hearing judge's order. (See Rules Proc. of State Bar, rule 300(b).) Nevertheless, we granted his motion for late filing and therefore consider the request, but we do so, as indicated, under the standard of review applicable to rule 300 petitions.

[1b] The grounds respondent asserted in support of his motion in the hearing department were that the discovery sanctions order which was the basis for the restitution "never became final," that the hearing judge advised him to bring a motion to strike the restitution from his probation, and that the discovery sanctions were discharged in his bankruptcy proceeding and therefore were "null and void." The State Bar opposed the motion partially on the ground that the period of probation had expired prior to the filing of the motion to modify the probation and that, therefore, there was no probation to modify. The hearing judge focused primarily on this part of the State Bar's argument. Applying the "rule of lenity," the hearing judge concluded that the motion to modify could be brought after the period of probation had expired. The hearing judge ultimately denied the motion, however, because he concluded that respondent was dilatory in filing it as respondent knew of his troubled financial picture almost 28 months before making the motion and delayed filing it until after the State Bar filed the present proceeding.

[1c] We limit our discussion to whether the hearing judge abused his discretion or made an error of law in denying the motion on the ground that respondent was dilatory, as this is the only issue raised by respondent on review.[5] Respondent argues that the motion to modify was timely because it was filed soon after the bankruptcy court ruled on his contempt order to show cause.

[1d] Respondent stipulated to paying the restitution as a condition of his probation, and that stipulation was filed in February 1997. The Supreme Court order

5. Although we do not reach the merits of the other issues raised by respondent in the hearing department, we note that this proceeding involves respondent's failure to comply with the Supreme Court's order imposing discipline and not the court order imposing the sanctions. The Supreme Court's order is final, has not been modified, and is not "null and void."

imposing the restitution was filed in August 1997. Respondent's financial condition apparently existed at the time he entered into the stipulation and continued, according to him, until at least the time he filed the motion to modify his probation. We also note that at the time of these events it was well established that restitution could be imposed as a condition of disciplinary probation even if the underlying subject of the restitution had been discharged in bankruptcy. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009.) Thus, respondent was aware or should have been aware of both the factual and legal need to modify the probation long before the motion was filed.

[2a] Respondent also seems to contend that the State Bar should be estopped from raising the timeliness of his motion to modify the probation.[6] According to respondent, he noted in every probation report he submitted to the State Bar that "the restitution issues had been resolved through the Bankruptcy." Respondent argues that the State Bar did not dispute any of those statements until it filed the present proceeding and that it would be "unfair and unjust" to "allow the Bar to wait until the last hour of probation and then complain that Respondent's motion to modify was untimely."

[2b] We first note that it is not at all clear that estoppel is applicable in this proceeding. "Estoppel will not ordinarily lie against a governmental agency if the result will be the frustration of a strong public policy. [Citations.]" (*Bib'le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 553.) The goals of attorney discipline - protection of the public, courts and legal profession - are strong public policy considerations that militate against applying the doctrine.

[2c] Even if estoppel were applicable, respondent has failed to demonstrate a factual basis for the claim. To successfully invoke the doctrine against the State Bar respondent would have to show that the State Bar's actions were intended to be acted upon by respondent to his injury and that he was ignorant of the true state of facts. ((*Bib'le v. Committee of Bar Examiners*, *supra*, 26 Cal.3d at pp. 552-553.) No such showing has been made here; nor could it be, as there was clear Supreme Court authority (*Brookman v. State Bar*, *supra*, 46 Cal.3d at p. 1009) controlling the actions and knowledge of both parties.

[1e] For the above reasons, we conclude that the hearing judge did not abuse his discretion or commit an error of law in denying the motion. Our review of the remaining issues in this case is pursuant to rule 301 of the Rules of Procedure of the State Bar. That review is de novo; we must independently review the record and may adopt findings and conclusions that vary from those of the hearing judge. (Rules Proc. of State Bar, Rule 305; Cal. Rules of Court, rule 951.5.) The standard of proof in probation revocation proceedings is the preponderance of the evidence.(§6093, subd. (c); Rules Proc. of State Bar, rule 561.)

2. Culpability

[3a] Respondent argued below and appears to argue on review that his conduct was not wilful because he believed that he had no obligation to pay the money as the restitution was discharged in his bankruptcy, and because he did not have the money to pay the restitution. Wilfulness for purposes of probation revocation (and other disciplinary) proceedings is simply a general purpose or willingness to commit an act or to make an omission; it does not require any intent to violate the law or the probation condition and does not necessarily involve bad faith. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536; *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.) Moreover, wilfulness does not require actual knowledge of the provision violated. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) Thus, the term wilful does not require a showing that respondent intended the consequences of his acts or omissions, it simply requires proof that he intended the act or omission itself. The "omission" at issue here is the failure to pay the restitution to

6. As respondent offered no legal authority and little analysis in support of this contention, the legal framework of the argument is not clear. It is also not clear whether respondent is asserting that the doctrine of estoppel precludes the State Bar from arguing the untimeliness of his motion to modify probation and, or, precludes the State Bar from seeking the revocation of his probation. Our discussion applies to both arguments.

attorney Linfield as ordered. Accordingly, we must determine whether it has been shown by a preponderance of the evidence that respondent had a willingness or general purpose to omit paying the money.

[3b] Respondent admits that he did not pay the restitution, and there is no evidence in the record suggesting that this omission was other than a purposeful act. Thus, the failure to pay the restitution was unquestionably wilful under the above definitions. Whether respondent believed that the bankruptcy discharge voided the Supreme Court order requiring him to pay restitution is simply not relevant to the issue of the wilfulness of his failure to pay, as it need not be shown that respondent intended the consequences of his omission or was even aware of the disciplinary provision he was violating.

[4a] Considerations of due process and fundamental fairness require, under the circumstances presented here, that we also examine both respondent's ability to pay the restitution and his efforts at acquiring the resources to pay. (*In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 537; *Bearden v. Georgia* (1983) 461 U.S. 660, 672.) Respondent asserted below that during the time he was on probation he did not have the ability to pay the restitution. Although the hearing judge did not make any specific factual findings regarding respondent's financial situation, he concluded that respondent's "financial difficulties over the past couple of years" were a mitigating factor. The hearing judge discounted the weight he accorded this factor because respondent did not present a more complete picture of his financial affairs in that respondent listed his income but not his assets and expenses for the period of time.

[4b] Respondent testified that he earned $560 from teaching and $1,300 from legal research work in 1998. Respondent also submitted pay stubs from two separate school districts showing gross earnings of $6,184 for the period of January 1 through October 1999. In his opening brief on review, respondent stated that he earned $1,860 in 1998 and $5,620 from teaching in 1999. No evidence was submitted of respondent's assets and expenses, or of his income for the years prior to 1998 or since 1999. Respondent also indicated that he has custody of his son and, since December 1999, his daughter, and that he pays child support for his remaining two children.[7] While we agree that these income amounts are not significant, they are not conclusive or persuasive when considered outside the context of total assets and expenses during the relevant time period.

[4c] The evidence presented regarding respondent's efforts at acquiring the resources to pay the restitution is also lacking. Respondent stated that he applied for "various positions" with several cities and counties, the State of California, and "numerous Community Colleges," and that he "left resumes at several job fair booths," all without success. Respondent did not present any other evidence regarding his efforts toward finding work. Thus, its not clear how many applications were submitted, what positions were sought, when he applied for any of the positions, whether he was qualified for any of the positions, whether the positions were for legal or non-legal work, or whether they were for full-or part-time work. Further, respondent did not present any evidence regarding his efforts at obtaining other resources to pay. Based on the above, we conclude that respondent is culpable of wilfully failing to comply with the restitution condition of his probation and that no circumstances have been presented showing that it would be fundamentally unfair to revoke the probation in this case.[8]

[5a] Before turning to the remaining issues, we note that in support of his contention that revoking his probation was a "violation of due process and equal protection, and was discriminatory based upon financial status," respondent cites two cases, but offers no

7. The stipulation in *Taggart I* indicates that respondent had six children to support, four natural and two adopted. The pleadings in the present case indicate that he has four children. The discrepancy is not explained.

8. Respondent argues in his reply brief, without citation to authority or explanation, that requiring him to show inability to pay improperly shifts the burden of proof. As indicated above, the State Bar is required to prove a wilful violation of probation, and it has done so.

analysis and little explanation. Neither case aids respondent. (*People v. Ryan* (1988) 203 Cal.App.3d 189 [trial court did not err in ordering restitution as a condition of probation in a criminal case in the absence of any evidence or determination of ability to pay]; *Bearden v. Georgia*, *supra*, 461 U.S. 660 [in a criminal probation revocation proceeding for failure to pay restitution, if the probationer willfully refused to pay or failed to make sufficient bona fide efforts to legally acquire the resources to pay, the court may revoke probation and sentence the defendant to jail].).

[5b] Respondent's constitutional claims also fail because the premise upon which they are based, that respondent's probation is being revoked because of his financial condition, is flawed. The revocation is based on his wilful failure to pay the restitution coupled with his failure to make reasonable efforts to acquire the resources to pay or to make other good faith efforts to satisfy the restitution obligation. Our inquiry is not a dollars and cents calculation.

3. Aggravating and Mitigating Circumstances

The hearing judge found in aggravation that respondent had a record of prior discipline and in mitigation that respondent "faced financial difficulties." Respondent offers no argument regarding the aggravating and mitigating factors found by the hearing judge. The State Bar agrees with the aggravating circumstances found, but asserts that the mitigating circumstance was made in error. We agree that *Taggart I* and *Taggart II* are aggravating circumstances as they are a record of prior discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)[9]

[6] Financial difficulties may be considered in mitigation if they are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control. (*In re Naney* (1990) 51 Cal.3d 186, 196-197.) Respondent bears the burden of establishing mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) Respondent failed to present a complete picture of his financial condition and therefore failed to establish that any financial problems he was facing were extreme or beyond his control. Further, the little evidence that was presented indicates that respondent's income was limited at the time he entered into the stipulation to facts and disposition in *Taggart I*. Thus, respondent has also failed to establish that any financial problems he experienced were not reasonably foreseeable.

In sum, we conclude that respondent wilfully failed to comply with the restitution condition of his probation. We also conclude that *Taggart I* and *Taggart II* are aggravating circumstances and that there are no mitigating circumstances present.

4. Degree of Discipline

Respondent also offers no argument regarding the appropriate discipline if culpability is found, although he does appear to request an extension of the probation term instead of revocation. The State Bar argues that the actual suspension should be increased to some unspecified amount.

[7a] We have held that in probation revocation proceedings the greatest amount of discipline is warranted for violations 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 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.)

[7b] Much of the misconduct in *Taggart I* occurred as a result of respondent's representation of a client named Chong. Chong hired respondent to sue her former employer, Golden Cheese Company, for wrongful termination and other related causes of action. Golden Cheese prevailed on a motion for summary judgement, which was attributable in large

9. All further references to standards are to these standards unless otherwise noted.

part to respondent's failure to represent Chong competently in the lawsuit. Chong hired attorney Linfield to represent her in an appeal of the Golden Cheese case and in a malpractice action against respondent. During the course of these proceedings respondent had his legal assistant contact counsel for Golden Cheese to inform them that respondent had damaging information (the discipline stipulation does not further describe the nature of this information) concerning Chong which would be beneficial to Golden Cheese in the lawsuit. Respondent also had his legal assistant contact Linfield to inform him that respondent was aware of past illegal conduct by Chong that would "come out" if the malpractice case continued. Respondent's purpose in contacting Linfield was to get Chong to drop the malpractice action. Respondent also issued a subpoena in the malpractice action to the Employment Development Department (EDD) seeking documents. In his declaration in support of the subpoena, respondent stated that the documents would show that Chong defrauded the EDD by receiving benefits while she was secretly working.

[7c] In another matter unrelated to Chong, respondent manufactured a claim of bias against a commissioner hearing the case in order to get the commissioner removed. In a third matter unrelated to the other two, respondent failed to return unearned fees promptly, and in a fourth unrelated matter, respondent failed to obey a court order requiring him to appear at an order to show cause hearing.

[7d] The misconduct for which the probation was given in *Taggart I* included the failure to pay court-ordered discovery sanctions in the malpractice action. While the restitution condition of probation was therefore directly related to the misconduct for which respondent was originally disciplined, the more serious wrongdoing in *Taggart I* involved misdeeds not significantly related to violations of court orders.[10] Nevertheless, respondent was disciplined in *Taggart I* in part for failing to obey court orders to appear at a hearing and to pay the sanctions, and he has again failed to obey a court order by failing to comply with the Supreme Court's discipline order.

[7e] We also note that the court order at issue here was an order to pay the restitution. The Supreme Court has held that the "significance of restitution is its probative value as an indicator of rehabilitation, not the repayment of the underlying indebtedness." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1093.) Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct. (*Brookman v. State Bar, supra*, 46 Cal.3d at p. 1009; *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 537.) Thus, a probationer's attitude toward the restitution is a significant factor to be weighed. (*Hippard v. State Bar, supra*, 49 Cal.3d at p. 1093.)

[7f] In the stipulation to facts and disposition in *Taggart I*, respondent asserted that he was financially unable to pay the sanctions. Yet, he agreed to pay restitution as a condition of probation. After the Supreme Court's order was filed and four days before its effective date, respondent sought to discharge the restitution in bankruptcy. Having received the benefit of the bargain provided by the stipulation, respondent promptly sought to relieve himself of one of the obligations of that bargain. In addition, even though respondent has asserted continued financial hardship since before the filing of the stipulation in *Taggart I*, he did not seek a modification of the restitution condition of probation until after he was charged with violating that probation. Further, respondent apparently made no attempt to inform himself of the effect of the bankruptcy discharge on his duty to comply with the Supreme Court's disciplinary order.

[7g] Respondent's stated belief that the "restitution issue" is "moot" because Linfield "forgave" the debt is also problematic. As noted above, restitution is imposed in order to rehabilitate errant attorneys and

10. Similarly, the wrongdoing in *Taggart II* involved blatant dereliction of respondent's duty of loyalty to his client and was likewise not significantly related to violations of court orders.

to protect the public by forcing the attorney to confront in concrete terms the consequences of his or her misconduct. (*Brookman v. State Bar*, *supra*, 46 Cal.3d at p. 1009.) These important state interests are not rendered moot because the underlying indebtedness is "forgiven" by a private party. The goal is prophylactic, not pecuniary. Respondent's demonstrated failure to recognize these most fundamental concepts causes concern and increases the risk that future similar misconduct may occur. Respondent's attitude toward the restitution shows indifference and warrants increasing the recommended discipline and requiring that the restitution be paid prior to respondent's resumption of active practice.

The State Bar has cited two cases in support of its position that a lengthy period of actual suspension should be imposed. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138 [one-year actual suspension]; and *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. 525 [two years' actual suspension].) Although both cases involved the failure to pay a restitution condition of probation, they also involved a more substantial nexus between the restitution and the gravamen of the underlying misconduct than is present here. Also, both cases involved additional violations of the same probation. There is no evidence in the record before us indicating that respondent has failed to comply with any of the other probation conditions in either *Taggart I* or *Taggart II*. Balancing all relevant factors, we conclude that the hearing judge's recommended discipline should be increased to two years' stayed suspension and two years' probation on conditions, including six months' actual suspension and payment of the restitution.

Like the hearing judge, we do not recommend that respondent be required to take and pass the professional responsibility examination or attend Ethics School, as he was ordered to do so in *Taggart I* and *Taggart II*. We also modify the language of the hearing judge's discipline recommendation to make clear that a new period of stayed suspension is being recommended.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent's probation ordered by the Supreme Court in case number S061148 (State Bar Court case number 91-O-03429) be revoked, that the stay of the execution of the two-year period of suspension be lifted, that respondent 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 on the following conditions:

1. Respondent shall be actually suspended for the first six months of his probation and until he pays restitution to Michael Linfield in the amount of $1,528 plus interest at ten percent per annum from September 19, 1997, and provides satisfactory proof of such payment to the Probation Unit.

2. During the probation period respondent shall comply with the State Bar Act and the Rules of Professional Conduct.

3. Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully, any inquiries of the Probation Unit of the Office of the Chief Trial Counsel which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

5. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Probation Unit, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

6. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

7. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years shall be satisfied and that suspension shall be terminated.

It is further recommended 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 thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein.

Finally, we 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.

We Concur:

STOVITZ, J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

EMIR PHILLIPS

A Member of the State Bar

No. 94-O-11471

Filed October 4, 2001

SUMMARY

The hearing department recommended respondent's disbarment after finding him culpable of twelve counts of charged misconduct in five client matters and two non-client matters. The misconduct found included: agreeing to, charging, or collecting an illegal fee; failing to release to clients promptly upon request all client papers and property; sharing legal fees with a nonlawyer; forming a law partnership with a nonlawyer; intentionally, recklessly, or repeatedly failing to perform legal services competently; failing to refund an unearned fee after employment has terminated; failing to deliver client's funds promptly upon client's request; failing to maintain complete records of all client funds in member's possession and failing to render an appropriate accounting; failing to respond promptly to reasonable status inquiries; and soliciting a prospective client with whom attorney has no family or prior professional relationship. (Hon. Carlos E. Velarde, Hearing Judge.)

The review department found respondent culpable of one additional charge of failing to refund an unearned fee after employment was terminated and otherwise adopted all of the hearing judge's findings regarding culpability. The review department additionally determined that respondent began to commit professional misconduct soon after he was admitted to practice, that he committed a wide range of misconduct, and that the misconduct was surrounded by little evidence in mitigation but serious, extensive evidence in aggravation. Under these circumstances, the review department concluded that disbarment was warranted.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: David A. Clare

HEADNOTES

[1 a, b] 290.00 Rule 4-200 [former 2-107]
Even assuming that it was not initially clear to respondent at the first meeting with his client that the case was a probate matter, respondent knew by the third meeting that the matter involved probate

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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.

but nevertheless proffered to the client at that time a retainer agreement which applied the $500 fee quoted at the initial meeting to the $2,000 total fee to be paid in advance for a probate matter. Therefore, at the time of the third meeting, the $500 fee was charged for work to be performed in a probate case in violation of the Probate Code sections which require court approval prior to attorney compensation. Moreover, because respondent charged the $500 fee at the time of the third meeting for services to be performed subsequently in a probate matter, it is irrelevant whether the Probate Code fee limit sections apply to payment for preliminary services performed prior to filing the probate matter.

[2 a-d] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
There was no evidence that respondent earned a fee so as to justify failing to refund the fee to a client after his employment was terminated where (1) there was insufficient evidence to establish an amount of work which, at the quoted rate, would have justified retention of the fee and (2) respondent failed to obtain the result for which he was retained.

[3] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Respondent could not have earned any fee in a probate case absent prior court approval of his fee.

[4 a, b] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
A client has an absolute right to retain counsel of choice and may discharge his or her attorney at any time, with or without cause. It is reasonable to assume that when a new attorney is retained, he or she will be able to communicate with and obtain the client's file from the former attorney. While the former attorney has the right and duty to ensure that the new attorney is acting with client consent, where the record showed that the new attorney attempted to communicate with respondent for several months before receiving a response and that respondent made no effort to obtain (1) specific proof that the clients had hired the new attorney or (2) permission to contact the clients to verify their authorization, respondent's failure to forward the clients' file to the new attorney promptly upon request constituted a willful violation of Rules of Professional Conduct, rule 3-700(D)(1).

[5] **139 Procedure—Miscellaneous**
Where findings made by the hearing judge cast respondent in a negative light but did not result in an additional ground of discipline or aggravation, respondent failed to demonstrate any specific or actual prejudice that would entitle him to any relief on review.

[6 a-c] **159 Evidence—Miscellaneous**
Where respondent's evidentiary objection at trial was neither timely nor specific, the review department refused to disregard the challenged evidence.

[7 a-e] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
In a prosecution for intentionally, recklessly, or repeatedly failing to perform legal services competently, failing to refund an unearned fee after employment was terminated, and failing to deliver clients' funds promptly upon request, there was sufficient evidence that respondent represented the clients involved where one of the clients was referred to respondent and went to his office intending to hire him, saw his name on the door and some of his business cards in the reception area, made several appointments with him, received one of two receipts for payment on respondent's letterhead, and filled out forms for respondent at the request of a member of the office

staff who was an employee or agent for respondent. Moreover, respondent had a key to the office, worked out of the office for at least a few hours each week, and, by failing to deny the fact upon accusation by the State Bar, admitted that the clients were his.

[8 a, b] **142 Evidence—Hearsay**
A client was allowed to testify regarding statements made to the client by a secretary working on respondent's behalf where such statements relayed information and instructions from respondent to the client. Such statements were admissible as authorized statements under Evidence Code section 1222 to prove that the client had retained respondent.

[9 a, b] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
The fee agreement itself established that respondent's fee was not a true retainer but an advanced fee, since the fee was paid not to ensure respondent's availability either for this matter or for a given period of time, but rather to pay respondent in advance for his services.

[10 a-d] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
In a prosecution for violating Rules of Professional Conduct, rule 3-700(D)(2), there was insufficient evidence in the record to establish that respondent earned the $1,000 fee. The fee agreement, as interpreted by respondent and as applicable here, provided for the client to pay respondent an hourly fee plus costs for consultants if the matter settled without a hearing. The actual cost due for one consultant was $100, but because respondent never paid the consultant, the client never became liable for such cost. In addition, respondent could not have reviewed the client's records because he never received them, did not have long telephone conversations with the consultant regarding the client's case, and performed insufficient research to have earned the $1,000 fee.

[11 a, b] **257.00 Rule 2-100 [former 7-103]**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
The review department determined that respondent's office contacted a represented party where, after respondent's employee sent a letter to a particular employee at an insurance company, counsel representing the insurance company sent a letter notifying respondent that he had contacted a represented party, but respondent's employee nevertheless sent a second letter to the same employee at the insurance company. The only reasonable inference to be drawn from the letter sent to respondent by counsel for the insurance company was either that the insurance company employee held one of the positions listed in Rules of Professional Conduct, rule 2-100(B)(1) or that the statements or actions of the insurance company employee pertaining to the matter would be binding upon, imputed to, or constitute an admission on the part of the insurance company. Moreover, respondent appeared to concede that the insurance company employee constituted a represented party in his letter to the State Bar.

[12 a, b] **257.00 Rule 2-100 [former 7-103]**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where respondent had been alerted to a problem in the way his employees ran his office but took no action to correct the problem, and it appeared that respondent failed to guide his staff and review their work, respondent was culpable of violating Rules of Professional Conduct, rule 3-110(A).

[13 a-d] **253.00 Rule 1-400(C) [former 2-101(B)]**
In a prosecution for a violation of Rules of Professional Conduct, rule 1-400(C), the review department rejected respondent's assertion that he reasonably believed he had a prior professional relationship with the client where the evidence established (1) that respondent knew that another

attorney, rather than respondent, had been assigned to represent the client and (2) that even if respondent did not know this fact at the time he set up a meeting with the client, respondent was put on notice of the fact once the client stated to him at the meeting that he was represented by another attorney. The danger of solicitation is that lawyers, trained in persuasion, may attempt to use such skills on potential clients who are vulnerable and susceptible to manipulation, and the record in this case demonstrated that a concern about that danger is justified.

[14] **159 Evidence—Miscellaneous**

Although neither the reporter's transcript of the hearing department proceedings nor the clerk's notations on the exhibits indicated that certain exhibits were formally admitted into evidence, the review department treated the exhibits as part of the record for purposes of review where the hearing judge considered the exhibits and the judge and counsel treated the exhibits as having been admitted into evidence.

[15] **765.39 Mitigation—Pro Bono Work—Found but Discounted**

While respondent's representation of clients for reduced or no fees constituted evidence in mitigation, such evidence was given little mitigating weight where the evidence established that respondent was eligible to receive substantial attorney fees in many of the cases and it was therefore unclear whether respondent's motive for taking such cases was to help others or to collect attorney fees.

[16] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
565 Aggravation—Uncharged Violations—Declined to Find

Absent a motion by the State Bar to amend the notice of disciplinary charges in a way that would have given respondent a sufficient opportunity to defend, the hearing judge should have sustained respondent's objection to evidence of uncharged misconduct on the ground that it was beyond the scope of the charge set forth in the notice of disciplinary charges. In view of respondent's timely and specific objection, the review department declined to adopt the finding of uncharged misconduct as an aggravating circumstance.

[17 a, b] **143 Evidence—Privileges**
144 Evidence—Self-Incrimination
193 Constitutional Issues
613.90 Aggravation—Lack of Candor—Bar—Found but Discounted

While respondent's improper assertion of various constitutional and statutory privileges showed a lack of cooperation with the State Bar during the disciplinary proceedings and constituted an aggravating factor, such factor was given little weight because (1) there was no evidence of resulting excessive delay in the disciplinary proceedings, (2) respondent willingly responded to most of the questions presented to him and only asserted the privileges as to matters which he believed involved the possibility of criminal prosecution, (3) the delay which did occur was not caused solely by respondent, (4) respondent's assertion of the privileges did not interfere with the State Bar's ability to prove its case, and (5) there was no clear and convincing evidence that respondent asserted the privileges in bad faith.

[18] **161 Duty to Present Evidence**
193 Constitutional Issues
615 Aggravation—Lack of Candor—Bar—Declined to Find
The review department rejected a finding that respondent displayed a lack of cooperation during State Bar proceedings by making unfounded and inflammatory statements in various pleadings filed in this disciplinary matter. Respondent's statements were not proper subjects for aggravation where the State Bar made no showing by clear and convincing evidence that they were false.

[19] **193 Constitutional Issues**
615 Aggravation—Lack of Candor—Bar—Declined to Find
The review department rejected a finding that respondent displayed a lack of cooperation during State Bar proceedings by filing six petitions for interlocutory review with the review department, at least one petition for review with the California Supreme Court, and over 30 motions in the hearing department. These documents were not proper subjects for aggravation where it was not shown by clear and convincing evidence that the documents were completely lacking in merit and were filed in bad faith. Respondent acted as cocounsel during the hearing department proceedings and was entitled to reasonable access to the courts to seek judicial remedies.

Additional Analysis

Culpability

Found

214.31 Section 6068(m)
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
252.21 Rule 1-310 [former 3-103]
252.31 Rule 1-320(A) [former 3-102(A)]
253.01 Rule 1-400(C) [former 2-101(B)]
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)]
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]

Not Found

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

Aggravation

Found

521 Multiple Acts
541 Bad Faith, Dishonest
551 Overreaching
561 Uncharged Violations
591 Indifference
611 Lack of Candor—Bar
621 Lack of Remorse

Declined to Find

565 Uncharged Violations
615 Lack of Candor—Bar

Mitigation
Declined to Find
710.53 No Prior Record
Standards
801.30 Effect as Guidelines
802.30 Purposes of Sanctions
Discipline
1010 Disbarment
Other
1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

In this disciplinary proceeding, respondent Emir Phillips seeks review of a hearing judge's decision finding respondent culpable of 12 charged acts of misconduct and recommending that he be disbarred. Respondent challenges most, though not all, of the hearing judge's adverse factual findings and legal conclusions.

We independently review the record before us in this matter. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.) Our review discloses that respondent began to commit professional misconduct soon after he was admitted to practice, that he committed a wide range of misconduct, and that the misconduct was surrounded by little evidence in mitigation, but significant evidence in aggravation. We conclude that the recommendation of disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession.

BACKGROUND

Respondent was admitted to practice law in California in June 1991 and has no prior record of discipline. At all relevant times, respondent had his own law practice which appears to have included a variety of cases involving probate, real estate, medical malpractice, personal injury, workers' compensation, immigration, education, disabled veterans, and civil rights. Although it is not clear whether respondent employed other attorneys, respondent did employ a nonattorney office staff to assist him.

CULPABILITY

In their briefs, the parties on review included discussions as to aggravation pertaining to each matter along with discussions regarding culpability. However, because issues concerning aggravating circumstances differ from those involving culpability, where aggravating evidence surrounds a specific matter, we defer our discussion of such aggravation to our discussion of all aggravating circumstances.

The Benjamin Matter

Lyric Benjamin Dill (Benjamin), a student with a part-time job, contacted respondent through the Los Angeles County Bar Association's Modest Means Referral Service.[1] Benjamin's father had died without a will, and Benjamin and her mother met with respondent on February 12, 1993.

At this initial meeting, she retained respondent to handle the probate of a house and a car. At that time, respondent asked who had title to the house and whether Benjamin's mother was married to Benjamin's father at the time of the father's death. Benjamin's mother informed respondent that she and Benjamin's father were divorced in 1979. Respondent told Benjamin that he would take the case and that he would charge her $500 to obtain a court date. Benjamin's mother gave respondent a $500 check.

In order to keep legal fees down, Benjamin obtained the deed of trust for her father's house for respondent and forwarded it to him on February 13, 1993. Subsequently, over a period of approximately six to seven weeks, Benjamin left over twenty messages on respondent's office answering machine asking whether respondent had obtained a court date. She received no response. She finally spoke with respondent at the end of March by calling him on a Sunday and set up a meeting for April 2, 1993.

At the meeting of April 2, respondent told Benjamin he had not obtained a court date but was working on the case. He also told Benjamin he was " 'going to get a petition concerning the estate' " and requested an additional $1,500 in legal fees and another $250 for court costs. Benjamin asked respondent for a contract and an itemized bill so she could determine how respondent had spent the $500 she had previously paid to him, but she never received a bill.

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1. We base our findings in this matter primarily upon the testimony Benjamin gave in the hearing department. As we will discuss, the hearing judge found Benjamin's testimony to be credible.

They next met on April 9, 1993. At that time, respondent presented Benjamin with a retainer agreement. At the time he prepared this agreement, he planned to be paid $2,000 for his services and did not even know whether the agreement was legal. Respondent had signed the agreement and pressured Benjamin to sign as well, but she took it home to review it first. Paragraph four of that agreement indicates that respondent was to receive $40 per hour to handle the "succession of Moses Benjamin's residence and all related probate matters." Benjamin never signed the agreement.

At some point during this time, respondent reviewed documents in this case and performed research on the matter.

Benjamin spoke with respondent on the telephone on April 16, 1993. At that time, she informed him that she no longer wanted him to represent her and requested a refund of the money previously paid. He refused to refund any money and told Benjamin she could "take him to Small Claims Court because he hasn't lost a case there yet." On April 23, 1993, she mailed respondent a letter reiterating that she no longer wanted him to act as her attorney and again requested a refund. Subsequently, Benjamin contacted the Los Angeles County Bar Association Dispute Resolution Services in an effort to obtain a refund of the $500 paid to respondent. Although respondent did not appear at the fee arbitration hearing on December 3, 1993, he sent a written response to the arbitrator. After the hearing, Benjamin was awarded the $500 plus $50 for the arbitration fee. Benjamin tried to call respondent to collect the money, but when she was able to contact him on the telephone, he hung up on her. Respondent finally paid Benjamin the amount awarded in arbitration plus interest in February 1997.

In contrast to the foregoing, respondent testified that, at their initial meeting, Benjamin's mother indicated to him that she wanted to transfer title to her house to Benjamin, and therefore respondent believed that the matter essentially involved a real estate issue. He also testified that it was not until the second meeting that he discovered that Benjamin's parents were divorced when Benjamin's father died and that he then obtained and reviewed the divorce documents, subsequently concluding that the case instead involved probate issues. He additionally testified that neither Benjamin nor her mother ever hired him to handle the probate matter and that he never hung up on Benjamin.

In this client matter, respondent was charged with violating Rules of Professional Conduct, rule 4-200(A)[2] (entering into an agreement for, charging, or collecting an illegal fee – count one); rule 3-700(D)(2) (failing to refund an unearned fee after employment terminated – count two); and Business and Professions Code section 6068, subdivision (i)[3] (failing to cooperate and participate in disciplinary investigation and proceeding – count three). The charged violation of section 6068, subdivision (i), was properly dismissed by the hearing judge upon motion of the State Bar prior to trial.

In his decision, the hearing judge found Benjamin to be "a very credible witness with a very good recall of dates and events." The hearing judge also found respondent's credibility in this matter to be lacking in some respects. The hearing judge found lacking in credibility respondent's assertion that he believed this matter was governed by Probate Code section 13660 and respondent's testimony that he was retained to represent Benjamin only in a simple real estate matter rather than in a probate matter. We give substantial weight to the credibility determinations made by the hearing judge, who saw and heard the parties testify. (Rules Proc. of State Bar, rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.) Thus, as previously indicated, our findings in this matter are based upon Benjamin's testimony. With respect to conflicts in the testimony, we find that, at the first meeting, respondent was retained to handle the probate of the house and car and was informed that Benjamin's parents were divorced when Benjamin's father died. We

2. All further references to rules are to the Rules of Professional Conduct of the State Bar unless otherwise indicated.

3. All further statutory references are to the Business and Professions Code unless otherwise indicated.

reject respondent's testimony that Benjamin's mother told him she wanted to transfer title to her house to Benjamin, that Benjamin never retained respondent to handle the probate matter, and that respondent never hung up on Benjamin. However, because there was no conflict in the evidence, we find that respondent performed some work on Benjamin's case and did not know at the time of drafting the retainer agreement whether it was legal.

[1a] The hearing judge concluded that respondent was culpable of agreeing to, charging, or collecting an illegal fee on the grounds that the matter was a probate case and that attorney fees in such cases must be approved by the probate court pursuant to Probate Code sections 10810 and 10830.[4] Respondent challenges this conclusion on the grounds (1) that his initial fee of $500 was paid and earned before he learned that the matter would involve probate so that his subsequent request for an additional fee did not change the nature of this $500 fee and (2) that the foregoing Probate Code sections do not address whether they apply to payment for preliminary services performed prior to filing the probate matter.

[1b] However, we agree with the hearing judge's conclusions. Even assuming arguendo that it was not initially clear to respondent at the first meeting on February 12, 1993, that Benjamin's case was a probate matter, he knew by the third meeting on April 9, 1993, that the matter involved probate. Nevertheless, at that time, he proffered to Benjamin a retainer agreement which, according to the evidence, applied the initial $500 fee to the total fee of $2,000 to be paid in advance for a probate matter. Therefore, the $500 fee was charged at that time without court approval for work to be performed in a probate case, in violation of Probate Code sections 10810 and 10830. Moreover, because respondent charged the $500 fee at that time for services to be performed subsequently in a probate matter, it is irrelevant whether the Probate Code fee limit sections apply to payment for preliminary services. Consequently, we adopt the hearing judge's holding that respondent is culpable of willfully charging an illegal fee in violation of rule 4-200(A).

[2a] The hearing judge dismissed the charge of failing to refund an unearned fee, finding no clear and convincing evidence as to that charge. As stated at the outset of this opinion, we independently review the record. That is, although we give great weight to the hearing judge's credibility determinations, we need not adopt the hearing judge's factual findings and legal conclusions. After considering the hearing judge's reasons for this dismissal, the evidence, and the law, we conclude that the hearing judge erred in dismissing this charge.

[2b] The sole reason the hearing judge gave for dismissing this charge was that respondent obtained various documents. Although we also note that respondent met with Benjamin three times and testified that he performed research on the matter, the retainer agreement he presented to Benjamin provided that he would perform legal services in this matter for only $40 per hour. While we recognize that Benjamin never signed the retainer agreement, it nevertheless appears that this was the amount respondent quoted to Benjamin as his compensation rate. At that rate of pay, even assuming that respondent spent several hours performing research and obtaining documents in addition to meeting with Benjamin three times, he did not earn the $500 paid by Benjamin's mother. Respondent would have been required to work 12.5 hours to earn that fee at the rate of $40 per hour, and the evidence does not establish that respondent spent

4. Probate Code section 10810 provides as relevant that "for ordinary services the attorney for the personal representative [of the probate estate] shall receive compensation based on the value of the estate accounted for by the personal representative ...." Probate Code section 10830 provides in relevant part that, at any time after four months from the issuance of letters in the probate matter, an attorney may file a petition for "an allowance on the compensation of the attorney for the personal representative." Furthermore, under section 10830, notice of a hearing on such a petition must be given to various parties having an interest in the estate which would be affected by the payment of the compensation, and the court *must* issue an order allowing any such compensation. Moreover, we note that Probate Code section 10813 provides that an agreement between the personal representative of the estate and the attorney for greater compensation than that provided for in the Probate Code is void. These three sections were all operative as of July 1, 1991, prior to the time Benjamin employed respondent.

anywhere near that amount of time meeting with Benjamin and working on Benjamin's case. For example, there is no specific evidence regarding what research respondent performed or how many of the documents introduced into evidence were actually obtained by respondent instead of by Benjamin.

[2c] Moreover, Benjamin hired respondent to obtain a particular goal, i.e., a transfer of her father's assets to the heirs of his estate. Respondent failed to achieve or take concrete steps toward this goal. To justify retention of legal fees, respondent was required to perform more than minimal preliminary services of no value to the client. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377.) Here, the record fails to support a finding that respondent performed any services of value to Benjamin.

[2d] We note additionally that respondent had the opportunity to defend against Benjamin's claim that he did not earn the $500 fee and to present evidence on the issue to an independent, neutral arbitrator prior to these proceedings; yet respondent failed to convince the arbitrator that he earned the fee. While we do not give the arbitration award conclusive effect in these proceedings, respondent's failure to present sufficient evidence in the arbitration proceedings that he earned the fee supports our conclusion, based upon the evidence before us, that he did not earn the fee.

In view of the fact that the record indicates respondent earned little of the $500 fee, we need not decide the precise amount of the fee which respondent earned through his services to Benjamin. Because we conclude that respondent did not earn the $500 fee and that he failed to refund promptly any portion of it to Benjamin after termination of his employment, we conclude that respondent was culpable of willfully violating rule 3-700(D)(2).

[3] In any event, respondent could not have earned any fee in this probate case absent court approval. This proposition is established by *Alberton v. State Bar* (1987) 43 Cal.3d 638, 639-640. In that case, Alberton was appointed as the attorney for the estate of a Mr. Vivian Skogsberg in accordance with a specific provision in Skogsberg's will providing for his appointment. Shortly after Skogsberg's death, Alberton met with Skogsberg's widow (Mrs. Skogsberg). At that meeting, Alberton requested $600 in attorney fees from Mrs. Skogsberg even though no probate proceeding had been initiated and no court approval had been obtained. Mrs. Skogsberg paid Alberton the $600 in attorney fees at that same meeting. Thereafter, Alberton withheld and kept, as additional attorney fees, approximately $1,200 in trust funds that he received on behalf of Skogsberg's daughter. The Supreme Court held that even though "the total amount of fees taken – approximately $1,800 – was not unconscionable, the failure to have obtained court approval rendered it misappropriation." (*Id.* at p. 640; see also *Tarver v. State Bar* (1984) 37 Cal.3d 122, 126-127.) While normally an attorney who is discharged is entitled to recover the reasonable value of the services actually rendered up to discharge (*Fracasse v. Brent* (1972) 6 Cal.3d 784), such a recovery has been denied in other contexts where prior court approval of attorney fees is statutorily required, but not obtained (see *In re Occidental Financial Group, Inc.* (9th Cir. 1994) 40 F.3d 1059, 1063 [quantum meruit remedy generally unavailable where attorney fees barred by law under bankruptcy rules]).

The Brown Matter

In June 1993, Carol Brown hired respondent to represent her minor daughter Tamekia Brown (Tamekia) in a medical malpractice matter. The alleged malpractice occurred in April 1993 when Tamekia was 16.

At some point, respondent entered into settlement negotiations with the insurer on behalf of the Browns. The insurer offered a structured settlement in the amount of $105,000, which offer respondent thought Brown should accept, but Brown did not sign the agreement.[5] Had the offer been accepted,

5. Respondent testified he "thought [Brown] would come to her senses" and sign the agreement.

respondent's fees would have been "somewhere in the ballpark of 20 percent."

In April 1994, Brown and Tamekia went to the office of an attorney named Michael Baker and hired him to represent them in the medical malpractice case. On April 18, 1994, Baker sent a letter to respondent stating that the Browns had retained him to represent them in the medical malpractice matter and asking respondent to forward to him the Browns' file. Baker understood that respondent had engaged in settlement negotiations regarding the matter and "that he had arrived at a figure that he wished the Browns to accept and they did not want to accept." Baker followed up on his letter of April 18, 1994, by telephoning respondent's office. Although respondent received the April 18, 1994 letter, respondent did not respond to it. Nor did he return Baker's telephone calls. Instead, he filed a civil complaint on behalf of the Browns in April 1994.

Unaware that respondent had already filed a complaint for the Browns, Baker filed a complaint on June 10, 1994, because he was concerned about the statute of limitations, in view of the Browns' statements to him that they had become alarmed about Tamekia's medical condition between April and May or early June 1993.

Between May 11, 1994, and September 16, 1994, Baker sent respondent six more letters requesting documents pertaining to the Browns' case. In addition, in September 1994, after Baker discovered that respondent had filed a civil complaint in April 1994 on behalf of the Browns, Baker repeatedly requested that respondent complete a substitution of attorney form. Baker finally received a signed substitution of attorney form from respondent on September 23, 1994, but never received some of the documents he requested from respondent.

As to this client matter, respondent was charged with violating section 6068, subdivision (m) (failing 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 – count four) and rule 3-700(D)(1) (failing promptly to release to clients upon request all client papers and property – count five). The hearing judge correctly dismissed the charge of violating section 6068, subdivision (m) (count four) upon motion of the State Bar prior to trial, and we do not discuss that charge further.

With respect to the charge of failing to release the Browns' file promptly upon request, respondent asserts that, although he received a letter from Baker requesting the file in April 1994, he was not culpable of the charge because he forwarded the file to Baker as soon as he received evidence that his former clients authorized him to do so. According to respondent, the first notification he received from his clients that they had retained Baker as their new counsel came in September 1994, when he received a substitution of attorney form signed by Brown, and it was only at that time that he became obligated to forward the file to Baker.[6]

[4a] We disagree with respondent's assertion. It is settled that the client has an absolute right to retain counsel of choice and may discharge his or her attorney at any time, with or without cause. (*Fracasse v. Brent*, *supra*, 6 Cal.3d at pp.790-791.) It is reasonable to assume that when new counsel is retained, he or she will be able to communicate with and obtain the client's file from former counsel. While former counsel has the right and duty to ensure that the new attorney is acting with the client's consent, the record here shows no lack of willingness on the part of Baker to respond to any questions from respondent. Indeed, Baker attempted to communicate with respondent from April through August 1994 before receiving a

6. Respondent testified he did not receive any indication from Brown or Tamekia in April 1994 that they had hired another attorney. He testified that, in September 1994, he received a substitution of attorney form signed by Brown, which was the first acknowledgment from his clients, written or otherwise, that they wished to retain a new attorney. He testified that, although the substitution of attorney form was not signed by Baker, respondent signed the form in good faith and sent the Brown file to Baker.

response from respondent in September 1994. Notwithstanding respondent's argument that he lacked client authorization, respondent made no effort to obtain from Baker either more specific proof that Baker had been hired by the Browns in the medical malpractice case or permission to contact the Browns to verify their authorization. Instead, respondent took no timely action, and we conclude that respondent's argument in this respect lacks merit. Although respondent also asserts he ultimately turned over all papers regarding Tamekia's claim, he did not do so until after Baker made repeated requests for the documents.

[4b] In *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 612 we held that Sullivan had violated rule 3-700(D)(1) when his client's new counsel requested the client file in November 1992 and Sullivan failed to deliver the file to new counsel until May 1993. We stated: "Even without the substitution of attorney respondent was on notice that the file should be prepared for delivery by the November letter [from counsel]." (*Ibid.*) Similarly, here, as previously stated, Baker requested the file in April 1994, but respondent failed to provide any documents to him until September 1994. Even without any formal substitution of attorney signed by Brown, respondent was notified by Baker's letter of April 1994 that the file should be forwarded to Baker. His failure to do so, without taking any action whatsoever to determine whether Baker was authorized to request the Browns' file, constituted a willful violation of rule 3-700(D)(1).

The Orozco Matter

Rene Orozco, who was not an attorney, provided nonattorney immigration services to clients. In February 1994, Orozco's secretary, Monica Monatas, introduced Orozco to respondent. At their meeting, Orozco and respondent agreed that Orozco would refer all personal injury and workers' compensation matters to respondent. Respondent and Orozco agreed to share evenly any amounts respondent received from personal injury cases. In addition, respondent was to appear in any deportation cases, and he would be paid by Orozco's office. Respondent and Orozco were also to establish a joint banking account for the deposit of settlement money in the personal injury cases.

In April 1994 Orozco received a letter which appeared to be from respondent. This letter reflected, with a few errors, the agreement between respondent and Orozco.

Orozco paid all of the rent and utilities at his Santa Ana office, as well as the salary of Monatas, although respondent began to work there part-time.

Pursuant to their agreement, a joint banking account was opened in May or June 1994. Both respondent and Orozco initially placed $100 into the account. Subsequently, settlement drafts from insurance companies in a personal injury case were sent to respondent at the Santa Ana office, and respondent endorsed the drafts and deposited the amounts into the joint banking account. Orozco maintained the check register and wrote checks on the account. Both Orozco and respondent had signature authority on the account. In August 1994 respondent unilaterally closed the account and removed approximately $6,000 remaining in the account. As a result, several clients did not receive settlement money to which they were entitled. At that time, Orozco told respondent to stay away from the Santa Ana office and changed the locks at that location.

Between February and August 1994, respondent spent less than four hours per week at the Santa Ana office, sometimes failing to show up for client appointments scheduled with him. As a result of respondent's failures to appear for appointments, Orozco sometimes had to obtain client information and reschedule client appointments. Also, between February and July or August 1994, Orozco referred thirty nine personal injury cases and between three to five workers' compensation cases to respondent, and respondent appeared in two deportation cases.

As to this matter, respondent was charged with violating rule 1-300(A) (aiding in the unauthorized practice of law – count six), rule 1-320(A) (sharing legal fees with a nonlawyer – count seven), and rule 1-310 (forming a law partnership with a nonlawyer – count eight). As no evidence was presented as to count six, its charges were properly dismissed at trial by the hearing judge upon motion of the State Bar.

Respondent does not challenge the hearing judge's conclusions of culpability as to the charges set forth in counts seven and eight, and after independently reviewing the record, we adopt those conclusions and the associated findings establishing them. Orozco's uncontradicted testimony established that he was not a lawyer, yet he and respondent agreed to share evenly all legal fees recovered in personal injury cases. Such evidence establishes a willful violation of rule 1-320(A). Moreover, the evidence outlined above regarding the business arrangement, in which respondent and Orozco maintained a joint checking account, Orozco referred certain legal matters to respondent, respondent and Orozco shared fees earned by respondent, and respondent was paid for other legal work by Orozco, indicates that respondent formed a law partnership with Orozco in willful violation of rule 1-310.

Respondent instead challenges only certain negative underlying findings made by the hearing judge. He asserts that although the hearing judge's decision does not indicate that the findings formed an independent ground for discipline or were considered in aggravation, we should nevertheless delete the hearing judge's findings that respondent closed the account at Bank of America, took all of the $6,000 in the account, and failed to distribute the funds therein to the clients of the Santa Ana office to whom such funds belonged, resulting in these clients not being properly paid and complaining to Orozco. Respondent bases his assertion on the grounds that no such matters were charged, the evidence regarding these matters was not elicited for the purpose of inquiring into the cause of the misconduct which was charged, and respondent "appropriately objected" to the evidence regarding these matters as speculation and beyond the scope of the matters charged.

However, it appears that the evidence regarding these matters was elicited for the relevant purpose of proving the charges in this matter. In other words, the evidence about which respondent complains, when taken together with the other evidence regarding this matter, further demonstrates that respondent entered into a law partnership with Orozco and that respondent shared legal fees with Orozco. Thus, we reject respondent's apparent assertion that the challenged evidence was irrelevant to the charged misconduct.

[5] Moreover, notwithstanding respondent's assertion that "these findings cast [him] in a negative light," we conclude that because the findings did not result in an additional ground of discipline or aggravation, respondent has failed to demonstrate any specific or actual prejudice that would entitle him to any relief on review. (Cf. *Farnham v. State Bar* (1976) 17 Cal.3d 605, 609.) Under these circumstances, we decline to strike from the decision the hearing judge's findings based on the evidence of which respondent complains. (See *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716, 724.)

[6a] In addition, contrary to respondent's argument, our review of the record indicates that respondent's evidentiary objection was neither timely nor specific, and therefore, the evidence need not be disregarded. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 108-109; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 793; see *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 41; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

[6b] As to timeliness, a party must object to a question, rather than making a motion to strike after the answer is given, "[w]hen the nature of [the] question indicates that the evidence sought is inadmissible." (*People v. Perry* (1972) 7 Cal.3d 756, 781.) " 'A party cannot hazard whether the reply of a witness to an objectionable question will be favorable or unfavorable to him, and when it appears unfavorable then object to it. He must object when the question is asked and before the answer is given, and if he does not, he waives his right to complain of the admission of the testimony under the answer.' [Citation.]" (*Ibid.*) Here, respondent failed to object when Orozco initially testified that respondent closed the bank account. When Orozco then added that respondent withdrew all of the funds without ever properly distributing them to the clients, respondent made a motion to strike on the sole ground that such testimony was speculation, arguing that Orozco had not named "one single client that wasn't paid." When the State Bar then asked Orozco to identify the clients who did not receive money to which they were entitled, respondent did not object. It was only after Orozco had identified the clients and moved on to other testimony, including testimony regarding the method

of distributing the checks from insurance companies and the amount of money respondent had taken, that respondent objected "as to these clients based on the fact that it's beyond the scope of the charges against me as well as the fact that he has already testified that every client was paid right away and so it conflicts with his prior testimony." Because the State Bar's questioning referred to above clearly asked for the identity of the clients who were not paid as a result of respondent's actions, respondent's objection, made after Orozco had concluded his testimony regarding the clients and had moved on to other testimony, was untimely.

[6c] In addition, as the foregoing description of respondent's objections demonstrates, respondent never specifically objected to Orozco's testimony that respondent closed the account and took the $6,000 remaining in the account. " '[T]he party who desires to raise the point of erroneous admission [of evidence] on appeal must object at the trial, specifically stating the grounds of his objection, and directing the objection to the particular evidence which he [properly] seeks to exclude.' [Citation.]" (*People v. Harris* (1978) 85 Cal.App.3d 954, 957, italics omitted; see also *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129.) Therefore, respondent has failed to preserve for review the issue of the inadmissibility of the evidence.

In view of the foregoing, we need not strike from the hearing judge's decision the challenged findings.

The Campos/Melendez-Arreola Matter

Thelma Campos went to an office in Santa Ana to hire respondent to complete some paperwork regarding an immigration matter for her husband, Melendez-Arreola.[7] When she arrived at the office, she saw the words "Emir Phillips and Associates" on the door and some business cards bearing respondent's name in the reception area. Although she made several appointments with respondent, he never appeared and never returned any of her telephone calls. Instead, the secretary at the location, Monatas, told Campos to fill out certain forms for respondent, and Campos gave Monatas $375. Campos paid an additional $375 on April 26, 1994, plus, at some point, an additional $75 filing fee. Campos met with Monatas approximately five times, sometimes with her husband there. Although Campos was aware of Rene Orozco being at the Santa Ana office, she had no dealings with him.

Because respondent was never available and never returned her calls, Campos called "[a] couple [of] months" later and stated she was a new client. At that time, she was able to speak with respondent. She told him that she wanted her money back because he had not done anything for her. She also told him she was going to send a letter to the State Bar due to his failure to perform the services for which he was retained, and he treated her statement "like a joke" and hung up on her. She never received a refund of any part of the money she paid to respondent.

In his pretrial statement, respondent represented he had paid Campos back in full. However, respondent testified at the hearing that that statement was probably a mistake.

As to this matter, respondent was charged with violating rule 3-110(A) (intentionally, recklessly, or repeatedly failing to perform legal services competently – count nine), rule 3-700(D)(2) (failing to refund unearned fee after employment terminated – count ten), and rule 4-100(B)(4) (failing to promptly deliver client's funds, i.e., the $75 filing fee, upon request by client – count eleven). The hearing judge found respondent culpable of all of these charges.

[7a] Respondent asserts that these counts should be dismissed because there is no clear and convincing evidence that he ever represented either Campos or her husband. In making this assertion, respondent merely "advances his version of the evidence." (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 627.) However, where there is a conflict in the testimony, the hearing judge is "in

7. We base our findings in this matter upon the testimony Campos gave in the hearing department, which testimony the hearing judge found to be credible.

a particularly appropriate position to resolve that conflict. [Citation.]" (*Ibid.*; *Gary v. State Bar* (1988) 44 Cal.3d 820, 826.) "[O]ur rules on review require that we give great weight to the judge's findings in such a matter and we are given no good reason to reach a different result." (*In the Matter of Koehler*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 627; *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 774-775.)

[7b] Respondent focuses primarily upon evidence that the Santa Ana office was Orozco's office, that Monatas worked for Orozco at that time and not for respondent, that the second receipt indicates that payment was made to Orozco, that respondent did not recall the case, and that Campos allegedly retained respondent to perform work which Orozco was to perform under the agreement between Orozco and respondent.[8] However, Campos testified credibly that she was referred to respondent at the Santa Ana office, went there intending to hire *respondent*, saw respondent's name on the door and some of his business cards in the reception area, and made several appointments with respondent. Although respondent never appeared for any of the appointments or returned Campos's calls, Monatas had Campos fill out forms for respondent.

[7c] Moreover, one of the two receipts for payment Campos received was on respondent's letterhead. Although respondent testified he did not authorize the preparation of a receipt on his letterhead and did not recall representing Campos or her husband, the hearing judge found his testimony with respect to this client matter to be lacking in credibility.

[7d] Furthermore, the memorialization of respondent's agreement with Orozco acknowledges that Monatas was to act as an employee of, or agent for, both respondent and Orozco with respect to certain matters. That document, which respondent drafted, states in relevant part that "Monica Monatas will have access to the bank account for the benefit of both Emir and Rene . . . ." In addition, we infer that respondent had a key to the office, since Orozco testified he changed the locks to the office upon the termination of his business relationship with respondent. Since Orozco testified that respondent visited and worked out of the Santa Ana office for at least a few hours each week, we find that respondent either knew or was grossly negligent in not knowing that the office was held out to the public as his office.

[7e] Finally, we note that in respondent's November 3, 1995 letter to the State Bar, respondent stated that at that time he was "assessing what work I and my office have done. I am more than willing to refund whatever I owe to Ms. Campos and/or her husband; however, at this time, I am looking at the file and the case to prepare a bill for you." This statement includes an explicit admission that respondent had the Campos file at that time, which is evidence that Campos was, in fact, a client of respondent's, as there would be no other reason for respondent to be in possession of the file after he was no longer in business with Orozco. Because the statement also indicates that respondent was in the process of assessing his work to prepare a bill, we view it as an admission that respondent believed he had performed some work for Campos or her husband, also indicating that Campos retained respondent. At the very least, as pointed out by the hearing judge in his decision, respondent's failure to deny, upon accusation by the State Bar, that Campos was his client constitutes an adoptive admission of that fact. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190; *Bowles v. State Bar*, *supra*, 48 Cal.3d at p. 108.) We conclude the evidence clearly and convincingly establishes that Campos retained respondent to perform immigration work for her husband.

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8. Respondent testified that he believed Campos and Melendez-Arreola never retained him, but instead retained Orozco. He testified that although a receipt was issued to Campos and Melendez-Arreola on respondent's letterhead by Monatas, whom respondent subsequently employed for almost two years, Monatas did not work for respondent at the time the receipt was issued, and respondent did not authorize the issuance of the receipt on his letterhead. Respondent further testified he never met with Campos because he never knew he was supposed to meet with anyone. Moreover, he testified his name was not anywhere on the door or at the entrance to the Santa Ana office, and he did not believe there were any of his business cards in the reception area there. He also testified he did not recall speaking with Campos either in person or on the telephone.

[8a] As to respondent's argument that the hearing judge should have sustained his hearsay objection to Campos's testimony regarding Monatas's statements to her, those statements to Campos were admissible as authorized statements pursuant to Evidence Code section 1222. That section provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The authority of a declarant to make a statement for another " 'concerning the subject matter of the statement' can be implied, as well as express. [Citation.]" (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570.) Whether such authority exists is to be determined from "the particular facts and circumstances of each case viewed in the light of the substantive law of agency . . . . [Citation.]" (*Ibid.*)

[8b] Here, as previously stated, Monatas acted as the agent of both Orozco and respondent at the time she was employed in the Santa Ana office. Moreover, as established in the Chimy matter, discussed below, as a secretary working on respondent's behalf, Monatas was specifically authorized to relay information and instructions from respondent to clients. Under these circumstances, Monatas's statements to Campos, particularly her statement informing Campos that respondent wanted Campos to fill out a form, were admissible to prove that Campos had retained respondent.

We also conclude that the evidence clearly and convincingly establishes respondent's intentional, reckless, or repeated failure to perform legal services competently, in that Campos testified respondent never filed any immigration documents for her husband or even provided Campos with completed documents for her to file. Moreover, although Campos sent a letter to respondent dated November 15, 1994, in which she requested a refund of all money previously paid to him, she never received any of her money back. Such evidence establishes that respondent is culpable of failing to refund the unearned fee of $750 and failing to promptly deliver to Campos the $75 she gave to respondent as a filing fee. Thus, we adopt the hearing judge's conclusions in counts nine, ten, and eleven.

The Van Tatenhove Matter

Sometime prior to October 1993, Dirk Van Tatenhove, a probate attorney, obtained the name of Virginia Russell, an educational consultant associated with respondent's law office, to help him seek special educational services for his daughter. Van Tatenhove contacted Russell in October 1993 and discussed the matter with her. She thought that she could help Van Tatenhove and recommended that Van Tatenhove retain respondent as his attorney. Subsequently, Van Tatenhove received from Russell a letter dated October 20, 1993, which in part memorialized his conversation with her, and a proposed retainer agreement between respondent and Van Tatenhove. The agreement provided as relevant that Van Tatenhove would pay a nonrefundable retainer fee of $1,000 to respondent, which would cover "all legal services (excluding costs)... through the completion of one due process (max. of three days, if more than three days, the fee is $250.00 per additional day beyond three days) at which time a new contract must be negotiated if this office is to be continued to be retained." (*Sic.*) The agreement additionally provided that if the case were settled "without [attorney] fees as [agreed] upon by Attorney, then Client shall pay Attorney for all hours worked at $150.00 per hour[,] $75 per hour for all paralegal work" and that costs, including those for consultants, would be paid by respondent and then billed to Van Tatenhove after obtaining Van Tatenhove's consent. Van Tatenhove testified that he believed the retainer fee would be refundable if respondent did not perform services for him: "[A]s a practicing attorney I know that no retainer is non-refundable if the attorney doesn't substantially perform the work."[9] On or about No-

9. As will be discussed post, rule 3-700(D)(2) as interpreted does recognize that true retainer fees are nonrefundable. The retainer fee here is not such a true retainer.

vember 4, 1993, Van Tatenhove sent a letter to Russell along with a check for $1,000 made out to respondent. He signed and sent her the retainer agreement on November 18, 1993.

On or about December 10, 1993, an evaluation was performed by Van Tatenhove's daughter's school which indicated that the daughter might not qualify for any special education services. At Russell's suggestion, Van Tatenhove contacted a psychologist to review his daughter's records and the school's evaluation. The psychologist conducted the evaluation free of charge and, on February 18, 1994, told Van Tatenhove that he could not win a case against the school to have Van Tatenhove's daughter placed in a special school. Respondent did not assist Van Tatenhove during either the school's or the psychologist's evaluation of the matter.

Shortly after meeting with the psychologist, Van Tatenhove discussed the matter with Russell, who agreed with the psychologist's evaluation. On March 24, 1994, Van Tatenhove sent a letter to respondent requesting an accounting and a refund of either the full retainer paid or the amount which had not yet been earned. Receiving no response, on May 3 and 17, 1994, Van Tatenhove sent two additional letters to respondent by certified mail, return receipt requested. Van Tatenhove received a telephone message on May 20, 1994, indicating that respondent's office had called to inform Van Tatenhove that respondent was out of town on vacation until May 30, 1994, and would prepare a bill when he returned. Van Tatenhove never received any other communication from respondent or his office and sent a complaint to the State Bar on September 1, 1994.

In 1996, Van Tatenhove finally received a letter, a statement, and a trust account check dated October 19, 1996, for $202 from respondent. The statement indicated that respondent had spent a total of 5.25 hours working on Van Tatenhove's case, which fact Van Tatenhove disputed. Although respondent indicated on the statement that he had spent two hours reviewing the records of Van Tatenhove's daughter, Van Tatenhove sent records to Russell only, and Russell testified she never forwarded such records to respondent. In addition, contrary to the indication on the statement, Russell never had any telephone conversations with respondent regarding Van Tatenhove's daughter that lasted three quarters of an hour. Moreover, although the statement indicated that two hours was being billed for Russell's work as a paralegal at a rate of $75 per hour, in a letter of March or April 1994, Russell informed respondent she had worked 10 hours on this matter, and respondent owed her $80 for this work plus $20 for telephone bills, which amount respondent never paid. Russell also suggested in the letter to respondent that, because they could not help Van Tatenhove, he should refund the full retainer minus the actual cost to respondent of Russell's work and costs for telephone bills. Finally, the Van Tatenhove statement itself was not dated and did not reflect the dates on which the work was performed.

As to this matter, respondent was charged with violating rule 3-700(D)(2) (failing to refund promptly unearned fee after employment terminated – count twelve), rule 4-100(B)(3) (failing to maintain complete records of all client funds in member's possession and to render appropriate accounting – count thirteen) and section 6068, subdivision (m) (failing to respond promptly to reasonable status inquiries – count fourteen.)

Respondent does not challenge the culpability findings as to counts thirteen and fourteen. Based upon our independent review of the record, we adopt the hearing judge's findings of culpability as to these counts, as the evidence establishes that notwithstanding Van Tatenhove's letters, respondent failed both to respond promptly to Van Tatenhove's status inquiries and to render the requested accounting regarding the funds paid by Van Tatenhove.

Respondent asserts that count twelve should be dismissed because there was no clear and convincing evidence respondent did not earn the $1,000 fee paid by Van Tatenhove. Respondent first appears to argue that the $1,000 fee was a nonrefundable retainer to which rule 3-700 (D)(2) does not apply. He then argues that, even assuming the $1,000 was not a true retainer, the evidence establishes that he fully earned the fee.

Rule 3-700(D)(2) provides that an attorney whose employment has terminated must "[p]romptly refund any part of a fee paid in advance that has not been

earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the [attorney] for the matter."

We first note that there was no evidence in the record the fee agreement was ever signed by respondent. Since that agreement itself provides that the agreement is effective "when it is executed by the second of the parties to do so," it appears the agreement was never in effect.

[9a] Even assuming the agreement may be given effect, the State Bar asserts that, under the fee agreement, the $1,000 fee was not a true retainer, but an advanced fee for services to be rendered. The State Bar argues that its position is supported by the fee agreement itself, since the agreement establishes that the $1,000 was paid not to ensure respondent's availability for this matter or for a given period of time, but rather to pay respondent in advance for his services in conducting a due process hearing regarding special educational services for Van Tatenhove's daughter. We agree with the State Bar's argument.

In *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, we concluded on similar facts that the fee at issue constituted an advanced fee rather than a true retainer fee. There, Lais and his clients entered into a written agreement providing for " '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.' " (*Id.* at p. 920.) A few days after the agreement was executed, the clients left Lais a message indicating they had changed their minds about pursuing legal action, they wanted no work to be performed on the matter, and they wanted a refund of the money paid. Lais did not refund their money until after the clients had, among a number of things, filed a complaint with the State Bar. (*Id.* at pp. 920-921.) Although the hearing judge in that matter concluded, based on the language contained in the agreement, that the fee was a nonrefundable retainer, we determined that the characterization of the fee in the agreement was not determinative and held that the $2,750 was an advanced fee. (*Id.* at pp. 922-923.) We noted that a true retainer is money a client pays to secure an attorney's availability over a given period of time and concluded that such definition did not apply to the $2,750 paid by Lais's clients: "The $2,750 was not earned when paid, but was intended to cover the initial 10 hours of [Lais's] work." (*Id.* at p. 923.)

Likewise, in *Matthew v. State Bar* (1989) 49 Cal.3d 784, 789 the Supreme Court determined that Matthew failed to return an unearned fee of $1,000 in a client matter where Matthew had failed to perform the services for which he was retained notwithstanding that the fee agreement provided that the $1,000 was a nonrefundable retainer.

[9b] Similarly, we conclude that respondent's fee agreement with Van Tatenhove establishes that the $1,000 fee was not earned when paid, but was instead an advanced fee intended to cover respondent's representation "through the completion of one due process [hearing]" lasting no more than three days.

In addition, when respondent eventually refunded a portion of the $1,000 to Van Tatenhove, he did so with a check drawn upon a client trust account. Therefore, assuming respondent's use of the trust account was proper, we may infer that respondent himself recognized that he did not earn the $1,000 when paid.

[10a] Moreover, as previously indicated, the fee agreement further provides that upon settlement of the case "without [attorney] fees as [agreed] upon by Attorney," Van Tatenhove was to pay respondent $150 per hour for the actual amount of time respondent spent on the case and $75 per hour for time spent by paralegals. While this provision of the fee agreement is not entirely clear, respondent, in his brief on review, indicates that this provision was to apply if the matter settled without a hearing. Because the matter was in fact concluded without a hearing, it appears that, if the agreement is given effect, this provision, rather than the provision regarding a nonrefundable retainer, is applicable here.

In arguing that the evidence established that he fully earned the $1,000 paid by Van Tatenhove, respondent focuses upon Russell's testimony that she

worked for approximately 10 hours on the matter and incurred telephone costs of $20; her testimony that her standard rate as an educational advocate is $75 to $125 per hour; the fee agreement's provision calling for Van Tatenhove to be billed $75 per hour for paralegal services; Russell's testimony that she spoke with respondent about this matter; and respondent's bill for two and a half hours for research and two hours for telephone conversations with Russell regarding this matter. Respondent argues that in view of the hearing judge's finding that Russell spent 10 hours on this matter, the judge should have found that respondent was entitled to bill Van Tatenhove for $750 for Russell's work, plus $20 for Russell's telephone costs. In addition, because respondent's bill showed that he spent two and a half hours for research and 45 minutes discussing the matter with Russell, the evidence established that respondent fully earned the entire amount paid.

[10b] As the State Bar points out, however, nothing in the record establishes that Van Tatenhove agreed to pay respondent for Russell's services at the paralegal rate set forth in the agreement. Instead, as previously indicated, the agreement provides that costs for consultants would be paid by respondent and then billed to Van Tatenhove if Van Tatenhove consented to the use of a consultant. Because Russell testified that respondent incurred only $100 in costs due to her consulting services, respondent would have been entitled to bill Van Tatenhove for that amount at most. However, in view of respondent's failure to pay Russell any amount for her consulting services in this matter, respondent was not entitled to bill Van Tatenhove for any consulting services.

[10c] In view of the evidence that respondent could not have reviewed the school records because he never received them and did not have telephone conversations with Russell regarding this matter which lasted three quarters of an hour, we adopt the hearing judge's finding that respondent fabricated those portions of his bill reflecting such work. We also adopt the hearing judge's finding that respondent's bill by itself establishes that respondent spent 2.5 hours for research on this matter.[10] In view of such limited evidence of respondent's work, the evidence establishes that respondent did not earn the $1,000 paid by Van Tatenhove.

[10d] Moreover, in view of our determination that respondent could not charge Van Tatenhove for Russell's consulting work, even if respondent's bill accurately set forth respondent's work in this matter, and whether respondent was entitled to charge $150 for his own work as set forth in the agreement or $110 as set forth in the bill, respondent did not perform sufficient work to earn $1,000, yet he failed to refund any amount to Van Tatenhove for over two years after Van Tatenhove requested a refund. We therefore hold that respondent is culpable of failing to promptly return the unearned fee as charged in count twelve.

The Hammill Matter

Respondent obtained numerous cases from attorney Jeffrey Jensen when Jensen ceased to practice law. One of these cases was *Marco A. Jimenez v. Tony Roma's* (the *Jimenez* case), a workers' compensation case. Jensen had represented Marco Jimenez in the matter.

Jeff Hammill is a civil litigation attorney whose practice consists mainly of workers' compensation cases. In 1994, Hammill was employed at the law firm of Ibold & Anderson, which firm represented Truck Insurance Exchange, a party in the *Jimenez* case. On or about April 21, 1994, Hammill received a letter from respondent. In the letter, respondent

10. The State Bar asserts in a footnote of its responsive brief on review that the context of the hearing judge's finding in this respect indicates that the hearing judge intended to state that he did *not* find the bill to be sufficient evidence to establish that respondent spent 2.5 hours on research in this client matter. However, the structure of the sentence itself demonstrates that the decision accurately sets forth the hearing judge's finding, since the sentence contains two indicators of such finding: "The Court, however, *does find* this bill, by itself, sufficient evidence to establish that Respondent *did spend* 2.5 hours on medical/legal research . . . ." We interpret the hearing judge's footnote, which states that respondent may have harmed himself on this issue by failing to testify, to mean that the hearing judge might have been able to find that respondent spent additional time on the Van Tatenhove case had respondent been willing to testify regarding such matters.

notified Hammill that he had taken over Jensen's practice and the majority of Jensen's workers' compensation cases and that, according to Jensen's records, Jensen was owed deposition fees in the amount of $1,012.50 for the *Jimenez* case. Respondent requested payment of the fees under Labor Code section 5710.

Hammill also received a copy of a letter dated October 12, 1994, from respondent to Cindy Pearson at Truck Insurance Exchange.[11] That letter informed Pearson that respondent had taken over Jensen's practice and requested payment for deposition fees in the amount of $1,012.50 for the *Jimenez* case. The letter also enclosed a copy of a lien filed by Jensen's office and stated that, if no response was received within 15 days, respondent would seek penalties and interest on the fees.

On October 27, 1994, Hammill sent a letter to respondent indicating, among other things, that Hammill's office represented Truck Insurance Exchange; had previously informed respondent of this representation in a telephone conversation between respondent and Michael Douglas of Ibold & Anderson on June 9, 1994, and a telephone conversation between respondent and Hammill on April 25, 1994; and had previously informed respondent that the *Jimenez* case had already been resolved in a compromise and release agreement. The letter additionally instructed respondent to refrain from directly contacting Truck Insurance Exchange and warned that, if such direct contact occurred again, Hammill's office would "take up this issue with the State Bar of California." Hammill did not receive a response to this letter.

On or about February 3, 1995, Hammill received a copy of another letter from respondent to Pearson at Truck Insurance Exchange. In this letter, dated January 19, 1995, respondent again requested payment of $1,012.50 in deposition fees, indicated this was his "final request for these fees," and stated he would petition the court for such fees as well as penalties and interest if Pearson did not respond within 15 days.

At some point, Hammill sent a letter to the State Bar. On February 14, 1995, respondent sent a letter to the State Bar responding to Hammill's letter and explaining the contact his office had with Hammill's client. Respondent indicated that he was a solo practitioner with hundreds of cases and therefore extremely busy. Because of this, he relied on his staff "to handle a large portion of the correspondence regarding various cases. I have complete confidence in my staff, and because of this I allow them to work independently and put my name to letters and other documents, after I have briefed them on how to legally handle various situations." Respondent explained that a nonattorney member of his staff, Damon Pipitone, was in charge of working on the *Jimenez* case and was "simply writing letters 'to opposition' as per my instructions, unaware that he was doing anything wrong." Respondent admitted that the letters were sent from his office and accepted responsibility, but stated that he did not personally write or sign them. He also indicated he had explained to his staff the nature of the violation so as to avoid the situation in the future.

Respondent was charged in this matter (count fifteen) with failing to supervise his employee adequately, thereby intentionally, recklessly, or repeatedly failing to perform legal services with competence in violation of rule 3-110(A). Respondent asserts that this count should be dismissed because, as to this matter, there is no evidence of a violation of any of the Rules of Professional Conduct. More specifically, respondent argues that a violation of rule 3-110(A) cannot be predicated upon improper contact, through an employee, with a party represented by counsel and that, in any event, there was no contact with a represented "party" as that term is defined in rule 2-100(B).

We first address respondent's argument that there was no evidence of contact with a represented

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11. Because the letters from respondent to Pearson do not indicate that respondent also mailed copies directly to Hammill, it appears that Pearson or another employee at Truck Insurance Exchange forwarded respondent's letters to Hammill. The record does not reveal the position Pearson held at Truck Insurance Exchange.

party. Rule 2-100(A) provides that an attorney shall not communicate, either directly or indirectly, about the subject of the representation with a party whom the attorney knows to be represented by another attorney, unless the other attorney consents. Rule 2-100(B) states: "For purposes of this rule, a 'party' includes: [¶] (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or [¶] (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

[11a] Respondent argues that there is no evidence in the record regarding the position held by Pearson within the corporation and that therefore there is no evidence that respondent's office sent letters to a "party." We disagree. Here, Hammill notified respondent in the letter of October 27, 1994, that by sending the October 12, 1994 letter to Pearson, respondent had contacted a represented party. The only reasonable inference from this evidence is that either Pearson held one of the positions listed in rule 2-100(B)(1) or Pearson's statements or actions pertaining to the matter would be binding upon, imputed to, or constitute an admission on the part of the corporation. We note additionally that instead of disputing any assertion that Pipitone's conduct was an improper contact with a represented party, respondent appeared to concede the issue in his letter to the State Bar dated February 14, 1995. There, in seeking to explain this matter, respondent described his office's contact with Pearson as an "honest mistake" made by a nonattorney who was unfamiliar with rule 2-100 and was "unaware that he was doing anything wrong." Respondent further stated that he subsequently "explained to [his staff] the nature of the violation" and that he accepted "full responsibility for the . . . violation."[12]

[11b] As there is no contrary evidence in the record regarding the propriety of the letters to Pearson, we conclude that Pipitone's letters to Pearson constituted a contact with a represented party. Moreover, because respondent's office was notified of this fact in Hammill's letter of October 27, 1994, at the very least Pipitone's second letter to Pearson, dated January 19, 1995, was improper.

Since respondent was not charged with a violation of rule 2-100, we need not decide whether respondent violated that rule through his employee's contact with Pearson. The State Bar instead relies upon the factual allegations regarding this contact only to support the rule 3-110(A) violation. Accordingly, we consider such allegations only for that purpose.

Based upon the allegations of the improper contact by respondent's office with a represented party, respondent was charged with failing adequately to supervise his staff, thereby intentionally, recklessly, or repeatedly failing to perform legal services competently in violation of rule 3-110(A). As indicated, respondent argues that any improper contact by his employee cannot result in his own culpability for intentionally, recklessly, or repeatedly failing to perform services competently.

[12a] "[W]here 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." (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 682.) Here, respondent admitted in his letter to the State Bar that he runs a high volume law office, relies upon his staff to work on cases independently, and allows staff to sign his name to letters and

12. Notwithstanding respondent's statements in the letter to the State Bar that the contact was an honest mistake, as we noted in *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 81, rule 2-100 and its predecessor rules are therapeutic and "designed, in part, to shield the represented party from well-meaning, but misguided advances by an attorney to an adverse party as well as deliberately improper ones. [Citations.]" The rules are also designed to protect the opposing party's counsel and the opposing party's relationship with his or her counsel. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 139.)

other documents, apparently without reviewing such documents himself. Respondent also appeared to admit that Pipitone was in charge of working on this case with no supervision whatsoever other than respondent's initial instructions. Even after the first letter was sent to Pearson and respondent had been cautioned by opposing counsel to send all such letters directly to counsel, respondent still took no action whatsoever. In other words, respondent was alerted to a problem, yet apparently took no action to correct the problem, resulting in Pipitone sending another letter directly to Pearson.

[12b] Although in his letter to the State Bar, respondent indicated that he had no knowledge that his employee was doing anything wrong, we note that a lack of actual knowledge is not a defense to the charge of recklessly or repeatedly failing to perform legal services with competence where it appears there is no system in place for supervising employees and monitoring cases. (*In the Matter of Sullivan*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 611-612.) While an attorney cannot be held responsible for every event which takes place in his or her office, he or she does have a duty to reasonably supervise staff, both by taking steps to guide employees and by reviewing client files to determine whether staff work has been appropriate. (*In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 681-682.) Respondent's failure to guide his staff and review their work constitutes a failure to adequately supervise staff, and we therefore conclude that respondent was culpable of the charge set forth in count fifteen.[13]

The Chimy Matter

Emanuel Jesus Chimy had a workers' compensation claim against American Handle. Chimy, who did not speak or read English fluently,[14] initially hired Jensen as his attorney in the matter, but after Jensen ceased to be an attorney in good standing, Benjamin Ammeian took over the case in October or November 1994.

On January 24, 1995, respondent sent a letter to State Fund regarding Chimy's case against American Handle. In the letter, respondent stated he had substituted into the case in place of Jeffrey Jensen as the attorney of record. He also stated that Chimy was "willing to accept $4,500.00 to settle this case . . . ."

On or about February 14, 1995, Chimy received a letter from respondent dated February 6, 1995. When Chimy telephoned respondent's office to inquire about the letter, someone named Monica told him that respondent had Chimy's case and made an appointment for Chimy to come to the office on February 17, 1995.

At the February 17, 1995 meeting, Chimy was told that respondent was taking his case. Chimy indicated he was confused because Ammeian was his attorney and asked whether Ammeian knew about respondent taking the case. Respondent told him that Ammeian was not working on his case and that respondent had taken the case from Jeffrey Jensen. Respondent also told him that he had negotiated a settlement of $10,000 for Chimy and asked Chimy to sign some papers. Chimy signed a document to allow respondent to become his attorney and other documents which were not explained to him. At some point prior to March 23, 1995, respondent substituted into the workers' compensation matter as attorney of record.

Approximately a week later, Chimy contacted Ammeian.

In March 1995, Ammeian received a letter from respondent dated March 14, 1995, in which respondent stated he was substituting in as attorney of record for Chimy in the workers' compensation case. Ammeian called State Compensation Insurance Fund and spoke with a woman named Trinidad Crystal. Based on his conversation with her, Ammeian called Chimy to clarify whether Chimy still wanted Ammeian

13. The State Bar asserts that the evidence presented in this count establishes that respondent also aided in the unauthorized practice of law by allowing Pipitone to handle an entire matter. However, because the State Bar presented no evidence that Pipitone engaged in acts which only an attorney may perform, we conclude that there was no clear and convincing evidence of such additional misconduct.

14. During the proceedings in the hearing department, an interpreter translated during Chimy's testimony.

to represent him. Ammeian set up an appointment with Chimy.

Ammeian met with Chimy on or about March 23, 1995. At that time, Chimy executed another substitution of attorney form substituting Ammeian into the matter as attorney of record in place of respondent. Ammeian sent this form to the State Compensation Insurance Fund. On March 23, 1995, respondent was dismissed as the attorney of record by the Workers' Compensation Board. Ammeian also sent a letter to respondent which, among other things, requested respondent's file on the Chimy workers' compensation matter. Ammeian never received the file from respondent. Ammeian subsequently settled the Chimy matter for $25,000.

In other cases Ammeian had received from Jeffrey Jensen's practice, respondent had also sent letters to insurance carriers and defense attorneys, notwithstanding that Ammeian had already notified respondent that these were Ammeian's clients.

[13a] As to this client matter, respondent was charged with violating rule 1-400(C) (soliciting a prospective client with whom attorney has no family or prior professional relationship – count sixteen). Respondent asserts that the evidence establishes he was not culpable of violating this rule because he had a reasonable, good faith belief that he had a prior professional relationship with Chimy. This belief was based upon the facts that respondent took over most of Jeffrey Jensen's cases; that, notwithstanding respondent's request, Ammeian did not inform respondent that Ammeian had taken over Chimy's case; and that the files were in disarray, with documents frequently placed in the wrong files, causing confusion. Respondent argues that he therefore reasonably believed that Chimy was mistaken when Chimy told respondent that Ammeian was his attorney.[15]

The hearing judge found that respondent was not a credible witness with respect to this matter and concluded that respondent willfully violated rule 1-400(C) when he continued the meeting with Chimy after Chimy informed respondent that Ammeian was his attorney. We agree with this conclusion.

[13b] While respondent deserves credit for attempting to preserve Chimy's workers' compensation claim after Jensen became ineligible to practice law, respondent does not automatically own a cause of action or a client as a result of taking over Jensen's cases. As we observed above in the Brown matter, the client has an absolute right to retain counsel of choice. In *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, we found a violation of former rule 2-101, regarding improper solicitation of potential clients, where the attorneys, working through others, imposed their services on clients. We there noted that the danger of solicitation is that lawyers, trained in persuasion, may attempt to use such skills on potential clients who are vulnerable and susceptible to manipulation. (*Id.* at p. 652.) The record here demonstrates that a concern about that danger is justified, as respondent used his skills of persuasion to convince a confused, non-English-speaking worker to substitute respondent as his attorney of record, notwithstanding that Chimy

15. Respondent testified that he was not sure whether Ammeian was representing Chimy. He testified that he had earlier asked Ammeian to give him a list of all of the cases Ammeian had taken from Jeffrey Jensen, and Chimy's name was not on the list Ammeian submitted to respondent. He further testified that when he substituted into Chimy's case he believed that Chimy was not represented by an attorney.

Respondent explained that when the State Bar asked him to take over Jeffrey Jensen's cases, he was required to look over approximately 3,400 cases. He testified that the files were not organized, mail had not been answered for about a year and a half, and documents had been placed in the wrong files. Respondent stated that he dismissed approximately 1,000 of the cases and took another 1,400 to 1,700. He further stated that Ammeian took about 40 cases and another firm, Leva & Knight, took 200 to 300. Respondent testified that when he discovered he was receiving mail or had documents pertaining to clients from the Jensen practice which had been assigned to other law offices, he routinely sent the documents or mail to the other offices.

Respondent testified he was aware that approximately one month after he had been substituted in as attorney of record in the case, he was dismissed as the attorney of record, and the compromise and release on which he had obtained Chimy's signature was eventually revoked.

stated that he was already represented by a practicing attorney.

[13c] Even if respondent was not aware that Chimy was represented by Ammeian when respondent's office asked Chimy to come in for a meeting, Chimy's statement that Ammeian was his attorney was sufficient to put respondent on notice that Ammeian was handling this matter. This is especially true in view of respondent's previous recognition that Ammeian's list of clients from Jeffrey Jensen's practice was incomplete. We note that the Rules of Professional Conduct serve to prevent not only deliberate overreaching by attorneys, but also inadvertent yet improper conduct. (Cf. *In the Matter of Wyshak*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 81.)

[13d] Moreover, respondent's letter of March 14, 1995, informing Ammeian that Chimy had retained respondent and asking Ammeian to sign an enclosed substitution of attorney form, establishes that respondent knew that Ammeian had been working on the matter. We therefore conclude that the evidence clearly and convincingly establishes that respondent solicited a prospective client with whom he had no prior professional relationship in violation of rule 1-400(C).

The Garcia Matter

In this client matter, respondent was charged in counts seventeen and eighteen with violating rule 3-110(A) based upon his intentional, reckless, or repeated failure to perform legal services with competence and his failure to supervise his employees adequately. It appears from the record that count seventeen, which alleged respondent's failure to appear at a mandatory settlement conference on April 4, 1995, was dismissed upon motion of the State Bar at a pretrial conference. In addition, count eighteen, which alleged that respondent's office caused the wrong client to execute a settlement document intended for another client, was dismissed by the hearing judge based on a lack of clear and convincing evidence that the problem was caused by respondent's failure to supervise his employees. The State Bar does not seek review of these dismissals. Upon our independent review, we agree with and adopt the dismissal of these counts and clarify that such dismissals are with prejudice.[16]

The Vielma/Herrera Matter[17]

Respondent was charged in count nineteen with intentionally, recklessly, or repeatedly failing to perform legal services competently in violation of rule 3-110(A) based upon his failure to appear on behalf of his clients on March 10 and June 19, 1995. After considering the exhibits, the hearing judge found there was no clear and convincing evidence of this violation. Upon our independent review of the record, we agree, as there is no evidence that respondent had notice of the dates of the court appearances. We therefore adopt the hearing judge's dismissal of count nineteen and clarify that such dismissal is with prejudice.

MITIGATION AND AGGRAVATION

Mitigation

In mitigation, respondent presented evidence that he performed pro bono work in several education cases. Although he testified he could have been awarded attorney fees by the courts had he won in these matters, such fees are rarely awarded in these types of cases, and in fact he performed services in these cases without ultimately receiving compensation. Although he did not have written retainer agreements in all of these cases stating that the clients did not have to pay anything for respondent's representation, he did have such a retainer in the Cronkite

16. See Rules of Procedure of the State Bar, rule 261(a).

17. **[14]** Neither the reporter's transcript of the proceedings in the hearing department nor the clerk's notations on the exhibits themselves indicate that the exhibits pertaining to this client matter were formally admitted into evidence. However, as it appears that the hearing judge considered the exhibits and the judge and counsel treated the exhibits as admitted into evidence, we treat the exhibits are part of the record for purposes of review. (*Komas v. Future Systems, Inc.* (1977) 71 Cal.App.3d 809, 812.)

case. However, he had not brought that agreement with him to the trial in this proceeding.

In addition to the foregoing, respondent worked on a panel with the Los Angeles County Bar Association's Modest Means Section for approximately one and a half years. While on this panel, respondent represented 10 to 15 clients at the rate of $40 per hour.

Respondent also presented evidence that he performed other legal work at a reduced rate of $70 per hour, regularly handles civil rights cases, and has handled disabled veterans cases, for which he could have received fees if awarded by the court.

[15] While respondent's representation in some cases for reduced or no fees constitutes evidence in mitigation (cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521), as the hearing judge found, respondent's testimony lacked credibility, and the evidence established that respondent was eligible to receive substantial attorney fees in many of the cases respondent described in presenting evidence in mitigation. It is therefore unclear whether respondent's motive for taking such cases was to help others or to collect attorney fees, and under these circumstances, we give respondent's evidence little weight in mitigation, as did the hearing judge.

Aggravation

Respondent challenges many of the hearing judge's findings regarding circumstances in aggravation.

In aggravation, respondent engaged in multiple acts of wrongdoing. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).)

In addition, respondent's conduct was followed by or surrounded by dishonesty, concealment, overreaching, and other violations of the Rules of Professional Conduct or the State Bar Act. (Std. 1.2(b)(iii).) Specifically, respondent's bill to Van Tatenhove was a dishonest attempt by respondent to claim he had earned the $1,000 fee and thereby avoid culpability for failing to return unearned fees. Such conduct also constitutes an act of moral turpitude in violation of section 6106. Although respondent challenges this finding in aggravation, in view of the evidence that respondent could not reasonably have believed he performed some of the work set forth on the bill, e.g., reviewing school records, we adopt the hearing judge's finding that the bill as a whole was not a reasonable statement of respondent's work, but a fraudulent attempt to justify keeping most of Van Tatenhove's fee.

In addition, respondent's conduct in the Brown matter was surrounded by overreaching. First, after receiving Baker's letter of April 18, 1994, informing respondent that the Browns had hired Baker to handle the matter, respondent filed a complaint on behalf of the Browns on April 28, 1994. Such conduct constitutes a violation of section 6104. Second, respondent attempted to settle the matter notwithstanding that Brown never agreed to a settlement proposed by respondent.

Respondent argues that he was justified in filing the complaint in view of the lack of indication from the Browns that they had hired new counsel and the legitimate concern, shared by Baker, that the statute of limitations would run sometime between April and June 1994.[18] However, respondent never explained why he did not simply inform new counsel of the possible statute of limitations issue and request immediate verification that the Browns had hired new counsel in view of the need to file a complaint quickly, rather than file a complaint for the Browns notwith-

18. Respondent testified he had filed a medical malpractice complaint on behalf of Tamekia on April 28, 1994, because the insurance company for the medical provider took the position that the statute of limitations would run in that month, one year after Tamekia was injured as a result of the alleged malpractice. Respondent testified he filed the complaint to avoid "unnecessary" litigation regarding the statute of limitations issue notwithstanding that he believed the statute of limitations on the claim was tolled while Tamekia was a minor. (See Code Civ. Proc., § 340.5.) He further testified he believed there was "no harm in me filing it to protect . . . the situation."

standing notification that they no longer wished to employ him. Nor did respondent explain why he did not promptly notify the Browns and Baker in April 1994 that he had filed the complaint to protect the Browns and make provisions to transfer the file to Baker. Under these circumstances, the findings of overreaching and a violation of section 6104 are justified. Moreover, although respondent asserts that the hearing judge's finding that respondent filed the complaint to protect his attorney fees is pure speculation, it appears that this finding was not an additional factor in aggravation, but merely a partial explanation for the hearing judge's rejection of respondent's testimony regarding his reasons for filing the complaint. We need not, and do not, adopt such finding, but we do give great weight to the hearing judge's finding that respondent's explanation for filing the complaint lacks credibility.

Respondent also argues he testified without contradiction that the Browns had orally agreed to the structured settlement, but subsequently decided not to sign the settlement documents. However, the record shows Baker testified without objection that the Browns told him they did not want to accept the settlement figure which respondent had negotiated. Moreover, we give great weight to the hearing judge's finding that respondent's testimony on this issue lacked credibility and therefore adopt the hearing judge's finding in this regard.

Respondent challenges many of the hearing judge's findings of uncharged misconduct, asserting that these violations should not be considered in any way in these proceedings due to the State Bar's failure to charge them in the notice of disciplinary charges (NDC). Respondent relies on *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163 and *In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. 23.

Glasser, however, did not address when or whether evidence of uncharged misconduct presented at trial may properly be considered in aggravation. Rather, the only issue there was whether the hearing judge correctly dismissed the notice to show cause on the motion of Glasser, which motion was based on the State Bar's failure to allege with particularity what misconduct was charged. *Glasser* is applicable here only to the extent that it acknowledged an attorney's entitlement in disciplinary proceedings to reasonable notice of the specific misconduct to be proved at the disciplinary hearing. (*In the Matter of Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 171.)

Dixon recognized the holding of *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36, that evidence of uncharged misconduct may sometimes be considered in aggravation in disciplinary proceedings: "Because this evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct, because the evidence was used merely to establish a circumstance in aggravation, and not as an independent ground of discipline, and because the review department's conclusion was based on [Edwards's] own testimony, we find no violation of [Edwards's] right to notice of the charges against him." (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 36.) In *Dixon*, however, the evidence of uncharged misconduct was introduced "to show an independent ethical violation and not merely for the purpose of inquiring into the charged misconduct." (*In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 41.) Although we stated in *Dixon* that, under such circumstances, the better practice would have been to file a separate charge for the misconduct, we nevertheless held that, because there was no objection to the testimony or documentary evidence establishing the uncharged misconduct, the evidence could properly be considered in aggravation: "We conclude that absent an appropriate objection to the introduction of evidence of misconduct other than that charged, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters. [Citation.]" (*Ibid.*)

Here, the hearing judge found as circumstances in aggravation several uncharged acts of misconduct. The hearing judge found that, in the Benjamin matter, respondent willfully failed to return client telephone calls in violation of section 6068, subdivision (m).[19]

19. Respondent also briefly disputes the hearing judge's conclusion that the evidence supports a finding of failure to return client telephone calls. We conclude, however, that the evidence fully supports the finding in view of Benjamin's testimony that she left over twenty messages on respondent's office answering machine over a period of approximately six to seven weeks, but received no response.

The hearing judge additionally found that respondent overreached in the Chimy matter in attempting to settle the matter unbeknownst to the client and before the client even knew of respondent.[20] The hearing judge also found in the Chimy matter that, in attempting to settle the matter, respondent made misrepresentations to the insurance company in violation of section 6106 and that respondent failed to provide Chimy's file to Ammeian upon request in violation of rule 3-700(D)(1). In the Van Tatenhove matter, the hearing judge found that respondent violated rule 1-320(A) by splitting fees with Russell, who is not an attorney.

[16] Of the foregoing evidence of uncharged misconduct, respondent objected on the specific ground urged here only to the evidence regarding the violation of rule 3-700(D)(1) in the Chimy matter. As to this evidence, respondent timely objected that it was beyond the scope of the solicitation charge set forth in the NDC. The hearing judge should have sustained this objection absent a motion by the State Bar to amend the NDC in a way that would have given respondent a sufficient opportunity to defend. (See *In re Ruffalo* (1968) 390 U.S. 544, 550-552.) In view of respondent's timely objection, we decline to adopt the finding in aggravation that respondent violated rule 3-700(D)(1) in the Chimy matter.

As to the finding that respondent was splitting fees with a nonlawyer in the Van Tatenhove matter, respondent argues that there was no evidence he actually split fees with Russell, only evidence that he entered into an agreement to do so. However, as the State Bar points out, Russell testified she was associated with respondent's office as an educational consultant and worked on approximately 20 cases with respondent. Under her agreement with respondent, she was to receive 15 percent of all retainers and settlements plus eight dollars per hour. She did not testify that she was never paid for her work on these other 20 matters, and the clear inference is therefore that she was paid according to their agreement. Because such circumstantial evidence is sufficient to support the hearing judge's finding of this factor in aggravation (*Medoff v. State Bar* (1969) 71 Cal.2d 535, 550-551), we adopt such finding.

We also adopt the hearing judge's finding that, with respect to his clients Benjamin, Campos, and Van Tatenhove, respondent demonstrated indifference toward atonement for or rectification of the consequences of his misconduct. (Std. 1.2(b)(v).) We reject respondent's assertions that this finding should be dismissed with respect to Benjamin and Campos.[21]

The evidence showed that respondent refused to refund Benjamin's money when she terminated respondent's services, although she had received no apparent benefit, and respondent told Benjamin she would have to take him to small claims court. After Benjamin received an arbitration award for a refund of the money paid to respondent, she tried to contact respondent again, but respondent hung up on her. Subsequently, respondent delayed over three years in satisfying the award. This evidence amply supports the hearing judge's finding in this respect.

Similarly, when Campos called respondent and told him that she wanted her money back because he had not done anything for her and that she was going to send a letter to the State Bar due to his failure to perform the services for which he was retained, he treated her statement "like a joke" and hung up on her. Notwithstanding respondent's arguments that he did not know Campos and was confused as to what she was talking about, we agree with the State Bar that given the nature of respondent's business relationship with Orozco, respondent should have been especially sensitive to the needs of clients from the Santa Ana office. We conclude that the evidence supports a finding that respondent showed indiffer-

20. Although respondent again argues that he reasonably believed Chimy was his client, we reject such argument for the reasons set forth previously.

21. Respondent does not challenge the finding that he demonstrated indifference toward atonement for or rectification of the consequenees of his misconduct in the Van Tatenhove matter, and based upon his failure to respond to Van Tatehhove's letters and subsequent dishonest billing statement, we adopt the finding.

ence toward atonement for or rectification of the consequences of his misconduct. While respondent asserts Campos should not have been allowed to testify regarding respondent's state of mind, we agree with the State Bar that Campos's testimony was merely a description of respondent's demeanor rather than speculation regarding respondent's state of mind.

The hearing judge also found that respondent displayed a lack of cooperation with the State Bar and engaged in misconduct during these disciplinary proceedings, which the hearing judge found to be aggravating under standard 1.2(b)(vi). More specifically, the hearing judge found that respondent (1) attempted to delay or prevent the State Bar Court proceedings by improperly asserting various statutory and constitutional privileges, including his Fifth Amendment privilege against self-incrimination, and repeatedly asking to be found in contempt; (2) displayed disrespect to the State Bar by making unfounded and inflammatory statements in various pleadings filed in this matter;[22] (3) made a dishonest statement in his pretrial statement; (4) filed motions containing baseless contentions and attempted to mislead the court in his arguments with respect to the Benjamin matter; and (5) made various additional misstatements throughout these proceedings.

We first address respondent's assertion of statutory and constitutional privileges to certain questions in the hearing department. When respondent was initially called as a witness for the State Bar in the Van Tatenhove matter, he refused to answer any questions, including a question about the date of his admission to the State Bar of California, invoking his Fifth Amendment right against self-incrimination, a right to privacy, an attorney-client privilege, and all state and federal constitutional and statutory privileges. Subsequently, respondent answered the question regarding his date of admission to the State Bar of California, but refused to respond to another question based upon his right against self-incrimination, refused to answer the hearing judge's inquiry regarding the application of the Fifth Amendment under the circumstances, and asked the court to find him in contempt so that he could appear before a state or federal judge. The hearing judge found that respondent's assertion of the privilege was improper and indicated he would consider imposing various sanctions on respondent as a result. Ultimately, respondent refused to answer almost every question posed to him in the Van Tatenhove and Orozco matters, and based upon his initial refusal to respond to the State Bar's questions in the Hammill matter, the State Bar did not rely upon his testimony in that matter.

On February 20, 1998, respondent filed a motion requesting to be found in contempt. In that motion, respondent stated that the hearing judge had imposed certain sanctions. The hearing judge clarified on the record that he had stated he would consider imposing the sanctions listed, but that he had not yet imposed them. Ultimately, the hearing judge sanctioned respondent for asserting the various privileges by (1) sustaining many of the State Bar's objections during respondent's cross-examination of Russell on March 23, 1998, (2) waiving the requirement that the State Bar lay a foundation as to respondent's State Bar registration card, and (3) considering respondent's improper assertion of these privileges as an aggravating circumstance.

[17a] We adopt the hearing judge's finding in aggravation that respondent's assertion of constitutional and statutory privileges in response to the State Bar's questioning regarding respondent's State Bar registration card constituted a lack of cooperation and misconduct during the disciplinary proceedings. We also adopt a finding in aggravation that respondent's requests to be found in contempt constituted a lack of cooperation, as well as the apparent findings noted in footnotes in the decision that respondent improperly asserted constitutional and statutory privileges to other questions posed to him on direct examination. However, we give little weight to these findings in aggravation for the following reasons.

[17b] First, although we conclude that

22. The hearing judge also found that respondent failed to maintain the respect due judicial officers and the court, as proscribed by section 6068, subdivision (b).

respondent's assertion of the various privileges was improper,[23] there is no evidence of excessive delay, notwithstanding that the proceedings were prolonged somewhat due to respondent's assertion of the privileges in the Van Tatenhove and Orozco matters. Further, there was almost no delay due to respondent's refusal to respond to questions regarding his State Bar registration card. Although we recognized that "the improper invocation of the Fifth Amendment and the resulting refusal to testify may properly be considered an aggravating factor" in *In the Matter of Dixon*, *supra*, 4 Cal. State Bar Ct. Rptr. at pages 41-42, we note that here, unlike in *Dixon*, respondent willingly responded to most of the questions presented to him throughout the proceedings and only asserted the various privileges as to matters which he believed involved the possibility of prosecution for aiding the criminal offense of engaging in the unauthorized practice of law. (See § 6126.) In addition, we cannot say that the delay which did occur was caused solely by respondent, since it was the State Bar's decision to call respondent as its first witness in these matters rather than attempting to prove its case through other witnesses as it did in the Hammill matter, thereby avoiding the same delay. Moreover, there was no showing that respondent's refusal to answer questions interfered with the State Bar's ability to prove its case. Finally, although we recognize that the use of "specious and unsupported arguments in an attempt to evade culpability in a disciplinary matter" constitutes a factor in aggravation (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225), we find no clear and convincing evidence that respondent asserted the privileges in bad faith. (See *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44.) Under these circumstances, respondent's improper assertion of various privileges is not entitled to great weight in aggravation.

[18] We reject the hearing judge's finding in aggravation that respondent displayed a lack of cooperation and engaged in misconduct during these proceedings by making unfounded and inflammatory statements in various pleadings filed in this matter. The hearing judge found that respondent made unfounded and inflammatory statements in his Reply to Opposition to Motion to Recuse State Bar Court Judges filed on June 27, 1996; in his Verified Petition for Review and Request for Referral to a Constitutional Court filed on October 2, 1996; and in his Complaint for Deprivation of Civil Rights under Color of State Law, Injunctive and Declaratory Relief filed in the U.S. District Court on February 13, 1998. However, such statements are not proper subjects for aggravation absent a showing by the State Bar by clear and convincing evidence that they are false. (Cf. *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 778, 783-785.) The State Bar made no such showing here.

[19] Similarly, we reject the hearing judge's apparent findings in aggravation that respondent filed six petitions for interlocutory review with the review department, at least one petition for review with the California Supreme Court, and over 30 motions in the hearing department,[24] as there was no determination

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23. In general, respondent had the right to invoke constitutional and statutory privileges in these disciplinary proceedings. (§§ 6068, subd. (i), 6085, subd. (e).) Respondent's briefs filed in the hearing department addressing the propriety of sanctions for the assertion of the privileges appeared to indicate that respondent relied primarily upon the Fifth Amendment privilege. However, in invoking this privilege, respondent was required to explain why the information sought by the State Bar was incriminating. (See *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 429.) Because the acts and events regarding which respondent was asked to testify occurred several years prior to the trial in this case, respondent was required to specify why he believed a criminal prosecution for such acts was not barred by the statute of limitations (*id.* at pp. 428-429), particularly in view of the State Bar's assertion that the one-year limitations period applicable to misdemeanors had run (see Pen. Code, § 802, subd. (a)). While respondent asserted in the hearing department that he could conceivably be charged with conspiracy (Pen. Code, § 182) to commit a felony, for which a six-year limitation period provided for in Penal Code section 800 could apply, he failed to specify what felony charge or charges he believed applied to his conduct such that a prosecuting agency could rely upon this lengthy limitations period. We therefore determine that respondent failed to establish that his assertion of the privilege against self-incrimination was proper. We find this to constitute an aggravating circumstance, but as noted herein, give it little weight, particularly since there was no clear and convincing evidence of respondent's bad faith or of delay prejudicial to the State Bar or the State Bar Court.

24. We note that it is unclear from the decision whether the hearing judge considered the motions filed by respondent to be a factor in aggravation.

or showing by clear and convincing evidence that these documents were completely lacking in merit and were filed in bad faith. We are reluctant to find that such filings, though numerous, are an aggravating circumstance absent an intent on respondent's part to mislead or hinder the court, since respondent acted as cocounsel during the hearing department proceedings (*In the Matter of Aguiluz*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 44) and is entitled to reasonable access to the courts to seek judicial remedies (*In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 8).

We adopt the hearing judge's finding in aggravation that respondent made a dishonest statement in his pretrial statement with respect to the Campos matter in view of respondent's assertion in his pretrial statement that Campos' fee was returned to her and testimony in the hearing department that Campos was never his client. Although respondent asserts that, as he testified, his assertion in the pretrial statement was a mistake rather than an intentional misstatement of the facts, the hearing judge implicitly rejected such testimony as lacking in credibility, and as previously indicated, we give such credibility findings great weight.

We reject the findings in aggravation that respondent filed motions containing baseless contentions and attempted to mislead the court in his arguments with respect to the Benjamin matter. The hearing judge based these findings upon (1) respondent's filing motions in which he reiterated his argument regarding Probate Code section 13660 notwithstanding that such argument had been rejected in an earlier ruling and (2) presenting argument that, pursuant to this Probate Code section, his fee in the Benjamin matter was authorized. However, asserting (or reasserting) a legally erroneous position does not necessarily rise to the level of asserting, in bad faith, a position which is totally devoid of merit. We conclude there is no clear and convincing evidence that such motions and argument caused delay or that the motions were brought in bad faith.[25]

The final basis for the hearing judge's finding of lack of cooperation and misconduct during the disciplinary proceedings was that respondent made various additional misstatements throughout these proceedings.

We reject the hearing judge's finding that respondent made a misstatement in his May 20, 1998 Verified Petition for Interlocutory Review. There, respondent stated that, while testifying on that date, he asserted various constitutional and statutory privileges, and as a result, the hearing judge imposed various sanctions. As his decision indicates, the hearing judge "did not impose any sanctions with respect to the matter on which Respondent asserted certain privileges on March 23, 1998." However, the hearing judge did impose sanctions on that date as a result of respondent's earlier refusal to answer questions in the Van Tatenhove matter, sustaining many of the State Bar's objections to respondent's questions during cross-examination of Russell. We therefore conclude there is no clear and convincing evidence that respondent made this misstatement in bad faith rather than inadvertently.

We adopt the hearing judge's finding that respondent made a misstatement in the same document regarding being denied the ability to cross-examine Orozco, as the record reflects that the hearing judge specifically overruled the State Bar's objection to cross-examination based upon respondent's refusal to testify regarding the Orozco matter.

We reject the hearing judge's finding that respondent misstated, in his March 23, 1998 Motion for Recusal, that the hearing judge indicated he intended to sever the trial into two separate trials. Respondent's

25. Because of the lack of clear and convincing evidence of bad faith, this case is distinguishable from *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 115-118, in which we determined that Lais was culpable of misconduct for reasserting legal arguments before a superior court and an appellate court after the appellate court, in an earlier appeal in the same case, had explicitly ruled on the precise legal issue in the case. We there noted that the appellate court's second opinion, essentially determining that the second appeal lacked any merit due to the assertion of identical legal arguments subsequent to the first decision, "was, at the very least, a prima facie determination that [Lais's] appeal in that case was frivolous and that it was pursued in bad faith." (*Id.* at p. 118.)

language does not clearly misstate the hearing judge's position that he was considering severing the trial.

We adopt the hearing judge's finding that, during a February 12, 1997 telephonic status conference, respondent misinformed a different hearing judge that he had filed an answer to the second amended NDC, then filed a Motion for Extension of Time to File Answer on February 27, 1997.

Finally, we adopt the hearing judge's finding that in his Motion to Put Oneself in Contempt filed on February 20, 1998, respondent misstated that the hearing judge imposed various sanctions for his assertion of various constitutional and statutory privileges on February 19, 1998. Contrary to respondent's statement, the hearing judge indicated on that date that he would consider certain sanctions, but the only sanction imposed was the waiver of the requirement that the State Bar lay a foundation as to respondent's State Bar registration card.

Respondent argues that he was never given notice that the hearing judge considered to be improper any language he used or statements he made at any time during the proceedings. However, respondent has provided no authority that such notice is required. The only authority cited in this section of respondent's brief is *In the Matter of Glasser*, *supra*, 1 Cal. State Bar Ct. Rptr. 163, which deals with the sufficiency of a notice to show cause when challenged by a respondent attorney on a motion to dismiss, as previously stated. *Glasser* does not indicate that an attorney in disciplinary proceedings must be given advance notice before any of the attorney's statements made during the proceedings may be found to be dishonest and considered in aggravation. We therefore reject respondent's argument.

APPROPRIATE DEGREE OF DISCIPLINE

In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts (*In re Morse*, *supra*, 11 Cal.4th at pp. 206-207; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580), always keeping in mind that the primary purposes of the disciplinary proceedings 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 (*In re Morse*, *supra*, 11 Cal.4th at pp. 205-206; std. 1.3 [primary purposes of State Bar disciplinary proceedings are protection of public, courts, and legal profession; maintenance of high professional standards by attorneys; and preservation of public confidence in legal profession].) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar*, *supra*, 44 Cal.3d at p. 828.)

As our opinion indicates, we have found respondent culpable of one additional charged violation not found by the hearing judge. Of the charged misconduct, respondent has been found culpable of one count each of willfully: (1) charging an illegal fee; (2) failing to release a client's file promptly upon request; (3) sharing legal fees with a nonattorney; (4) forming a law partnership with a nonattorney; (5) failing to deliver promptly upon request funds the client was entitled to receive; (6) failing to render an accounting to the client; (7) failing to respond promptly to reasonable status inquiries of the client; and (8) solicitation of a prospective client. He has also been found culpable of two charged counts of intentionally, recklessly, or repeatedly failing to perform services competently and three charged counts of failing to return unearned fees promptly. Thus, taken together, respondent has been found culpable of thirteen counts of charged misconduct involving five separate clients and two separate non-clients. Respondent committed these thirteen violations in seven separate matters over a period of nearly four years,[26] and as we previously indicated, respondent's misconduct began less than two years after he was admitted to practice law. Hence, as of the end of the period of misconduct

26. The misconduct charged in this case began in early 1993, and the record reflects that respondent failed to refund the unearned fee in the Benjamin matter, even after Benjamin was awarded the money in arbitration, until February 1997.

with which we are concerned, respondent had been committing misconduct in the practice of law for double the amount of time he had practiced without committing misconduct. We note additionally that respondent's misconduct includes ten different violations of the rules and codes governing attorneys, quite a wide range of misconduct.

In addition, the record reflects only slight evidence in mitigation, but serious, extensive evidence in aggravation.[27] As noted in our discussion of aggravation, respondent's misconduct was surrounded by considerable dishonesty, concealment, overreaching, and several other uncharged violations of the State Bar Act and Rules of Professional Conduct. Respondent displayed indifference toward rectification of or atonement for the consequences of his misconduct as well as a lack of candor during disciplinary investigation and proceedings, both to clients and to the State Bar. Moreover, it appears from the record that several of respondent's clients were of modest means and apparently modest education, which facts undercut sharply the weight to be given to respondent's mitigation evidence regarding his pro bono work.

Viewing the facts of these matters as a whole, we conclude that respondent has demonstrated clear disrespect for his clients and a nearly complete lack of appreciation for his professional obligations. In two matters, those involving Brown and Chimy, respondent attempted to settle cases without client authority, and in the Chimy matter, without ever having even met the client. Moreover, in the Brown matter, respondent filed a lawsuit on behalf of his former clients against their wishes that he no longer represent them. In addition, respondent waited years before refunding unearned fees to Benjamin and Van Tatenhove and never refunded such fees to Campos. In the Benjamin and Campos matters, respondent spoke to his clients rudely and hung up on them when they requested a refund of unearned fees. In all of the matters except that involving Orozco, respondent ignored correspondence and telephone calls from clients and from other counsel regarding respondent's cases, failing either to comply with requests or to respond in any way. In addition, Orozco testified that respondent ignored client appointments in their Santa Ana office, forcing someone else from the office to meet with respondent's clients and reschedule appointments. In sum, besides ignoring his professional duties in general, respondent specifically made a habit of ignoring his clients and their interests. "Client neglect is serious misconduct that constitutes a breach of the fiduciary duty owed by an attorney to the client and, accordingly, warrants substantial discipline. [Citation.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 566.)

In addition, as the hearing judge noted, respondent has demonstrated a willingness to disregard the truth whenever the need arises, including during these proceedings. As previously indicated, respondent initially appeared to admit that Campos was his client, since he failed to deny it upon accusation by the State Bar and indicated in his pretrial statement that Campos's fee had been returned to her, then subsequently testified at the hearing that he believed she was never his client. In addition, respondent fabricated portions of the bill he sent to Van Tatenhove in a dishonest attempt to claim he had earned the $1,000 fee and avoid culpability for failure to return unearned fees. In the Chimy matter, respondent made misrepresentations to the insurance company regarding Chimy's willingness to settle despite the fact that respondent had never met with Chimy.

Additionally, respondent falsely stated in his May 20, 1998 Verified Petition for Interlocutory Review that he had been denied the ability to cross-examine Orozco; falsely stated during a February 12, 1997 telephonic status conference to a hearing judge that he had filed an answer to the second amended NDC, then filed a Motion for Extension of Time to File Answer on February 27, 1997; and misstated in his Motion to Put Oneself in Contempt filed on February 20, 1998, that the hearing judge imposed various sanctions for his assertion of various constitutional and statutory privileges on February 19, 1998, when the hearing judge indicated on that date that he would consider certain sanctions, but the only sanc-

27. As indicated, we adopted the vast majority of the hearing judge's findings in aggravation.

tion imposed was the waiver of the requirement that the State Bar lay a foundation as to respondent's State Bar registration card.

As the foregoing demonstrates, respondent is entirely willing to make false statements to clients, to opposing parties, and to courts when it will suit his purposes. Accordingly, he has "violated ' " 'the fundamental rule of [legal] ethics–that of common honesty–without which the profession is worse than valueless in the place it holds in the administration of justice' . . . ." ' [Citation.]" (*In re Menna* (1995) 11 Cal.4th 975, 989.)

In addition, as the hearing judge noted, respondent does not appear to exhibit any remorse or even recognition of his wrongdoing. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1036-1037; *In re Rivas* (1989) 49 Cal.3d 794, 802.)

In recommending respondent's disbarment, the hearing judge relied in part upon *In the Matter of Brimberry*, *supra*, 3 Cal. State Bar Ct. Rptr. 390. In that case, Brimberry was found culpable of serious misconduct in four matters. As here, Brimberry had no prior record of discipline, her misconduct commenced soon after being admitted to practice, there was significant evidence in aggravation but little in mitigation, and the mitigation was substantially discounted. Also as found in this case, Brimberry showed that she was willing to disregard the truth whenever the need arose, "overreached her clients for her personal benefit" (*id.* at pp. 403-404), and demonstrated a complete lack of recognition of the duties of an attorney (*id.* at p. 405). As a result, we concluded that "[o]nly a disbarment recommendation can give the level of protection we believe the public and the courts deserve in this case. We strongly believe that [Brimberry] 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. [Citation.]" (*Ibid.*) While the misconduct in *Brimberry* was more serious because in three matters Brimberry effectively "became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees" (*ibid.*), respondent has demonstrated a similar reckless disregard of the truth and protracted failure, or refusal, to recognize the duties of an attorney. In addition, in the present case, respondent is culpable of more misconduct which began earlier after being admitted to practice law.

We are also guided by *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, Chang was found culpable of misappropriating client funds, failing to render an accounting to his client, and making misrepresentations to his client and to the State Bar. (*Id.* at pp. 123-124, 127-128.) In determining that Chang should be disbarred, the court focused upon his lack of candor to the State Bar's investigator and the State Bar Court, the seriousness of the misconduct, and the lack of mitigating evidence. (*Id.* at pp. 128-129.) Although the court emphasized that Chang's misappropriation of over $7,000 constituted serious misconduct, Chang's violations committed in a single client matter "appear[ed] to be an isolated instance of misappropriation" (*id.* at p. 129), and therefore respondent's numerous acts of misconduct, committed over a period of four years, appeared to be more serious. As in the present case, in mitigation, Chang had no prior disciplinary record, yet he never acknowledged the impropriety of his conduct and demonstrated a lack of candor before the State Bar, manifesting "a disrespect for the bar's authority." (*Id.* at pp. 128-129.) The court concluded that "[t]he risk that [Chang] may engage in other professional misconduct if allowed to continue practicing law is sufficiently high to warrant his disbarment. [Citations.]" (*Id.* at p. 129.)

This court has previously noted that in cases involving extensive misconduct "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," suspension has generally been deemed adequate only where the attorney presented evidence of a tragic event or set of circumstances which altered and explained the attorney's conduct, as well as sufficient evidence of rehabilitation to give the court confidence that the misconduct would not be repeated. (*In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 687.) Respondent presented no such evidence here.

In view of the foregoing, we conclude, as we must, that aggravating circumstances overwhelmingly outweigh the minute evidence of mitigation presented. Given that the misconduct itself was serious and repeated, lasting for double the amount of time respondent practiced law before his misconduct commenced, we conclude that respondent poses a significant threat of harm to the public and the legal profession. "It is the protection of the public and the integrity of the legal profession which is here at stake, and when it is shown as here that those interests are endangered by the character of the attorney before us, our responsibility and duty require that we act in order to prevent that danger from bearing fruit in the form of future harm." (*Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 579.) Even if the misconduct here did not occur because respondent consciously disregarded his professional obligations, but rather because he was oblivious to them, we nevertheless "have great concern that respondent's lack of understanding of his obligations as an attorney poses risks to the public." (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 881.) In view of respondent's repeated disregard of his clients' interests and of his professional duties, as well as his willingness to disregard the truth, we agree with the hearing judge's conclusion that there is a great likelihood that respondent will engage in misconduct in the future. Consequently, we recommend that respondent be disbarred.

RECOMMENDATION

For the foregoing reasons, we adopt the recommendation of the hearing judge that respondent Emir Phillips be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of persons admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded 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.

We concur:
Obrien, P. J.
Talcott, J.*

Talcott, J. sat in place of Watai, J., who was disqualified.

*. Hearing Judge of the State Bar Court assigned by the Presiding Judge under rule 305(e) of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS P. FREYDL

A Member of the State Bar

No. 99-J-11781

Filed October 30, 2001

SUMMARY

Respondent's Michigan law license was suspended for three years as a result of respondent's misconduct while practicing there. The misconduct found in Michigan included misappropriating $12,500 of client funds, failing to maintain client funds in trust, failing to pay funds to a client promptly, failing to keep a client informed concerning the status of client funds, failing to respond to client inquiries concerning client funds, failing to account, moral turpitude, failing to represent a client diligently and expeditiously, failing to keep a client reasonably informed concerning the status of the client's matter, and failing to respond to a request for an investigation by disciplinary authorities. The hearing judge held that the misconduct found in Michigan required a finding of misconduct in California and recommended that respondent be actually suspended for two years. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The review department determined that while some of the misconduct found in Michigan was previously the subject of discipline in California and could not support the imposition of discipline in these proceedings, other misconduct found in Michigan had never been the subject of discipline in California. The review department also rejected respondent's contention that the instant proceedings were barred because respondent, in agreeing to settle charges in a prior California disciplinary case, relied on the State Bar's representations that no other matters were under investigation by the California authorities. The review department determined that respondent knew of the Michigan case when he signed the stipulation in the prior California case but nevertheless failed to ensure that the stipulation included all matters which were the subject of the Michigan case. The review department additionally concluded that the Michigan final disciplinary order conclusively established respondent's culpability of professional misconduct in California. However, because the Michigan opinions did not indicate that the facts were established by clear and convincing evidence, the review department could not rely upon aggravating and mitigating factors found in Michigan. Upon considering the misconduct found in Michigan and the aggravating and mitigating circumstances separately established in these proceedings, the review department recommended that respondent be disbarred.

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

COUNSEL FOR PARTIES

For State Bar: Paul T. O'Brien

For Respondent: Thomas P. Freydl

HEADNOTES

[1 a-h] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
135.01 Effective Date/Scope of Applicability
135.89 Specific Proceedings—Other/General
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

The State Bar was not barred from relying on Michigan proceedings to impose discipline in California under the authority of Business and Professions Code section 6049.1 notwithstanding that, at the time of a prior California disciplinary case in which the State Bar and respondent entered into a stipulation disposing of the charges, the State Bar knew of disciplinary proceedings pending in Michigan but nevertheless advised respondent in writing pursuant to Rules of Procedure of the State Bar, rule 133(a)(12) that there were no additional State Bar investigations pending against him. The clear purpose of Rules of Procedure of the State Bar, rule 133(a)(12) is to require the State Bar to give notice to respondents before the State Bar Court or to attorneys being investigated by the State Bar of the pendency of other complaints lodged with the State Bar against such attorneys, and to expand that requirement to include complaints lodged in other jurisdictions would impose a far greater burden than that contemplated. At the time of the stipulation, both respondent and the State Bar knew of the Michigan proceedings, yet the stipulation did not in any way deal with the California consequences of the Michigan matter, there was no evidence that the Michigan proceedings were included in discussions leading to the stipulation, respondent entered into the stipulation without inquiring about including the Michigan matter in the stipulation, and the State Bar had no way to evaluate the seriousness of the Michigan proceedings.

[2] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
162.30 Issues/Proof in § 6049.1 Matters
192 Due Process/Procedural Rights
195 Discipline in Other Jurisdictions
1931.90 Section 6049.1 Cases—Other Procedural Issues

Where respondent asserted for the first time at oral argument that Business and Professions Code section 6049.1 was being unconstitutionally applied because a Michigan disciplinary action required only a preponderance of the evidence for a finding of culpability and that California reliance on that lower standard deprived him of due process and equal protection of the law, respondent's failure to have raised the issue before the hearing department or in his briefs on review constituted a waiver of the issue.

[3 a-c] **139 Procedure—Miscellaneous**
147 Evidence—Presumptions

162.30 Issues/Proof in § 6049.1 Matters
195 Discipline in Other Jurisdictions
1931.50 Section 6049.1 Cases—Record from Foreign Proceeding
1933.40 Section 6049.1 Cases—Limitation of Issues
1935.10 Section 6049.1 Cases—Misconduct Found

A certified copy of a final disciplinary order of the State of Michigan finding respondent culpable of misconduct conclusively established that respondent was culpable of professional misconduct in California. Such misconduct, which included misappropriation of client funds, failure to account, failure to respond to a client's reasonable inquiries, failure to pay to a client funds to which she was entitled, moral turpitude, failure to take necessary legal action to protect a client's interest, failure to respond to a client's inquiries concerning the status of her funds, and failure to respond to investigations, warranted discipline in California.

[4 a-h] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
161 Duty to Present Evidence
162.11 Proof—State Bar's Burden—Clear and Convincing
162.30 Issues/Proof in § 6049.1 Matters
195 Discipline in Other Jurisdictions
801.90 Standards—General Issues
1931.50 Section 6049.1 Cases—Record from Foreign Proceeding
1933.50 Section 6049.1 Cases—Degree of Foreign Discipline

In a proceeding under Business and Professions Code section 6049.1, once it had been conclusively established that respondent was culpable of professional misconduct in California, the remaining issue for consideration in California was the degree of discipline. Where the only evidence in the record consisted of the final record of discipline in Michigan, no portion of the underlying evidentiary record from the Michigan proceedings was placed in evidence, and the Michigan final record of discipline indicated that each of the findings of fact in Michigan was made under a preponderance of the evidence standard of proof, a purported showing of the facts and circumstances found in Michigan to surround the misconduct could not be weighed under the required California standard of clear and convincing evidence. Instead, the misconduct found in Michigan was weighed with only the aggravation and mitigation separately shown in California.

[5] **735.10 Mitigation—Candor—Bar—Found**

Respondent was entitled to mitigating consideration for stipulating to the use of a declaration of a witness, thereby avoiding the necessity of bringing that witness from Michigan to testify.

[6] **191 Effect/Relationship of Other Proceedings**
513.10 Aggravation—Prior Record—Found but Discounted
802.21 Standards—Definitions—Prior Record

The aggravating weight of prior discipline was diminished where the misconduct underlying the prior discipline occurred during the same time period as did the misconduct underlying the present matter. Under such circumstances, the totality of the charges brought in both cases was considered in order to determine the appropriate discipline.

[7 a, b] **691 Aggravation—Other—Found**

Respondent's repeated failure to respond to inquiries by clients as to the status of their cases and to investigation inquiries by professional organizations responsible for maintaining standards within the profession constituted an aggravating factor. The combination of respondent's misconduct

presented respondent's disregard for his obligations to his profession as well as disregard for his obligations to his clients.

Additional Analysis

Aggravation

Found

511 Prior Record

Mitigation

Found but Discounted

735.30 Candor—Bar

Standards

801.30 Effect as Guidelines

801.45 Deviation From—Not Justified

822.10 Misappropriation—Disbarment

Discipline

1010 Disbarment

1091 Substantive Issues re Discipline—Proportionality

OPINION

OBRIEN, P. J.:

In 1998, respondent Thomas P. Freydl, who is a member of both the Michigan and California Bars, was suspended from the practice of law in the State of Michigan for a period of three years. In December 1999, the State Bar[1] sought to discipline respondent in California, based on the misconduct found in the Michigan proceedings. The hearing judge held that under the provisions of Business and Professions Code section 6049.1,[2] the misconduct found in the Michigan proceedings required a finding of misconduct in California, and recommended to the Supreme Court that respondent be actually suspended from practice in California for a period of two years. With some limited exceptions, section 6049.1 provides that California "shall" rely on the formal record of discipline in another state as conclusive evidence of professional misconduct in this state.

Respondent seeks review, contending that prior California discipline precludes this state from relying on the Michigan proceedings in seeking further discipline in California. More specifically, respondent contends that (1) his prior California discipline involved the same misconduct as that found in the Michigan proceeding and (2) in agreeing to settle the disciplinary charges in a prior California disciplinary case he relied on the State Bar's representations that there were no other matters under investigation by the California authorities.

We reject respondent's arguments and affirm the hearing judge's finding of culpability. We recognize that we "'must independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with the hearing decision.'" (*In re Morse* (1995) 11 Cal.4th 184, 207.) Following that independent review and consideration of the hearing judge's recommendation, we find that respondent has a disturbing history of (1) ignoring his obligations to clients, (2) failure to respond to the Michigan disciplinary investigations, (3) failure to advise the State Bar of his current address and thus not responding to a California disciplinary investigation, (4) failure to comply with the provisions of his prior California disciplinary probation, and (5) failure to appear in his prior probation violation case. When this history is combined with the serious misconduct found in the Michigan disciplinary matter we conclude that disbarment is the appropriate recommended discipline.

NATURE OF PRESENT PROCEEDING

The present proceeding, under the provisions of section 6049.1, is based on a finding of respondent's misconduct by the State of Michigan. Under that section a final order of the United States, or of a sister state or territory of the United States, determining that a member of the California Bar has committed professional misconduct in that jurisdiction is conclusive evidence that the attorney is culpable of professional misconduct in California. A respondent may challenge the imposition of discipline in California under section 6049.1 only by affirmatively showing that as a matter of law the culpability found in the other jurisdiction would not warrant discipline in California or that the proceeding in the other jurisdiction lacked fundamental constitutional protection. (§ 6049.1(b)(1), (2) & (3); *In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 162.) If a respondent fails to make this affirmative showing, the only remaining issue is the degree of discipline, to be determined by California.

PROCEDURAL HISTORY

Respondent was admitted to practice law in the State of Michigan in June 1968 and was similarly admitted in California in June 1992. For conduct occurring during the years 1995 and 1996 in Michigan, respondent was alleged to have committed misconduct in four matters: (1) Melissa Christie's employment of respondent to dissolve a business entity known as "Magnolias;" (2) Lawrence Shinoda's engagement

1. All references to the State Bar are to the California State Bar.

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

of respondent for contract negotiation with Gibson Guitar Company; (3) a check that was dishonored by respondent's bank; and (4) a matter regarding respondent's client Buddy Killen Music Inc. (Killen).[3]

In June 1997, based on complaints filed with the State Bar on behalf of clients of respondent, the State Bar filed original disciplinary proceedings against respondent, charging misconduct in the Shinoda and Killen matters in *In the Matter of Freydl*, case number 96-O-01650 (*Freydl I*). The charges in that case were based on the State Bar's own investigation and not on the record of the Michigan Attorney Discipline Board or section 6049.1.

Respondent stipulated to misconduct in *Freydl I* in both the Shinoda and Killen matters. The charges in those matters arose out of the same conduct and client matters as did the charges involving Shinoda and Killen contained in the Michigan matter. No reference to the Christie matter is included in *Freydl I*. On May 18, 1998, the Supreme Court suspended respondent for a period of two years, stayed, on condition that he be actually suspended for 45 days, and until he made restitution to Killen in the sum of $2,500, plus interest, among other conditions of probation. That restitution has been made.[4]

THE MICHIGAN PROCEEDINGS

In August 1996, the State of Michigan brought disciplinary proceedings against respondent involving the Christie, the Shinoda and the check matters. The Michigan Attorney Discipline Board found respondent culpable of professional misconduct in the Christie and Shinoda matters. A count concerning the dishonored check was dismissed on appeal by the Attorney Discipline Board of Michigan, and we do not further consider that charge. However, the Michigan Attorney Discipline Board found respondent culpable of failure to respond to the investigation of the check matter, and we do consider that finding. Respondent was suspended from practice in Michigan for three years. On respondent's appeal in Michigan, the Michigan Attorney Discipline Board affirmed that order. Respondent did not seek review by the Michigan Supreme Court. During the two-year course of the Michigan proceedings on these three matters, the Killen matter was charged and resolved in Michigan by the imposition of a 60-day suspension, to run concurrently with the 3-year suspension already imposed.

The Michigan Attorney Discipline Board, following the recommendation of the local grievance panel, found respondent culpable in three separate charges involving his client Christie. In count 1, respondent was found culpable of misappropriation of $12,500 (although charged with misappropriating $25,000) of Christie's funds, failure to maintain her funds in trust, failure to promptly pay funds to Christie, failure to keep Christie informed concerning the status of the funds, failure to respond to inquiries concerning Christie's funds, failure to account, and moral turpitude.[5] In count 2, respondent was found

3. The Killen matter is sometimes referred to in the record as the Weaver/Killen matter as respondent was hired by Killen's Nashville lawyer, C. Steven Weaver, to represent Killen in a copyright infringement action.

4. In a subsequent California proceeding, respondent's violation of some remaining conditions of that probation were considered, as we will discuss *post*.

5. In the Michigan matter, count one, involving Christie, respondent was found culpable of a violation of the Michigan Court Rules (MCR) 9.104(2) (conduct that exposes the legal profession or courts to obloquy, contempt, censure, or reproach); MCR 9.104(3) (conduct contrary to justice, ethics, honesty, or good morals); MCR 9.104(4) (conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court); Michigan Rules of Professional Conduct (MRPC) 1.4(a) and 1.4(b) (failure to keep client reasonably informed); MRPC 1.15(a) and (b) (failure to maintain client funds in an account separate from the attorney's own funds, to render an accounting on request, or to promptly deliver funds to the client); and MRPC 8.4(a) and (b) (violation of the rules of professional conduct and conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer).

In count two, also involving Christie, respondent was found culpable of MCR 9.104(4) (violation of the standards or rules of professional responsibility); MRPC 1.1(c) (neglect of a legal matter entrusted to a lawyer); MRPC 1.4(a) (failure to keep a client reasonably informed of the status of a case); and MRPC 8.4(a) (violation of the rules of professional conduct).

We have treated these charges as subsumed into the enunciated California misconduct.

culpable of failure to represent Christie diligently and expeditiously and failure to keep Christie reasonably informed concerning the status of the matter. In count 5, respondent was found culpable of failure to respond to a request for investigation in the Christie matter.

In count 9, respondent was found culpable of failure to respond to a request for investigation in a complaint filed by Shinoda, and in count 11, he was found culpable of failure to respond to a similar request concerning the check matter. As previously indicated, an order of discipline filed by the Attorney Discipline Board of the State of Michigan confirmed the suspension of respondent from the practice of law in that state for a three-year period commencing on May 6, 1998. The order included a requirement that respondent make restitution to Christie in the sum of $16,429.58 within 180 days.[6] As also indicated, the Michigan Attorney Discipline Board dismissed the charges in the check matter, except it did find respondent culpable of failure to respond to the investigation of the dishonored check.

DISCUSSION OF PARTIES' CONTENTIONS

As the result of *Freydl I* and the discipline imposed in that proceeding, the State Bar acknowledges "that *the substantive allegations* concerning [Shinoda] are not properly at issue in the instant proceedings." [Emphasis in original.]

In the Michigan proceedings, the first client matter involved Melissa Christie and her employment of respondent to dissolve a business entity known as "Magnolias," while in the second client matter respondent was retained to represent Lawrence Shinoda in contract negotiations with Gibson Guitar Company. In the Christie and Shinoda matters, respondent was found culpable of professional misconduct in Michigan in November 1998 by order of the Michigan Attorney Discipline Board. At some point during the pendency of the Christie and Shinoda matters, additional charges involving Killen were filed in Michigan against respondent. Although there are references to the Killen charges in the record, including testimony by respondent, no copy of the charges, evidence introduced to support those charges, or disposition of those charges is before us.

[1a] *Freydl I* did not include any reference to, or charges relating to, the Christie matter, nor had a complaint been made to the State Bar on behalf of Christie. The investigation by the State Bar of the *Freydl I* matters commenced no later than April 30, 1996, and charges were filed in California on June 2, 1997. Respondent knew of the Michigan investigations no later than March 1996. By March 1997, the State Bar knew of the proceedings in Michigan. Rule 133(a)(12), Rules of Procedure of the State Bar (rules), requiring the State Bar to advise a party entering into a stipulation disposing of a disciplinary matter of any additional pending disciplinary investigations against that party, was in effect at the time of entering into the stipulation in *Freydl I*. In conjunction with the stipulation, the State Bar advised respondent, in writing, ". . . there are no additional State Bar investigations pending against you."

[1b] The record clearly establishes that the disciplinary agencies in both California and Michigan were each aware of the proceedings being prosecuted in the other state, and particularly that the State Bar was aware of all of the specific charges and of the fact that Michigan was prosecuting respondent in the Christie matter. In December 1999, the State Bar filed the present proceeding against respondent under the authority of section 6049.1. Attached to the California notice of disciplinary charges (NDC) in the present proceedings was a copy of the final Michigan disciplinary order and the opinion of the Attorney Discipline Board, which described the actions of respondent leading to the finding of misconduct and further described the specific charges of which he was found culpable. Included in that order and opinion are the charges relating to both the Christie and the Shinoda matters.

As indicated, the State Bar has conceded that the Michigan findings of misconduct in the Shinoda

6. The record does not reveal whether any portion of that ordered sum was paid.

matter are not a proper matter for discipline in the present proceeding because those charges were the subject of prior discipline in California in *Freydl I*. We agree. The remaining question is whether or not the order and findings of the Michigan Attorney Discipline Board concerning respondent's conduct in the Christie matter both permit and warrant California discipline against respondent.

[1c] Respondent argues that *Freydl I* bars the present action and that his motion to dismiss filed in the hearing department ought to have been granted or that, based on the evidence introduced, the State Bar is barred from relying on the Michigan record. He relies on rule 133(a)(12), requiring that all stipulations as to facts, conclusions of law or dispositions relating to disciplinary matters include a statement that the respondent has been advised in writing of any pending investigations or proceedings not resolved by that stipulation, except for investigations by criminal law enforcement agencies. Respondent contends that the Christie matter was a "pending proceeding" within the meaning of rule 133(a)(12) and that by virtue of that rule the State Bar is barred from relying on the Michigan proceedings in the Christie matter for California discipline. He argues further that in reliance on the stipulation in *Freydl I* to have disposed of any California disciplinary consequences as the result of his misconduct in Michigan, he did not appeal the decision of the Michigan Attorney Discipline Board to the Michigan Supreme Court. We reject these arguments of respondent.

[1d] Both respondent and the State Bar knew of the Michigan proceedings at the time the stipulation in *Freydl I* was entered into. The four corners of the stipulation did not purport, in any way, to deal with the California consequences of the Michigan matter, nor is there any evidence that the Michigan proceedings were included in the discussions leading to that stipulation.

[1e] Respondent's reliance on rule 133(a)(12) is misplaced. In *Smith v. State Bar* (1985) 38 Cal.3d 525, Smith entered into a stipulation with the State Bar concerning two separate client matters. Unknown to respondent and the attorney representing the State Bar, there was a pending investigation of Smith by the State Bar concerning a third client matter. (*Id.* at pp. 530-531.) Smith sought to set aside the stipulation on the grounds that the State Bar had not advised him of the pending investigation as required by the predecessor to rule 133(a)(12). The court held that "[a] stipulation cannot be expected to include information which is not yet known to either party." (*Id.* at p. 533.) We note that such ruling was made even though the existence of the investigation was known to the State Bar, although not to the attorney prosecuting the proceedings. Here, we have a situation where the information was known to both parties, yet the stipulation was silent as to the existence of the Michigan matter. Respondent was in fact participating in the Michigan proceedings during the time that the stipulation in *Freydl I* was signed.[7] Nonetheless, respondent entered into the stipulation without any inquiry about including that matter in the stipulation. We can only conclude that his failure to inquire was deliberate. We also note that the statute concerning the effect of discipline in other jurisdictions (section 6049.1) in California has been in its present form since 1985.

[1f] Respondent argues that the Michigan matter must be found to be a pending proceeding within the meaning of rule 133(a)(12). We disagree. The State Bar had no control over the Michigan proceedings, nor did it have any way to evaluate the seriousness of the proceedings in that foreign jurisdiction. The clear purpose of rule 133(a)(12) is to require the State Bar to give notice to respondents before the State Bar Court or to attorneys being investigated by the State Bar of the pendency of such matters. As the Supreme Court has noted, "[i]t is not unreasonable to expect the State Bar to keep a central record of all complaints lodged against an attorney." (*Smith v. State Bar, supra,* 38 Cal.3d at p. 533, fn. 7.) That reference was to complaints lodged with the State Bar against a California attorney. To expand that requirement to include complaints lodged in all other

7. There was a concern that the setting of trial in *Freydl I* would conflict with respondent's appearance in Michigan for the continued trial of that matter.

jurisdictions within the United States would impose a far greater burden than that contemplated by the Supreme Court.

[1g] Respondent was fully acquainted with the proceedings in Michigan, and if he contemplated they were to be covered by his stipulation in *Freydl I* it was incumbent on him to see that such a provision was included within that stipulation. The stipulation was silent concerning the Christie matter, even though both parties to the stipulation knew that matter was pending in Michigan and, at least presumptively, knew of the provisions of section 6049.1.

[1h] The disposition of the Christie matter was an issue that existed at the time of that stipulation and was not included in that agreement. In *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677-680, the Supreme Court held that a compromise agreement that did not deal with costs of suit and attorney's fees that were statutorily authorized did not preclude a claim for such items following the approval of the compromise. The Supreme Court pointed out "that neither costs nor fees were discussed during settlement negotiations." (*Id.* at p. 681.) We note that there is no contention that the disposition of the Christie matter was included in the discussions leading to the stipulation in *Freydl I* and that at the time of the stipulation, section 6049.1 authorized the prosecution of attorney disciplinary matters in California based on the final record of discipline in a sister state. We conclude that the stipulation in *Freydl I* did not dispose of the Christie matter.

[2] During oral argument respondent asserted, for the first time, that section 6049.1 was being unconstitutionally applied because a Michigan disciplinary action requires only a preponderance of the evidence for a finding of culpability and that California reliance on that lower standard deprived respondent of due process and equal protection of the law. No such position had been asserted in the hearing department, nor did any such argument appear in respondent's brief. Respondent having failed to raise the issue before the hearing department or in his briefs, it is deemed waived. (Cf. *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 521-522 [due process issue]; *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 491 [due process]; see also State Bar Rules of Practice, rule 1320.)[8]

Without further comment, we reject respondent's arguments purported to be addressed to res judicata, full faith and credit, and judicial comity. We also reject, as approaching frivolous, respondent's argument that *Freydl I* included the issues of the Christie matter and thus barred California's reliance in the present proceedings on the Michigan findings of culpability in that matter.

[3a] The certified copy of the final disciplinary order of the State of Michigan, finding respondent culpable of misconduct in the Christie matter, conclusively establishes that respondent is culpable of professional misconduct in California. (§ 6049.1; *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 162.) The only exceptions are whether, as a matter of law, the misconduct found in the other jurisdiction would not warrant imposing discipline in California and whether the other jurisdiction's proceedings lacked fundamental constitutional protection. (§ 6049.1, subds. (a) and (b).) "The attorney bears the burden to establish that the exceptions do not warrant imposing discipline." (*In the Matter of Jenkins*, *supra*, at p. 162.) Although respondent makes some complaint about the Michigan procedure, there is no serious challenge to the fundamental constitutional protection afforded him in the Michigan proceedings. There can be no question that the misconduct found in Michigan warrants discipline in this state.

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8. Although we do not make a recommendation concerning the issue (see *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11), it seems clear that the absences of constitutional infirmity in the Michigan proceedings gives California every right to rely on the Michigan findings of culpability.

EVIDENCE AVAILABLE TO DETERMINE DISCIPLINE

[4a] The remaining issue for consideration in this proceeding is the degree of discipline to recommend. (§ 6049.1, subd. (b)(1).)[9] The State Bar placed in evidence certified copies of the *Order of Suspension and Restitution*, the *Report of the Tri-County Hearing Panel - #83*, the *Board Opinion*, and an *Order Modifying Findings of Misconduct and Affirming Suspension and Restitution*, constituting the final record of discipline in the State of Michigan. No portion of the underlying evidentiary record in the Christie matter was placed in evidence.[10]

[4b] The findings of fact issued in the *Report of the Tri-County Hearing Panel - #83* and the *Board Opinion* of the Attorney Discipline Board set forth the surrounding circumstances of the charges of which respondent was found culpable. Many of those findings would serve to act as aggravation to the charges as found. However, each of those findings of fact was made under a preponderance of the evidence standard.[11]

[4c] Section 6049.1, subdivision (a), makes clear that we accept the findings of professional misconduct of a sister state as conclusive. However, subdivision (b)(1) of that section makes equally clear that the degree of discipline remains an issue to be determined under California law. (See *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.) The record before us is replete with references establishing that various acts of respondent in the Christie matter were found to be true by a preponderance of the evidence. It is fundamental that in this state all showings of both aggravation and mitigation must be by clear and convincing evidence. (Std. 1.2(b) & (e), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (stds.); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 222, 224-225; see *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation].

[4d] The underlying evidence in the Michigan proceedings is not before us, and the Michigan opinions do not give any clear indication that a higher standard than a preponderance of the evidence was shown in the Michigan proceedings.

[4e] In its supplemental brief, the State Bar argues that under the provisions of section 6049.1, subdivision (a), the determination by a sister state of professional misconduct "shall be conclusive evidence that [an attorney] is culpable of professional misconduct in this state, . . ." We agree. However, that position avoids the issue we address. Following the quoted language that section provides: "subject only to the exceptions set forth in subdivision (b)." Subdivision (b) sets forth the exceptions: (1) the degree of discipline; (2) whether the foreign finding would warrant discipline in California; and (3) whether the foreign proceeding lacked fundamental constitutional protection. We conclude that the requirement that the discipline be determined in California carries with it the California standards for weighing evidence to show aggravation. (*In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.) That

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9. We note that respondent has been convicted of a misdemeanor charge of practicing law in violation of section 6125. By order dated July 31, 2001, in case number 00-C-15473, we referred that conviction to the hearing department for a finding of the facts and circumstances surrounding that conviction. We do not consider that conviction or the circumstances surrounding it in the matter before us. Rather we note that, under the provisions of rule 216(a), it may be appropriate for the hearing department to consider either our recommendation or the final order of the Supreme Court in this matter in the event that department reaches the issue of recommending discipline in that criminal conviction matter.

10. Respondent introduced a portion of the transcript of the Michigan Shinoda matter. Apparently Michigan had planned to produce evidence on the Christie matter on that same day. The Christie matter was continued for more than a month. The only portion of that record relating to Christie was that, on learning her matter would not be heard that day, Christie expressed concern relating to the delay.

11. Although not briefed by the parties, we advised the parties of our concern that the facts and circumstances surrounding the finding of culpability on which we would ordinarily rely to aid in determining discipline were not shown under a clear and convincing standard of proof, and we invited their briefs on that issue before oral argument pursuant to rule 305(b). A brief was filed by the State Bar. None was filed by respondent.

standard requires clear and convincing evidence (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933; std. 1.2(b).)

[4f] As a consequence, we have no ability to weigh a purported showing of the facts and circumstances found in Michigan to surround the misconduct found in Michigan under the required California standard of clear and convincing evidence. Therefore, in determining discipline we must weigh the misconduct found in Michigan with only the aggravation and mitigation separately shown in this proceeding.

[3b] We are able to identify the charges in the Michigan Christie case by virtue of an *Amended Formal Complaint* issued by an attorney for the Attorney Grievance Commission and placed in evidence by respondent. By reading the various documents together we are able to determine that respondent was found culpable in Michigan of misappropriation of $12,500 of Christie's funds, failure to account, failure to respond to a client's reasonable inquiries, failure to pay to a client funds to which she was entitled, and moral turpitude. He was also found culpable of failure to take necessary legal action to protect his client's interest and failure to respond to her inquiries concerning the status of her funds. Respondent was additionally found culpable of failure to respond to the Michigan Christie investigation, and finally he was found culpable of failure to respond to the Michigan investigation of the check matter.

[3c] To determine the specific charge of which respondent was found culpable we take the lesser of the charges in each count, and we accept the Michigan findings of culpability as conclusive evidence of that found misconduct in California. (§ 6049.1, subd. (a).) **[4g]** We must base our determination of discipline on these findings of culpability, and not on the recitations of facts found by a preponderance of the evidence as set forth in the Michigan opinions. (§ 6049.1, subd. (b)(i); *In the Matter of Jenkins, supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.)

DISCUSSION OF APPROPRIATE DISCIPLINE

[5] In mitigation, the hearing judge found that respondent has been candid and cooperative, noting particularly that respondent stipulated to the use of a declaration of a witness, thereby avoiding the necessity of bringing that witness from Michigan to testify. There is authority that a respondent is entitled to mitigating consideration for such conduct. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 156 [respondent allowed complaining witness to testify by telephone].) We give respondent some mitigating credit for candor and cooperation. No other evidence in mitigation was offered in the present proceeding.

In aggravation, respondent has a record of prior discipline. In *Freydl I* in the Shinoda matter, respondent stipulated to borrowing $10,000 from a client on a no-interest loan and a verbal promise of repayment, without advising the client in writing of the client's right to seek independent advice concerning that transaction, and failure to keep the State Bar advised of his current address. Also in *Freydl I*, involving the Killen matter, respondent stipulated that he received $5,000 in advanced fees to file a copyright infringement action and failed to file that action, although he did perform some work on the case, failed to refund $2,500 in advanced fees, failed to respond to reasonable status inquiries from the client, and failed to keep the State Bar advised of his current address.[12] Respondent was actually suspended for a period of 45 days and until he made restitution to Killen in the sum of $2,500 as one of the conditions of two years' probation. Although respondent made restitution, he was subsequently charged with and found culpable of a violation of an additional condition of his probation. Respondent did not appear in that proceeding, his probation was revoked, and he was suspended for a period of six months in Supreme Court case number S068276 (*Freydl II*), after being placed on inactive enrollment by the State Bar Court, effective November 7, 1999.

12. Both the Shinoda and Killen matters were the subject of discipline in Michigan but are not included in our present finding of culpability under section 6049.1. Rather, we treat those matters as prior California discipline, in aggravation.

[6] The aggravating weight of *Freydl I* is diminished because the misconduct underlying that prior discipline occurred during the same time period as did the underlying misconduct found in Michigan and relied on by us in finding culpability in the present matter. "Since part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation], it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in the prior case." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) Under the circumstances, we consider the totality of the charges brought in both cases in order to determine the appropriate discipline, had both cases been brought together. (*Ibid.*) We find no such limitation on considering the full impact of *Freydl II* as prior discipline.

[7a] A factor not mentioned by the hearing judge in her decision is respondent's repeated failure to respond to inquiries by clients as to the status of their cases and to investigation inquiries by professional organizations responsible for maintaining standards within the profession. We note that in the Christie matter, in addition to the misappropriation of $12,500 of the client's money, respondent was found culpable of failure to respond to her status inquiries, failure to keep Christie reasonably informed of the status of her matter and failure to respond to a request for investigation into her matter. The record shows that respondent further failed to respond to an investigation by the Michigan authorities concerning the check matter.[13] In *Freydl I*, respondent acknowledged that he failed to respond to Killen's reasonable status inquiries and that he failed to keep the State Bar advised of his current address. That latter failure becomes significant for disciplinary purposes when placed in context with his failure to respond to clients and responsible professional organizations. In *Freydl II*, following his failure to comply with the terms of his probation, he failed to respond to that disciplinary charge or to appear on that matter. This combination of misconduct presents respondent's disregard for his obligations to his profession as well as his disregard for his obligations to his clients. We deem this found conduct by respondent to be a most serious aggravating circumstance. We note that the misappropriation of $12,500 from Christie and the borrowing of $10,000 from Shinoda evidence a similar effort to take advantage of clients, although we give far greater weight to the former. We find a similar showing of taking advantage of clients in his failure to return unearned fees after failing to file the complaint in the Killen matter.

In our search to recommend the proper discipline, we look first to the standards for guidance. By far the most serious of respondent's found Michigan offenses was his misappropriation of $12,500 from Christie. Because of the Michigan finding of moral turpitude it is clear that such misappropriation was willful. Standard 2.2 suggests disbarment for willful misappropriation unless the amount misappropriated is "insignificantly small" or "the most compelling mitigating circumstances clearly predominate." The amounts involved are not "insignificantly small," nor do mitigating circumstances clearly predominate. Nonetheless, we treat the standards as guidelines only, and not as directives that must be followed in each case. (*In re Young* (1989) 49 Cal.3d 257, 268.) We endeavor to recommend discipline consistent with prior Supreme Court holdings. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656; see *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) It is clear that disbarment is most frequently imposed where there are several instances of misappropriation of large sums, involving multiple clients. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 658.) However, the Supreme Court has imposed disbarment on an attorney with no prior record of discipline

13. Although a similar finding of culpability was made in Michigan in the Shinoda matter, we do not rely on that finding, as charges involving Shinoda were the subject of *Freydl I*.

in a case of a single misappropriation even though there was substantial mitigation. (*In re Abbott* (1977) 19 Cal.3d 249 [taking of $29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with slightly over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately $29,000 in law firm funds over an 8-month period, while in *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost $7,900 from his law firm, coincident with his termination by that firm, and was disbarred.

Based on the recommendation of this court, the Supreme Court has ordered disbarment of an attorney with no prior record of discipline for misappropriation of approximately $55,000 from a single client. That case involved serious aggravation in that respondent used, for personal purposes, funds entrusted to him for a down payment on real property by a client with limited English skills. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170; see also *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511 [misappropriation of nearly $40,000, misled client for a year, no prior discipline].)

In misappropriation cases, discipline of less than disbarment is warranted only where extenuating circumstances show that the misappropriation of entrusted funds is an isolated event. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1360-1361, 1366-1368.) In the matter before us, we consider the fact of respondent's misappropriation in connection with the additional misconduct found against him. In the Michigan case, limiting our consideration to the findings of culpability in the Christie matter, we find misappropriation of $12,500, moral turpitude, failure to account, failure to respond to client inquiries, failure to represent his client diligently, failure to respond to status inquiries and failure to respond to the investigation of that matter. Unfortunately, we do not have before us, in a form we may consider, the facts and circumstances surrounding this misconduct in Michigan. Nor do we have before us any mitigation, other than the hearing judge's finding of cooperation by respondent, which we consider but do not give great weight.

It is true that many of the cases have found "'clearly extenuating circumstances.'" (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 656.) Less than disbarment was imposed in *Finch v. State Bar* (1981) 28 Cal.3d 659, where the court recognized the attorney's alcoholism and subsequent rehabilitation; *Bate v. State Bar* (1983) 34 Cal.3d 920, where respondent used the funds to travel outside the country in the face of death threats in an unrelated action; and *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, where this court found severe emotional difficulties from which the attorney had been rehabilitated.

In *Freydl I*, respondent stipulated that although he received a $5,000 fee to represent Killen in a copyright infringement action, he failed to file the action within the time agreed upon, failed to return unearned fees in the amount of $2,500, failed to respond to Killen's reasonable inquiries and failed to keep the State Bar advised of his current address. He further stipulated to borrowing $10,000 from Shinoda on a verbal, no-interest loan, not advising Shinoda in writing to seek independent counsel, and failure to keep the State Bar advised of his current address. In *Freydl II*, following his failure to comply with the terms of probation imposed in *Freydl I*, respondent failed to respond to a motion to revoke his probation and failed to appear in the State Bar Court at a hearing on that motion.

[7b] We consider this record of prior discipline to reflect respondent's disregard for his clients and the obligations of the profession. Considering the found prior misconduct, respondent has misappropriated $12,500 from a client, failed to properly perform and respond to proper inquiries from that client, borrowed $10,000 from a second client on oral loan without complying with his duties to that client, and failed to promptly refund unearned fees and respond to reasonable status inquiries from a third client. To this we add two charges of failing to keep the State Bar advised of respondent's current address, his total disregard of a proceeding against him for a violation of his probation, and failure to cooperate in two Michigan investigations. There is nothing in this picture to cause us to believe that respondent's misappropriation in the Christie matter is an isolated act of misconduct; rather it appears to represent an

attorney's disregard for his ethical obligations to clients in favor of financial benefits for himself. Respondent's failure to comply with the terms of his prior probation and then failure to respond to the proceeding brought as the result of that failure to comply with those terms makes clear that such probation provisions have had no rehabilitative effect on respondent.

We find nothing in the record to warrant exemption of this matter from the Supreme Court's observation that "misappropriation generally warrants disbarment unless 'clearly extenuating circumstances' are present. [Citation.]." (*Kelly v. State Bar*, *supra*, 45 Cal.3d 649, 656.) In the matter before us we find no such extenuating circumstances, nor other circumstances that encourage us to move from the Supreme Court's recommended discipline of disbarment for misappropriation of client funds.

[4h] Although, as the concurring and dissenting opinion notes, the Michigan Attorney Discipline Board recommended suspension of respondent, not disbarment, section 6049.1 is not a "like discipline" statute but rather requires that discipline be decided anew in this state based on all relevant factors. In our weighing of discipline we have before us more adverse factors than did the Michigan Attorney Discipline Board even if we give weight to the degree of discipline imposed in Michigan.

RECOMMENDED DISCIPLINE

We recommend that respondent Thomas P. Freydl be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded 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.

Pursuant to the provisions of section 6007, subdivision (c)(4) and rule 220(c), Rules of Procedure of the State Bar, respondent is ordered enrolled inactive on personal service of this opinion or three days after service by mail, whichever is earlier.

I Concur:
STOVITZ, J.

CONCURRING AND DISSENTING OPINION OF TALCOTT, J.

I concur with the majority opinion in all respects except as to the appropriate level of discipline. I respectfully dissent from the recommendation of Thomas P. Freydl's disbarment. In my view, disbarment is not warranted in this case in order to serve the primary purposes of disciplinary proceedings, i.e., 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. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.3 (standards); *In re Morse* (1995) 11 Cal.4th 184, 205.)

The majority opinion itself reflects that respondent practiced law for approximately 30 years before discipline was imposed against him in California, and his two prior California disciplinary proceedings did not result in lengthy periods of actual suspension. Instead, respondent's first prior case (*Freydl I*), involving misconduct in the Shinoda and Killen matters, resulted in the imposition of an actual suspension of only 45 days, along with periods of stayed suspension and probation.[1] Due to respondent's failure to

1. As the majority states, the aggravating weight of *Freydl I* is diminished because the misconduct underlying that case occurred during the same time period as did the misconduct underlying the present case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

comply with an unspecified condition of the probation imposed in *Freydl I*, respondent was subsequently suspended for six months in *Freydl II*.

While I recognize that the misconduct and aggravating circumstances in this case are quite serious and include misappropriation along with moral turpitude, it should be noted that even in Michigan, the jurisdiction where the charged misconduct occurred, respondent was suspended for three years rather than disbarred as a result of violations which were, with only a few exceptions,[2] identical to the violations we consider here. Moreover, the hearing judge, who considered the identical misconduct involved in this case, recommended an actual suspension of two years.[3] In light of all factors involved in this case, I view disbarment as unduly harsh. I would instead recommend that respondent be suspended from the practice of law in the State of California for a period of three years, that the three-year period of suspension be stayed, and that respondent be placed on probation for a period of four years on condition that respondent be actually suspended from the practice of law in this state for three years and until respondent shows, in accordance with standard 1.4(c)(ii), proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law.

TALCOTT, J.*[4]

*Talcott, J., sat in place of Watai, J., who was disqualified.

2. The majority opinion points to the following aggravating circumstances established in this case which were not included in the underlying Michigan proceedings: (1) in *Freydl I*, respondent acknowledged that he had failed to keep the California State Bar apprised of his current address and had failed to respond to reasonable status inquiries of his client Killen; (2) as established in *Freydl II*, respondent failed to comply with a condition of the probation imposed in *Freydl I*; and (3) respondent failed to respond to the disciplinary charges or to appear in *Freydl II*.

3. I am aware that because of the review department's obligation to independently review the record, it must not rely too heavily on other disciplinary recommendations. (*In re Morse*, *supra*, 11 Cal. 4th at p. 207.) I refer to these other recommendations simply to point out that I am not alone in my view that disbarment is not warranted under the facts of this case.

4. Hearing Judge of the State Bar Court assigned by the Presiding Judge under rule 305(e) of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES CONNELL MCCARTHY

A Member of the State Bar

No. 96-O-00528

Filed April 15, 2002; as modified April 25, 2002; reconsideration denied June 11, 2002

SUMMARY

The hearing department recommended respondent's disbarment upon finding that respondent, acting as a general partner of a limited partnership, breached his fiduciary duties and misappropriated funds by refusing to distribute one limited partner's portion of a distribution of partnership funds. The hearing department determined that this willful misappropriation constituted an act involving moral turpitude. The hearing department also determined that respondent was culpable of seeking an agreement to have a complaining witness, the limited partner in this case, withdraw his State Bar complaint as a condition of settlement. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The review department concluded that respondent was culpable of the violations found by the hearing department. However, the review department determined that disbarment was inappropriate in view of all of the circumstances of the case and that a four-year stayed suspension with a three-year probationary period and a two-year actual suspension was the appropriate discipline in this case.

COUNSEL FOR PARTIES

For State Bar: Charles Weinstein

For Respondent: Henry T. Heuer

HEADNOTES

[1a-f] 204.90 Culpability–General Substantive Issues
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
Because an attorney who is a general partner of a California limited partnership owes the limited partners fiduciary obligations, including the duty of good faith and fair dealing and the duty to safeguard funds to which the limited partners are entitled, the attorney is held to the high standards of the legal profession whether or not he or she acts in the capacity of an attorney. Moreover, the attorney is subject

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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.

to discipline if he or she assumes a fiduciary relationship and violates a fiduciary duty in a way that would justify disciplinary action if the relationship were that of attorney and client. Thus, respondent was subject to discipline where the evidence established that respondent, as general partner, (1) breached his fiduciary duty to a limited partner by taking his share of profits in two different distributions without having first distributed to the limited partner his capital contribution and share of profits, contrary to both the applicable statute and the partnership agreement, and (2) misappropriated funds which the limited partner was entitled to receive.

[2] **221 State Bar Act–Section 6106**
221.10 State Bar Act–Section6106.1
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
Respondent was culpable of committing an act involving moral turpitude where respondent, acting as a general partner of a California limited partnership, misappropriated a limited partner's share of distribution funds, which act was also a breach of respondent's fiduciary duties to the limited partner.

[3a-c] **106.10 Procedure–Pleadings–Sufficiency**
117 Procedure–Dismissal
130 Procedure–Procedure on Review
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs
In reviewing a motion to dismiss a disciplinary charge based on a contention that the notice of disciplinary charges is defective due to its failure to state a disciplinable offense, the review department treats the factual allegations of the notice of disciplinary charges as true and disregards all factual matters outside the ambit of the notice of disciplinary charges except for judicially noticeable facts, since the purpose of the motion is to test the sufficiency of the notice of disciplinary charges and not to contest the charges. Where the notice of disciplimary charges alleged (1) that respondent, as general partner of a California limited partnership having a fiduciary duty to the limited partners, made preliminary distributions of partnership profits but failed to disburse any funds to one limited partner due to that limited partner's refusal to sign a release of liability and (2) that despite the limited partner's repeated request for the funds, respondent never released the funds and subsequently informed the limited partner that he no longer had the funds, the notice of disciplinary charges was sufficient to state a disciplinary offense, i.e., that respondent committed an act involving moral turpitude by breaching his fiduciary duty to the limited partner and misappropriating funds to which the limited partner was entitled.

[4] **106.20 Procedure–Pleadings–Notice of Charges**
117 Procedure–Dismissal
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs
Because respondent's motion to dismiss the notice of disciplinary charges based on insufficient notice of one of the charges was filed later than the date his response to the notice of disciplinary charges was due, in violation of Rules of Procedure of the State Bar, rule 262(c)(2), respondent's assertion was waived as a basis for dismissal.

[5a,b] **106.90 Procedure–Pleadings–Other Issues**
117 Procedure–Dismissal
130 Procedure–Procedure on Review
135.20 Procedure–Revised Rules–Commencement/Venue/Filings/Service/Time
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs

In reviewing a pretrial motion to dismiss the notice of disciplinary charges on the ground that it was barred by the applicable period of limitations, we treat the factual allegations of the notice of disciplinary charges as true. Where the notice of disciplinary charges alleged that respondent, a general partner of a California limited partnership, informed a limited partner within five years before the notice of disciplinary charges was filed that the limited partner's share of funds from a partnership distribution was gone, the charge that respondent committed an act involving moral turpitude by breaching a fiduciary duty and misappropriating funds was timely filed under Rules of Procedure of the State Bar, rule 51.

[6] **159 Evidence–Miscellaneous**

Where the record did not establish that respondent made an offer of proof in order to give the hearing judge notice of the substance, purpose and relevance of proposed testimony (Evid. Code, § 354), respondent waived any error in the exclusion of the proposed testimony.

[7a-c] **218.00 State Bar Act–Section 6090.5**

Although respondent's attorney handled settlement negotiations with the opposing party, respondent acknowledged that he was on notice that one term of the proposed settlement was that the opposing party withdraw his complaint to the State Bar. Because respondent did nothing upon receiving notice of this fact to inform either his attorney or the opposing party that his attorney lacked authority to discuss such a settlement on his behalf, respondent's attorney had apparent authority to enter into such settlement discussions for respondent. Therefore, respondent intended to agree to this term of the settlement and was culpable of conditioning settlement on the withdrawal of the opposing party's complaint to the State Bar.

[8] **221 State Bar Act–Section 6106**

Disbarment was not warranted for misappropriation of over $20,000 where the matter appeared to have been an aberrational, isolated instance of misconduct, respondent had no prior record of discipline in over 40 years of practice, and respondent presented evidence of good character and community service.

Additional Analysis

Culpability
Found
218.01 Section 6090.5
420.13 Misappropriation–Wrongful Claim to Funds
430.01 Breach of Fiduciary Duty

Aggravation
Found
541 Bad Faith–Dishonesty
588.10 Harm–Generally
591 Indifference
621 Lack of Remorse

Mitigation
Found
710.10 No Prior Record
765.10 Pro Bono Work
Found but Discounted
715.30 Good Faith
740.33 Good Character

Declined to Find
715.50 Good Faith
Standards
801.20 Purpose
801.30 Effect as Guidelines
801.41 Deviation From–Justified
822.59 Misappropriation–Declined to Apply
Discipline
1013.10 Stayed Suspension–4 Years
1015.08 Actual Suspension–2 Years
1017.09 Probation–3 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

OPINION

WATAI, J.:

This matter is before this court for review because respondent Charles Connell McCarthy, general partner of Kau-Kona Land Co., a California limited partnership, (the Kau partnership, the partnership, or Kau) was found to have breached his fiduciary duties and misappropriated funds by refusing to distribute to Nazar H. Ashjian, one of the limited partners of Kau, Ashjian's portion of the preliminary distribution of Kau's funds.

The hearing judge recommended disbarment based on her findings of willful misappropriation constituting an act involving moral turpitude (Bus. & Prof. Code, § 6106)[1] and of seeking an agreement or agreeing to have a complaining witness withdraw his State Bar complaint as a condition of settlement (§ 6090.5, subd. (a)(2)).

Respondent contends that the hearing judge erroneously found culpability of the charges and requests dismissal of the entire matter.

Upon our required independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a);[2] *In re Morse* (1995) 11 Cal.4th 184, 207) and based on the applicable standards and case law, we find respondent culpable of both charges and recommend a stayed suspension of four years, a probationary period of three years, and an actual suspension of two years.

I. STATEMENT OF FACTS

Respondent was admitted to the practice of law on June 14, 1949, and has been a member of the California State Bar since that time. He has no record of prior discipline. Effective December 31, 1991, he was placed on inactive status at his request. According to respondent's exhibit A, a letter from a State Bar membership records supervisor, he returned to active status on July 6, 1999, where he remained until August 14, 2000, when he was involuntarily enrolled inactive under section 6007, subdivision (c)(4), incident to the disbarment recommendation we now review.

Procedural Background

The notice of disciplinary charges (NDC) was filed on November 24, 1999. Count one of the NDC charged respondent with violating section 6106, conduct involving moral turpitude, based on respondent's violation of his fiduciary duty[3] and misappropriation of Ashjian's share of a Kau partnership distribution. Count two of the NDC charged respondent with violating section 6090.5, subdivision (a)(2), seeking an agreement to have the complaining witness, Ashjian, withdraw his State Bar complaint. Respondent filed his response to the NDC on December 30, 1999.

Respondent filed a motion to dismiss on May 30, 2000, contending that count one of the NDC should be dismissed because it failed to state a disciplinable offense (rule 262(c)(1)) and was barred by the applicable period of limitations set forth in rule 51 (rule 262(d)). The hearing judge denied the motion to dismiss, determining that count one of the NDC pleaded adequate facts to state a violation of section 6106 and that the charge set forth in count one was not barred by the applicable statute of limitations due to respondent's continuing obligation to disburse the preliminary distribution funds to Ashjian.

Facts

The Partnership

On October 10, 1967, the "Agreement of Limited Partnership of Kau-Kona Land Co." (the Kau partnership agreement or the partnership agreement) was executed. It included respondent and L. M. Prince, Jr.,

1. All further references to sections are to the Business and Professions Code.

2. All further references to rules are to these Rules of Procedure of the State Bar unless otherwise indicated.

3. While the NDC does not specifically state that respondent breached or violated a fiduciary duty, it does specify that respondent was a fiduciary to the limited partners, and respondent himself acknowledges in his opening brief on review that he was charged with breaching his fiduciary duties to Ashjian.

as the only general partners and Ashjian as one of the regular limited partners with an initial capital contribution of $3,000 (1 percent interest). The purpose of Kau was to purchase and hold for investment approximately 1,400 acres of land located in Hawaii. Under the partnership agreement, the regular limited partners were required to make additional capital contributions in the same proportions as their initial contributions for mortgage payments, real property taxes, and various other charges incident to real property ownership. The regular limited partners made capital contributions pursuant to the partnership agreement for approximately five or six years.

Pursuant to the partnership agreement, the general partners, in their absolute discretion, had the power, among other things, to determine whether and when to make distributions to the partners. The partnership agreement specified, however, that the general partners had no authority to do any act in contravention of the partnership agreement or of Kau's certificate of limited partnership.

Under the "Certificate of Limited Partnership of Kau-Kona Land Co.," the partnership was to continue until the earliest of the following events: (1) the sale of all partnership interest in the real property; (2) the death, adjudication of bankruptcy, insanity, or incompetency of the last surviving general partner, unless within 90 days thereafter at least 60 percent of the regular limited partnership interest elected a regular limited partner to act as general partner; or (3) October 10, 1987.

In 1971, 400 acres of the partnership's 1,400 acres of land were condemned by the State of Hawaii. Kau used the monies realized from this sale to pay off the mortgage on the entire 1,400 acres. Thus, at that time, Kau owned the remaining 1,000 acres of land "free and clear." The partners were not called upon for further capital contributions and received a distribution in an unspecified amount at that time.[4]

In 1976, Prince breached his fiduciary duties and subsequently lost his authority to act as a general partner in 1983 by court judgement. Nonetheless, Prince retained his equity ownership in Kau.

In 1987, the partnership was extended past the October 10, 1987 termination date.

The Preliminary Distribution

In July 1986, Kau filed a voluntary petition for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.). Kau filed its petition in the United States Bankruptcy Court for the District of Hawaii. Kau sought reorganization under Chapter 11 to prevent the foreclosure on its remaining 1,000 acres for Kau's nonpayment of water facilities charges and of a loan it obtained to purchase water rights for the property.

The bankruptcy court authorized and confirmed Kau's sale of its remaining 1,000 acres of land for $5,250,000. Thereafter, in May 1988, Kau filed a motion for order authorizing payment of all creditors and partial disbursement to equity owners. In an order dated June 9, 1988, the bankruptcy court granted that motion and authorized Kau to pay all of its pre-petition and post-petition claims/debts. In that order, the bankruptcy court also authorized Kau to make a return of capital and a partial distribution of profits to Kau's partners in the specific amounts listed for each partner on exhibit A of Kau's motion (sometimes referred to as the preliminary distribution).

In May 1988, Kau also filed a motion to dismiss its bankruptcy proceedings. Thereafter, in an order dated July 29, 1988, the bankruptcy court found that all of Kau creditors (pre-petition and post-petition) had been paid and granted Kau's motion to dismiss. Then, in an order dated August 31, 1988, the bankruptcy court formally closed Kau's bankruptcy proceeding.

On July 27, 1988, respondent apprised each limited partner by letter that the bankruptcy court had

4. This distribution appears to have partially reimbursed the limited partners for their capital contributions. Because no issues are raised in this case pertaining to this initial distribution, we do not discuss it further.

(1) granted Kau's motion to dismiss its bankruptcy proceedings and (2) authorized him to disburse funds to each partner in accordance with the specific amounts listed for each partner on exhibit A to Kau's motion.

Even though the bankruptcy court order did not authorize him to do so, respondent conditioned this disbursement of funds to each of the partners on their executing a warranty, indemnification and release (release or release form). Specifically, respondent stated in the July 27, 1988 letter to each of Kau's partners that he "shall make distribution to you as set forth in Exhibit A of the Motion (copy enclosed), *PROVIDED* you first sign and return the enclosed [release]." The release respondent enclosed in his letter to the limited partners, among other things, absolved respondent personally from any claims arising from his stewardship of Kau's affairs. Respondent further stated in his July 27, 1988 letter that, if the limited partner did not sign and return the release, he or she should inform respondent of the claims against him, "in which case individual distributions shall be withheld until final resolution of any dispute."

Almost all of the limited partners signed and returned the release and received their monies. Two exceptions were Ashjian and the Estate of Elinor Mayer Bryden, Decedent (the Bryden Estate). These two limited partners refused to execute the release, arguing it was improper for respondent to request that they execute a release before disbursement of their money. However, neither of these two limited partners informed respondent that they had any claims against him.

In 1989, the probate court allowed the executor of the Bryden Estate to execute the release if additional language was included in the release,[5] and the Bryden Estate thereafter received its portion of the court authorized preliminary distribution in the sum of $209,460. Ashjian insisted on a mutual release, but respondent refused to accept it, and to date, Ashjian has still not received his portion of the preliminary distribution in the sum of $20,946, which included $5,156 for a return of capital and $15,790 for his share of the profit distribution. In August 1988, Ashjian signed the requested release without any modification on its face, but his attorney stated, in the cover letter accompanying the release, that the release was, in effect, mutual. Respondent refused to accept this release or disburse the $20,946 to Ashjian.

The preliminary distribution in 1988, which was made to all general and limited partners except Ashjian, left Kau with an undistributed cash balance of at least $332,055, in which sum the limited partners had a 60 percent interest and the general partner, i.e., respondent, had a 40 percent interest.[6] Respondent represented that he was holding this cash balance as a reserve to meet any contingent liabilities and obligations of the partnership.

The Final Distribution

In September 1989, respondent informed the Kau limited partners by letter that a lawsuit had been filed against CitiSavings & Loan (CitiSavings) and its attorneys on behalf of Kau; Charles McCarthy, individually; Leon Daniell, individually; and Larry Lopez, individually, for treble compensatory damages and punitive damages for bad faith dealings with the plaintiffs. Kau sought over $41,000,000 in damages. After several weeks of trial in 1990, the court dismissed the matter when the Resolution Trust Corporation (federal regulators) took over CitiSavings. However, the plaintiffs' cause of action against the attorneys for CitiSavings survived, and it settled for $1,000,000 in November 1992.

On March 30, 1993, respondent informed the Kau partners by letter that the CitiSavings attorneys' lawsuit had settled in November 1992. Kau's share of the settlement was $300,000, less $57,237.50, which was Kau's one-third share of the litigation cost, less

5. The additional language to be included in the warranty was set forth in the probate court's order as follows: "'Notwithstanding the foregoing it is understood and agreed that the Release shall not include or prevent any claims the undersigned Estate of ELINOR MAYER BRYDEN may have concerning or with respect to any future partnership distributions.'"

6. Because respondent did not make the $20,946 distribution to Ashjian in accordance with the bankruptcy court's June 9, 1988 order, this amount should have been $353,001 ($332,055 plus $20,946).

approximately $95,000, a repayment to respondent for litigation costs advanced by respondent for about two years, and less $30,000 to be paid to respondent as compensation for making the $95,000 "non-recourse" advance on Kau's behalf. Respondent also informed the partners that $100,000 was paid to co-plaintiff Larry Lopez, but respondent's letter was silent as to the distribution of the balance of the $600,000. We assume that $300,000 was paid to Leon Daniell[7] and $300,000 was paid to respondent, as they were represented to be plaintiffs, individually, sharing equally in the recovery proceeds and in the litigation costs. Finally, respondent stated that he was distributing $80,000 from the net proceeds to the partners as the final distribution but gave no further explanation of how he arrived at this amount of the net proceeds. Respondent made the final distribution in early 1993, and Ashjian received $480 as his proportionate share of the final distribution, without the requirement of a release.

Ashjian's Collection Attempts

After the preliminary distribution of Kau funds in 1988, Ashjian continued to demand his $20,946 share of those funds, and respondent continued to refuse to deliver the funds unless Ashjian signed the unamended release form. Ashjian received IRS Schedule K-1 forms (K-1 form), entitled "Partner's Share of Income, Credits, Deductions, etc.," throughout the life of the partnership. In 1995, the K-1 form he received showed $22,258 in his partnership capital account. For the year 1996, however, his K-1 form showed $22,258 in his capital account at the beginning of the year and nothing in his capital account at the end of the year.

In 1994, Ashjian filed a complaint in the Los Angeles Municipal Court for breach of contract and common counts against Kau, respondent in his individual capacity, and respondent's wife in her individual capacity. Said matter was ordered to arbitration, and the arbitrator awarded Ashjian damages from Kau and from respondent in the amount of $20,946, plus interest in the amount of $10,660.22, for a total of $31,606.22. The arbitrator found that there was a fiduciary relationship between respondent as the general partner and Ashjian as a limited partner of Kau and that respondent did not have the discretion or right to require Ashjian to sign a release as a precondition to receiving his share of partnership profits. The arbitrator further found that respondent was under a continuing obligation to hold Ashjian's share of funds in trust and to turn them over to Ashjian. He also found that the K-1 form provided to Ashjian in 1994 constituted an acknowledgment of indebtedness and obviated the statute of limitations issue proffered by respondent. The award was subsequently confirmed as a municipal court judgment[8] on December 19, 1995. Thereafter, Ashjian levied on a bank account of respondent and collected $4,113.28. All other attempts to collect on the judgment were and remain unsuccessful.

On May 21, 1996, respondent filed a voluntary petition in the United States Bankruptcy Court for the Central District of California. In this petition, respondent sought to have personal debts, including Ashjian's municipal court judgment against him, discharged under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 et seq.).

On August 22, 1996, Ashjian initiated an adversarial proceeding in respondent's personal bankruptcy to determine, as relevant here, the dischargeability of his municipal court judgment against respondent. In a memorandum of decision filed on July 29, 1997, the bankruptcy court found, among other things, that Ashjian's municipal court judgment against respondent was nondischargeable under the Bankruptcy Code. Specifically, the court found the municipal court judgment nondischargeable under 11 United States Code section 523(a)(4) because it is based on a debt

7. Leon Daniell and Larry Lopez were others with whom respondent was attempting to develop the Kau property.

8. Code of Civil Procedure section 1287.4 provides: "If an [arbitration] award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification."

that arose from a defalcation while respondent was acting in a fiduciary capacity.[9] In light of its finding that Ashjian's judgment was nondischargeable, the bankruptcy court entered judgment in favor of Ashjian for $27,493.22, which was the uncollected balance remaining on Ashjian's municipal court judgment of $31,606.22 after Ashjian recovered $4,113.28 by levying on respondent's bank account. The bankruptcy court also awarded Ashjian prejudgment and postjudgment interest thereon in accordance with federal law.

Respondent testified in the hearing department that the Kau partnership was dissolved in 1996 upon his filing for bankruptcy, as per the partnership agreement. However, we note that according to both the partnership agreement and the certificate of limited partnership, the partnership was dissolved when it sold the remaining 1,000 acres of its original 1,400 acres of land in Hawaii under the bankruptcy court's authorization in 1988.

Settlement Discussions as to the Bankruptcy Adversary Proceeding

During the pendency of respondent's personal bankruptcy, respondent and Ashjian engaged in negotiations regarding a possible settlement of Ashjian's adversarial proceeding. On March 7, 1997, James R. Felton, attorney for respondent, directed a fax and a letter to Ashjian confirming their settlement in the matter. (That letter was admitted into evidence in this proceeding as exhibit 20.) In the letter, Felton stated to Ashjian that his client (respondent) "has agreed to pay you the sum of $25,000.00 in full and complete settlement . . . ." Payment was to have been made approximately two weeks later. That letter further stated that Ashjian was to execute a full release of any and all claims against respondent and contact the State Bar to withdraw any claims, i.e., complaints, he had made. Felton further stated in his letter that a settlement agreement and mutual general release would be forwarded to Ashjian. Felton sent Ashjian a second fax and letter modifying the agreement later that same day. (That letter was admitted into evidence in this proceeding as exhibit 12.) This second letter specified that payment of $25,000 was to be made to Ashjian on or before March 20, 1997, and that the mutual general release would be signed by Ashjian, respondent, and respondent's wife. Felton explained the two letters in his letter to the State Bar dated March 25, 1997: "The first letter, faxed to [Ashjian] at approximately 9:15 a.m. that day, confirms my understanding of the terms of the settlement. The second letter, faxed to him at approximately 10:03 a.m., confirms our telephone conversation and the two changes that he requested and that Mr. McCarthy agreed to regarding the settlement."[10]

Hearing Judge's Determination of Culpability

Based on the above, the hearing judge found respondent culpable of misappropriating Ashjian's share of the preliminary distribution, which misappropriation constituted conduct involving moral turpitude and therefore violated section 6106. She further found respondent culpable of conditioning the civil settlement agreement upon the withdrawal from the State Bar of a disciplinary complaint in violation of section 6090.5, subdivision (a)(2).

II. DISCUSSION

In this case, we must determine whether respondent is subject to discipline (1) for breaching his fiduciary duty and misappropriating funds to which Ashjian was entitled, thereby committing an act involving moral turpitude, and (2) for seeking or agreeing to

9. Because under California law partners are trustees (1) for each other (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514) and (2) over the assets of the partnership (*Ragsdale v. Haller* (9th Cir. 1986) 780 F.2d 794, 796), partners are fiduciaries for purposes of determining the dischargeability of a debt under 11 United States Code section 523(a)(4) (*Ragsdale v. Haller*, *supra*, 780 F.2d at pp. 796-797). Moreover, in the Ninth circuit, defalcation under section 523(a)(4) "'includes the innocent default of a fiduciary who fails to account fully for money received.' [Citations.] . . . An individual may be liable for defalcation without having the intent to defraud." (*Lewis v. Scott* (*In re Lewis*) (9th Cir. 1996) 97 F.3d 1182, 1186-1187, fn. omitted; *F.D.I.C. v. Jackson* (9th Cir. 1998) 133 F.3d 694, 704.)

10. The record does not reveal the reason for the failure of this settlement. Such failure appears particularly inexplicable in view of respondent's agreement to a mutual release, which Ashjian had earlier offered but respondent had rejected.

Ashjian's withdrawal of his complaint to the State Bar as a condition of a settlement agreement as outlined in attorney Felton's March 7, 1997 faxes and letters to Ashjian.

Culpability as to Count One

[1a] It is well established, contrary to respondent's position, that respondent, as a general partner, owed to Ashjian, a limited partner, fiduciary obligations, including the duty of good faith and fair dealing (*Wortham & Van Liew v. Superior Court* (1987) 188 Cal.App.3d 927, 932) and that respondent was not permitted to take unfair advantage (*Cagnolatti v. Guinn* (1983) 140 Cal.App.3d 42, 48). "Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other." (*BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410.) With respect to Ashjian's share of the distribution funds, at the time such funds were distributed among the other Kau partners, respondent had a fiduciary duty to safeguard the money to which Ashjian was entitled. "An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney. He must maintain proper books of account and records of transactions, and he may not commingle client's funds or use them for personal purposes. [Citations.]" (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341.) Further, "[w]hen 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. [Citations.]" (*Clark v. State Bar* (1952) 39 Cal.2d 161, 166; *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307.) Thus, respondent is subject to discipline if he misappropriated Ashjian's share of the distribution funds or breached his fiduciary duty by failing to distribute funds to which Ashjian was entitled.

Respondent argues that he is absolved of any wrongdoing because his action is supported by Corporations Code section 15684, regarding distribution of assets, which indicates that creditors shall be paid first. However, that section is part of the California Revised Limited Partnership Act, operative July 1, 1984, and that statutory scheme is inapplicable to the Kau partnership. Instead, the provisions of the Uniform Limited Partnership Act apply to Kau. Corporations Code section 15523, part of the latter act, provides as relevant regarding the distribution of partnership assets as follows: "(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order: [¶] (a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners, [¶] (b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions, [¶] (c) Those to limited partners in respect to the capital of their contributions, [¶] (d) Those to general partners other than for capital and profits, [¶] (e) Those to general partners in respect to profits, [¶] (f) Those to general partners in respect to capital."

Moreover, the partnership agreement provides, as relevant, that among partners, "[d]istributions when made . . . shall be made as hereinafter provided. [¶] A sum equal to the total of all capital contributions made by the Regular Limited Partners, without interest thereon, shall be paid to them, out of the first cash available for distribution, in the same proportions to which they made such contributions. . . . There shall be no disbursement of cash to the General Partners, or to the Special Limited Partner, until all Regular Limited Partners and/or their successor(s) in interest, have been paid sums equal to the total of all their capital contributions as hereinabove provided."

[1b] Thus, the applicable statute, as well as the provisions of the partnership agreement, provide that limited partners are to receive their capital contributions before a general partner receives a share of the profits. In addition, the statute provides that limited partners are to receive both capital contributions and profits before a general partner receives profits. Here, contrary to the applicable statute and the partnership agreement, respondent received his share of profits in two different distributions without having first distributed to Ashjian his capital contribution and share of profits. We therefore conclude that respondent breached his fiduciary duty to Ashjian.

[1c] We additionally determine that the evidence establishes that respondent misappropriated funds

which Ashjian was entitled to receive. In *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36-37, misappropriation was found based on evidence that the attorney withdrew a client's funds from his trust account and spent such funds for his own benefit without his client's authorization. In *Baca v. State Bar* (1990) 52 Cal.3d 294, 304, the court held that "an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]" In *Brody v. State Bar* (1974) 11 Cal.3d 347, 349-350, the attorney was found culpable of commingling client funds with his own and misappropriating client funds to his own use. The attorney argued that due to an inadvertent mathematical error, he had been unaware of any financial obligation to his client, and therefore he was not culpable of willful misappropriation. (*Id.* at p. 350.) The Supreme Court found, however, that evidence of Brody's persistent refusal to account to his client in the face of repeated demands to do so justified the finding of willful misappropriation. (*Ibid.*)

In each of the above cases, the conclusion that misappropriation occurred was based upon a finding that the attorney utilized client funds for his own use. In the present case, as we will discuss, we conclude (1) that Ashjian was entitled to receive his share of the preliminary distribution funds, whether or not he was entitled to receive them at the time of the preliminary distribution in 1988, and (2) that respondent committed a misappropriation by taking Ashjian's share of those funds for his own use.

The record reflects that in 1988, when the preliminary distribution was announced by the general partner and all limited partners were informed of their respective shares of the distribution, each partner's share was earmarked and recorded in an individual account. The record additionally reflects that respondent, as general partner, took his portion of the preliminary distribution of profits of over $1 million dollars without having paid Ashjian his $20,946 share.

[1d] Even assuming, without deciding, that respondent was entitled to retain Ashjian's share of funds at the time of the preliminary distribution in 1988 because Ashjian did not execute the release which respondent requested, then at the very least, respondent was required to disburse to Ashjian his $20,946 share of the preliminary distribution no later than early 1993, when respondent made the final distribution. At that time, respondent disbursed all remaining partnership funds without requiring any release, and he should therefore have been able to release all of the funds to which Ashjian was entitled at that time. Instead, respondent disbursed to Ashjian only his $480 share of the final distribution and still took his own $22,400 share of the final distribution. Because respondent was not entitled to take his share of the final distribution before paying Ashjian his capital contribution and profits, respondent effectively took Ashjian's $20,946 share of the preliminary distribution for his own use no later than this time.[11]

[1e] However, we need not and do not decide in this case whether the funds which respondent took belonged to Ashjian or to Kau, as it is clear that respondent took funds he did not own and to which Ashjian was entitled. Because the evidence establishes that respondent took his share of the final distribution without ever having paid Ashjian his share of the preliminary distribution, we conclude that at the time of the final disbursement, at the very latest, respondent was culpable of willfully misappropriating funds to which Ashjian was entitled.

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11. *Fretz v. Burke* (1967) 247 Cal.App.2d 741, discussed the propriety of a general partner holding certain limited partners' share of profits in a suspense account, although distribution of profits had been made to other limited partners. A preliminary injunction was obtained by the limited partners requiring the general partner to disburse their share of profits to them. In holding the injunction to be proper, the appellate court held (1) that the injunction "simply directs that the part *which belongs to [the limited partners]* shall be paid to them now, and shall not be held by [the general partner] in suspense;" (2) that the injunction "merely prevents [the general partner] from putting funds *which belong to [the limited partners]* into a suspense account, purportedly as security for possible costs, a security which the law does not allow him;" and (3) that the injunction corrected "an overbearing assumption by [the general partner] of superiority and domination over *the rights and property of [the limited partners]*." (*Id.* at pp. 745-746, italics added.) We look to *Fretz v. Burke*, *supra*, only as support for our conclusion that, regardless of who owned the funds, Ashjian was entitled to receive them.

To support his assertion that he was entitled to take his share of the preliminary distribution before disbursing Ashjian's share, in his reply brief respondent points to the provision of the partnership agreement that allows the general partners a disbursement of 50 percent of their portion of the cash and 25 percent of their portion of the capital gain income for federal income tax purposes.[12] However, there is no evidence that respondent, as general partner, received only 50 percent of the cash and 25 percent of the capital gain income and only for income tax purposes. Instead, as indicated, the evidence shows that respondent received his portion of the preliminary distribution but did not disburse to Ashjian his portion of this distribution at any time.

[1f] Notwithstanding respondent's assertion, noted above, that he simply used Ashjian's share of the preliminary distribution to pay creditors first, as required under the Corporations Code, respondent has nevertheless failed to explain why he took his own share of the preliminary and final distribution before disbursing Ashjian's share of the preliminary distribution. In arguing the propriety of paying creditors of the partnership, respondent misses the point. As discussed, respondent was not entitled to take his share of partnership profits until after Ashjian had been paid, and by taking his share of distribution funds first, respondent used Ashjian's share to pay himself. This payment to respondent prior to payment to Ashjian constituted a misappropriation of Ashjian's share of distribution funds.

Respondent relies on *Wyler v. Feuer* (1978) 85 Cal. App.3d 392, 402-403; *Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1451, fn. 6; and *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 411, to support his position that requiring the release before distribution was a discretionary act made in the exercise of his honest business judgment as general partner. However, in each of these cases the discussion of a general partner's exercise of business judgment pertained to the general partner's liability for business losses sustained in managing the partnership's businesses. In the present case, we are not concerned with respondent's management of the partnership and partnership funds. Rather, this case involves respondent's ethical duties as an attorney when acting as a general partner and payment to himself of funds which, at least at the time of the final distribution, a limited partner was entitled to receive. Moreover, respondent's decision to require the limited partners to execute a release as a condition of distribution was not a decision made purely in the exercise of his honest business judgment in managing the partnership. Instead, the release was intended to exonerate respondent personally, not just the partnership, from all liabilities. Therefore, respondent cannot escape responsibility by claiming he was simply carrying on the business of the partnership when he sought to condition the preliminary distribution on the execution of the releases by the limited partners.

We also conclude that this willful misappropriation and violation of respondent's fiduciary duties to Ashjian involved moral turpitude. In *Johnstone v. State Bar* (1966) 64 Cal.2d 153, the Supreme Court found moral turpitude under similar circumstances. There, Johnstone negotiated a $3,000 settlement for personal injuries his client suffered in an industrial accident. As part of the settlement, Industrial Indemnity Company (Industrial) agreed to accept $1,000 of the $3,000 settlement funds from the third-party tortfeasor in place of its workers' compensation benefit lien in the amount of $4,945.57. (*Id.* at pp. 154-155.) After Johnstone deposited the settlement funds in his trust account, he delivered to Industrial a $1,000 check drawn on his trust account, but the check was returned by the bank for insufficient funds. Johnstone never paid Industrial the money to which it was entitled. (*Id.* at p. 155.) The Supreme Court determined that Johnstone held the money in trust for Industrial, that Johnstone breached that trust by failing to pay such money to Industrial and instead taking the

12. The partnership agreement provides as relevant: "If prior to payment of the Regular Limited Partners, of sums equal to the full amounts of their contributions to capital, ordinary income or capital gain income, as defined for federal income tax purposes, is attributable to the General Partners and Special Limited Partner as of the end of any tax year, then notwithstanding the foregoing, General Partners and Special Limited Partner shall be entitled to a disbursement of cash equal to 50% of any such ordinary income and 25% of any such capital gain income, less 50% of any cummulative [sic] loss attributable to them."

money for his own use, and that such breach was an act involving moral turpitude: "The wilful violation of [the] trust herein, as found by the [State Bar], clearly constitutes an act involving moral turpitude and dishonesty within the meaning of section 6106 of the Business and Professions Code, as that section has been applied even in the absence of an attorney-client relationship." (*Id.* at p. 156, fn. omitted.)

[2] Similarly, respondent's misappropriation of Ashjian's share of the distribution funds in this case, which act was also a breach of respondent's fiduciary duties to Ashjian, constituted an act involving moral turpitude. In sum, upon our independent review, we conclude that the State Bar has proved respondent culpable of violating of section 6106 by clear and convincing evidence.

Respondent's Contentions on Review as to Count One[13]

Motion to Dismiss Count One

In his opening brief on review, respondent asserts that the hearing judge erred in denying his motion to dismiss count one of the NDC and argues that the review department should now correct that error by dismissing count one. In requesting such dismissal, respondent repeats his arguments that: (1) the NDC failed to allege specific facts in support of the charge set forth in count one; (2) respondent was entitled to rely upon a probate court order approving of respondent's requirement that the Kau limited partners sign a release prior to receiving their respective shares of the preliminary distribution; (3) the NDC relied upon an underlying municipal court judgment that is void; and (4) the NDC was barred by the applicable period of limitations.

Respondent brought his motion to dismiss under rule 262(c) and (d). Rule 262(c)(1) provides as relevant that "[a] proceeding may be dismissed . . . for failure of the initial pleading to state a disciplinable offense . . . ." Rule 262(d) provides that "[a] proceeding may be dismissed on the ground that it is barred by any applicable statute or rule."

[3a] As previously indicated, all of respondent's arguments set forth in the motion to dismiss, except the argument based on the period of limitations, were encompassed within his contention that the NDC was defective because it failed to state a disciplinable offense. In reviewing such a contention, "we treat the factual allegations of the notice as true, but draw our own independent conclusions regarding the legal import of those facts. [Citations.]" (*In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 124.) "Both at hearing and on review, the court considering a motion to dismiss of this type should disregard all factual matters outside the ambit of the notice . . . , since *the purpose of the motion is to test the sufficiency of the notice, not to contest the charges*. [Citation.] However, judicially noticeable facts outside the scope of the notice are an exception to this rule, and are cognizable. [Citations.]" (*Ibid.*, italics added.)

[3b] Respondent never explained, and we fail to understand, how the probate court order and the municipal court judgment result in the failure of the NDC to state a disciplinable offense. In making these arguments, rather than presenting grounds for dismissal as a result of the insufficiency of count one, respondent is contesting the substance of the charges and apparently requesting a sort of pretrial summary judgment. (See Code Civ. Proc., § 437c.) However, no such procedure is available in State Bar disciplinary proceedings. "Assuming the notice . . . properly charges a disciplinable offense, the appropriate time for respondent to present evidence in defense or mitigation [is] at the hearing on the merits . . . ." (*In the Matter of Tady*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 125.) We therefore conclude that respondent's assertions as to these matters did not warrant pretrial dismissal.

As to the general question of whether count one states a disciplinable offense, we note that respondent

13. We address respondent's principal points of error on review. Any points of error or supporting arguments that are not expressly addressed in this opinion have been considered and rejected.

was charged in that count with violating section 6106. That section provides in relevant part that "[t]he 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." Respondent was specifically charged with violating section 6106 by misappropriating funds to which Ashjian was entitled. Moreover, as noted above in footnote 3, we conclude that the NDC adequately charged respondent with violating his fiduciary duties to Ashjian.

We have already discussed that respondent, as a general partner, had a fiduciary duty to Ashjian and was statutorily required, upon the dissolution of the partnership, to pay Ashjian his share of capital contributions and partnership profits before respondent took his own share of profits. (*Wortham & Van Liew v. Superior Court*, *supra*, 188 Cal.App.3d at p. 932; Corp. Code, § 15523.) As we have also discussed, respondent, having accepted fiduciary responsibilities, "is still held to the same fiduciary duties . . . as if there were an attorney-client relationship. [Citations.]" (*In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 191.) A breach of such fiduciary responsibilities can constitute an act involving moral turpitude where such breach involves more than simple negligence. (*Ibid*; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.)

As to the charge that respondent misappropriated funds, the terms "misappropriation" and "willful misappropriation" are often used interchangeably, and neither of them appear in either the Rules of Professional Conduct or the State Bar Act. These terms are defined by many court decisions, as we have discussed *ante*, which have held that the terms cover a wide range of conduct involving the conversion of client or other trust funds. (See *Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.) When an attorney's misappropriation involves at least gross carelessness or gross negligence, the misappropriation involves moral turpitude. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020-1021.) Moreover, "'[t]he fact that the balance in an attorney's trust account has fallen below the amount due his client will support a finding of wilful misappropriation.' [Citation.]" (*Id.* at p. 1020.)

[3c] In summary, count one of the NDC alleged that respondent, as general partner of Kau having a fiduciary duty to Ashjian, a limited partner, made preliminary distributions of partnership profits in July 1988; that Ashjian's share of this preliminary distribution was $20,946; and that because Ashjian refused to sign the release of liability which respondent requested prior to making the preliminary distribution, respondent refused to disburse Ashjian's share. Count one further alleged that despite Ashjian's repeated requests for the funds, respondent never released the funds to Ashjian and informed Ashjian in or about January 1997 that he no longer had the funds. These allegations were sufficient to state a disciplinary offense: by failing to distribute to Ashjian his share of the preliminary distribution funds, respondent breached his fiduciary duty to Ashjian and misappropriated funds to which Ashjian was entitled, and such conduct constituted an act of moral turpitude.[14] **[4 - see fn. 14]**

[5a] As to the assertion that the NDC was barred by the applicable period of limitations, respondent relies upon rule 51(a). That rule provides: "A disciplinary proceeding based solely on a complainant's allegation of a violation of the State Bar Act or Rules of Professional Conduct shall be initiated within five years from the date of the alleged violation." Rule 51(b) goes on to provide: "For purposes of paragraph (a) of the rule, a violation of the State Bar Act or the Rules

14. [4] In some respects respondent's arguments in both the motion to dismiss and his opening brief on review appear to involve arguments regarding insufficient notice of the charge set forth in count one. To the extent that respondent attempts to make such an assertion, however, such assertion was required to be made "no later than the date on which the moving party's response is to be filed, or, if no response is provided for, no later than twenty (20) days after the service of the initial pleading." (Rule 262(c)(2).) Because respondent's motion to dismiss was filed later than the date his response to the NDC was due, however, the assertion was waived as a basis for dismissal of the charge in count one. (Rule 262(c)(2) ["Failure to file a timely motion under this subparagraph shall preclude the party from a later assertion of the alleged inadequate notice of the charges as a ground for dismissal of the proceeding . . . ."].)

of Professional Conduct is deemed to have been committed when every element of the alleged violation has occurred, except where the alleged violation is a continuing offense, in which case the violation is deemed to have been committed at the termination of the entire course of conduct." Moreover, rule 51(c)(4) provides that the five-year limitations period in rule 51(a) is tolled during the time that "[t]he member conceals facts constituting the violation." The State Bar does not dispute, and we agree, that rule 51(a) applies in this case. The State Bar argues, however, that the five-year limitations period was tolled for various reasons.

[5b] We need not address each of the reasons for tolling advanced by the State Bar. As already indicated, in reviewing a pretrial motion to dismiss, we treat the factual allegations of the NDC as true. (*In the Matter of Tady, supra*, 2 Cal. State Bar Ct. Rptr. at p. 124.) According to these allegations, respondent did not inform Ashjian that Ashjian's share of the preliminary distribution funds was gone until approximately January 1997. Under these facts, either the funds were not gone, and therefore the charged breach of fiduciary duty and misappropriation did not occur, or continued, until that date, or respondent concealed the breach of fiduciary duty and misappropriation until that date. Either way, under rule 51, the five-year limitations period did not commence to run until that date. Therefore, the NDC, filed on November 24, 1999, was timely.

Respondent's argument that the NDC was untimely is based upon his incorrect assertion that the moral turpitude charge arose from respondent's alleged breach of fiduciary duty occurring in 1988, when respondent initially refused to distribute Ashjian's funds until Ashjian signed the release.[15] However, while the NDC refers to the 1988 date, the NDC specifies that the moral turpitude charge is based upon respondent's breach of fiduciary duty and misappropriation resulting not only from his initial failure, but from his ultimate failure to distribute the preliminary distribution funds, even after Ashjian obtained with respect to these funds a municipal court judgment and a bankruptcy court finding of nondischargeability of the judgment.

Motion to Dismiss for Failureto Meet Burden of Proof

Respondent next contends that the hearing judge erroneously denied his motion brought pursuant to rule 219. Rule 219(a) provides as relevant that "[d]uring a trial, after the party with the burden of proof has rested, and before the proceeding is taken under submission by the Court, an opposing party may make an oral or written motion for a determination that the party with the burden of proof has failed to meet that burden . . . ." Rule 219(b) provides that in ruling upon such a motion, the court is to "consider all of the evidence introduced, weigh the evidence and make determinations of credibility." We apply a de novo standard of review to a hearing judge's ruling on a rule 219 motion. That is, "[b]ased upon our independent review of the evidence before the hearing judge at the time the motion was made, we must determine whether clear and convincing evidence was presented of each element of the charged offenses. In deciding these issues, we must give great weight to the hearing judge's credibility determinations. [Citation.]" (*In the Matter of Chesnut* (2000) 4 Cal. State Bar Ct. Rptr. 166, 171.)

We note briefly that our conclusion regarding respondent's culpability as to count one, discussed previously, was based upon evidence presented in the State Bar's case-in-chief. Thus, the evidence in the record at the time respondent made his motion established respondent's culpability under count one.

As to this motion, respondent specifically argues in his brief on review with respect to count one that (1) respondent cannot be found culpable of an act involving moral turpitude because his actions were based

15. We note additionally that in his opening brief, respondent erroneously relies upon his trial testimony in arguiug that Ashjian's funds were "exhausted as of early 1993" and that therefore the charged breach of fiduciary duty and misappropriation occurred more than five years before the NDC was filed. However, as indicated, the NDC alleges that the relevant breach of fiduciary duty and misappropriation occurred or continued after that date, or at least that respondent concealed such misconduct until a later date.

upon his exercise of reasonable business judgment; (2) the State Bar failed to establish that respondent took Kau money and used it for his personal gain; and (3) respondent's conduct did not rise to the level of moral turpitude.

As we discussed in determining culpability, we are not concerned with respondent's management of the affairs of the partnership but with respondent's ethical duties as an attorney acting as a general partner. Thus, we reject respondent's arguments regarding his exercise of reasonable business judgment.

We also reject respondent's next argument, that the State Bar failed to produce any evidence establishing that he took Kau money and used it for his personal gain. As we previously discussed in determining respondent's culpability as to count one, although respondent relies upon Corporations Code section 15684 to support his use of Ashjian's $20,946 share of the preliminary distribution funds to pay creditors, respondent has failed to explain why, at the time of the final distribution, when respondent no longer required a release, respondent failed to disburse Ashjian's share of the preliminary distribution but nevertheless took his own share of the final distribution. This payment to himself, a general partner, prior to payment of a limited partner violated both the applicable Corporations Code section and the partnership agreement and constituted a breach of fiduciary duty and a misappropriation of Ashjian's share of the funds for respondent's own use.

In our discussion of culpability as to count one, we have already resolved adversely to respondent his assertion that his conduct did not rise to the level of moral turpitude. In the cases upon which respondent relies, the attorneys were impliedly found not to have acted intentionally or with gross negligence, and therefore no moral turpitude was involved. Here, as we have indicated, we find, consistent with the hearing judge's finding, that respondent's use of Ashjian's share of the preliminary distribution funds to benefit himself involved moral turpitude, as it resulted from at least grossly negligent conduct.

Hearing Judge's Culpability Findings After Trial

Respondent next contends with respect to count one that in finding him culpable after trial, the hearing judge erred in (1) determining that the funds earmarked for Ashjian at the time of the preliminary distribution became Ashjian's funds; (2) determining that respondent breached his fiduciary duty to Ashjian by requiring a release from all limited partners before disbursing funds pursuant to the preliminary distribution; (3) assuring respondent that his plan for preliminary distribution was proper, then concluding otherwise in the decision; (4) applying the doctrine of collateral estoppel and ignoring the State Bar's heavier burden of proof in disciplinary proceedings; (5) refusing to consider respondent's defense that he relied upon the advice of counsel regarding the propriety of the release and Ashjian's refusal to sign it; and (6) determining that respondent concealed the absence of Ashjian's share of the preliminary distribution funds by sending Ashjian K-1 forms reflecting that his share of the funds were available.

With respect to respondent's first two contentions, upon this independent review, we need not determine whether the funds earmarked for Ashjian at the time of the preliminary distribution became Ashjian's funds or whether respondent breached his fiduciary duty to Ashjian by requiring a release from all limited partners before disbursing funds pursuant to the preliminary distribution plan. As we have stated, even assuming for the sake of argument that respondent was entitled to withhold the funds at the time of the preliminary distribution due to Ashjian's refusal to sign the release, respondent was precluded from receiving respondent's share of profits at the time of the final distribution, when no release was required for disbursal of funds, prior to disbursing Ashjian's share of distribution funds. Moreover, regardless of whether Ashjian or Kau owned the funds earmarked for Ashjian at the time of the preliminary distribution, it is clear that respondent did not own the funds, and respondent was statutorily required to pay the $20,946 to Ashjian at the time the partnership was dissolved and before taking his own share of the final distribution. Because respondent paid to himself funds that should have been paid to Ashjian, respondent breached his fiduciary duties to Ashjian and misappropriated the funds.

Moreover, with respect to the hearing judge's assurances that respondent's plan for preliminary distribution was proper, it appears from the record that

the hearing judge was merely stating that no one was challenging respondent's decision to preliminarily distribute funds to the partners, the fairness of the amounts distributed, or the way respondent ran the partnership in general. Each time the hearing judge made these assurances, however, she correctly added that the issues being questioned were respondent's failure to disburse Ashjian's share of the preliminary distribution and possibly the requirement of a release prior to making this distribution.[16] In making each of the statements to which respondent refers, the hearing judge was appropriately attempting to expedite the trial proceedings by excluding evidence which was only marginally relevant to the issues raised in this case. (See Evid. Code, § 352; *People v. Hart* (1999) 20 Cal.4th 546, 607 [a court has discretion to exclude evidence on collateral matters].) We conclude that the hearing judge's statements to respondent during trial were correct and cannot have misled respondent into believing he did not need to explain the actions he took which are at issue in this case.

We disagree with respondent's statement that the "inescapable inference" from the record is that the hearing judge applied the doctrine of collateral estoppel in this case, giving preclusive effect to the municipal court judgment and ignoring the State Bar's heavier burden of proof in disciplinary proceedings. Rather, because the hearing judge never stated she was applying the doctrine of collateral estoppel or indicated in the decision that she was in any way bound by the municipal court judgment, we decline to interpret her statement in the decision as an application of collateral estoppel. In such statement, the hearing judge specifically ruled that the release requirement was improper "in the court's view," and only parenthetically noted that the arbitrator in the municipal court action held the same view. We therefore find no error in this respect. In any event, we have not applied collateral estoppel in our de novo review.

[6a] Respondent also asserts that the hearing judge erroneously refused to consider his defense that he relied upon the advice of counsel regarding the propriety of the release and Ashjian's refusal to sign it. However, because, as we have discussed, we need not decide in this case whether requiring a release at the time of the preliminary distribution was appropriate, we need not determine whether the hearing judge should have allowed respondent's attorney to testify regarding this advice to respondent.[17] **[6b - see fn. 17]**

Respondent's final contention in his opening brief is that the hearing judge erred in determining that respondent concealed the absence of Ashjian's share of the preliminary distribution funds by sending Ashjian K-1 forms reflecting that the funds were available. Respondent argues in his reply brief that because (1) the K-1 form is simply an accounting tool and (2) Ashjian testified that he understood that a capital account does not necessarily represent cash, the K-1 forms could not have misled Ashjian regarding the availability of the preliminary distribution funds. Respondent's arguments in this respect are essentially that, based on the evidence presented at trial, these disciplinary proceedings were barred by the period of limitations. As we previously stated, the hearing judge determined that respondent concealed the breach of fiduciary duty and misappropriation until 1996 by issuing to Ashjian K-1 tax forms which showed an amount equal to Ashjian's share of the preliminary distribution funds in Ashjian's capital account until the year 1995. The 1996 K-1 form showed for the first time a zero balance in Ashjian's capital account.

Respondent argues as to this issue that the hearing judge's determination set forth above "appears particularly far fetched and unsupported by any evidence," that "this inference from the evidence presented is simply not reasonable," and that "the only reasonable . . . explanation for the 1996 K1" is that the 1996 K-1

16. As previously indicated, we need not resolve in this case the propriety of respondent's requirement of a release at the time of the preliminary distribution, since we have concluded that, even if it were proper, respondent could not continue to withhold the preliminary distribution funds from Ashjian at the time of the final distribution, when respondent no longer required any release prior to disbursing funds.

17. **[6b]** We note additionally that the record does not establish that respondent made an offer of proof in order to give the hearing judge notice of the substance, purpose, and relevance of the proposed testimony. (See Evid. Code, § 354.) Accordingly, respondent has waived any error.

simply reflected "an 'accounting decision' that any positive capital accounts would be reduced to zero and show an ordinary loss that could be used as a deduction." However, we disagree with respondent's characterization of the hearing judge's determination and agree with the hearing judge's interpretation of the evidence.

As we found, Ashjian received K-1 forms throughout the life of the partnership. His 1995 K-1 form showed $22,258 in his partnership capital account, and his 1996 K-1 form showed $22,258 in his capital account at the beginning of the year but nothing at the end of the year. Respondent gave no explanation as to why the accountant would continue to send the K-1 forms through these years and then suddenly show "0" at the end of the year in 1996, except to say that it was a joint decision of respondent and the accountant and that it occurred in 1996 because Kau had no further assets, and Ashjian could use the loss as a deduction. Respondent testified that Ashjian's share of the preliminary distribution had remained in the general account and that the general account had been depleted in 1993 for litigation costs, but there is no evidence showing that Ashjian knew of this alleged fact. On May 11, 1993, respondent's attorney wrote to Ashjian's attorney and stated in reference to the settlement of the CitiSavings lawsuit: "With the settlement of this lawsuit, all of the business and affairs of the Kau Partnership have been completed." Respondent argued earlier in his opening brief on review that this statement should have alerted Ashjian at that time that the partnership had no assets. Alternatively, respondent argues that Ashjian "was on notice of his claim as early as August 1988" when respondent informed the partners that they must sign a release in order to receive their shares of the preliminary distribution.

However, we agree with the hearing judge's conclusion that in providing the K-1 forms to Ashjian through 1996, respondent concealed from Ashjian the availability of funds remaining in Kau and, consequently, respondent's misappropriation of Ashjian's share of the preliminary distribution funds. It is clear that on March 30, 1993, there were sufficient funds in the partnership account from the CitiSavings settlement to pay Ashjian his $20,946, but respondent chose to pay himself and the other limited partners, depleting all of the funds available to pay Ashjian.[18] We determine that this concealment of respondent's breach of fiduciary duty and misappropriation is the more reasonable explanation for additional K-1 forms showing funds in Ashjian's capital account after the time of the final distribution.

Respondent additionally argues in his reply brief that he cannot be found culpable of moral turpitude as set forth in count one because he was entitled to rely upon a probate court order approving of the requirement that the Kau limited partners sign a release prior to receiving their respective shares of the preliminary distribution. However, because we need not address the propriety of the release in this case, we do not further address this issue.

Culpability as to Count Two

Respondent contends that the State Bar failed to prove that he is culpable of conditioning settlement on the withdrawal of Ashjian's complaint from the State Bar, and therefore this charge should be dismissed. He argues that he was not in direct contact with Ashjian and that his attorney discussed the withdrawal of the State Bar complaint without his knowledge. The hearing judge found this to be incredible and found that respondent, at the least, ratified his attorney's position as to the proposed settlement, since he was more than aware of the complaint filed by Ashjian. We give substantial weight to the credibility determinations made by the hearing judge, who saw and heard the parties testify. (Rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)

[7a] Section 6090.5, subdivision (a), provides that it is a disciplinable offense for an attorney "to agree or seek agreement" that "[t]he plaintiff shall withdraw a disciplinary complaint" from the State Bar. While the record reflects that respondent's attorney handled the

18. As we previously indicated, respondent testified at the trial in this matter that all partnership funds had been depleted by 1993.

settlement negotiations with Ashjian in the bankruptcy adversarial proceeding, respondent acknowledged, while testifying at trial in this matter, that he received copies of the letters his attorney sent to Ashjian and was on notice that one term of the proposed settlement was that Ashjian withdraw his State Bar complaint. Moreover, in his letter to the State Bar dated March 25, 1997, respondent's attorney, Felton, indicated that respondent had specifically agreed to the terms of the settlement set forth in Felton's second letter to Ashjian dated March 7, 1997. Although respondent asserted during his trial testimony that in his view, the withdrawal of the State Bar complaint was not a condition of the settlement, in his declaration in the bankruptcy court dated July 15, 1997, respondent stated that the withdrawal of the State Bar complaint was one of the terms of settlement.

[7b] Respondent asserts that his attorney had no authority to discuss the withdrawal of Ashjian's State Bar complaint and that he never ratified his attoruey's unauthorized settlement negotiations. First, however, as we noted above, Felton's letter to the State Bar indicates that respondent himself agreed to all terms of the settlement, including the term that Ashjian withdraw his complaint to the State Bar. Second, "[a]s a general proposition . . . 'the client as principal is bound by the acts of the attorney-agent within the scope of . . . his apparent or ostensible authority . . . .' [Citations.]" (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403.) Ostensible authority can include "such authority as the *principal*, either intentionally or by want of ordinary care, causes or allows a *third person* to believe the agent possesses. [Citations.]" (2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 93, p. 92, original italics; *Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 913-914.) Here, respondent admitted at trial that upon receiving notice that his attorney had discussed Ashjian's withdrawal of his complaint to the State Bar, respondent did nothing to inform either his counsel or Ashjian that his counsel lacked authority to discuss such a settlement term on his behalf. In view of respondent's failure to take any action, we conclude that respondent's attorney had apparent authority to enter into such settlement discussions for respondent.[19]

Respondent also asserts that he relied in good faith upon the advice of his counsel, which reliance constitutes a defense to the charge in count two. Respondent cites *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 (*Kaplan*). There, upon Kaplan's misappropriation of funds which Kaplan's firm held for a client in bankruptcy, the Hearing Panel of the State Bar Court found a trust account violation under former rule 8-101(A) of the Rules of Professional Conduct but did not find that the misappropriation involved moral turpitude. This refusal to find moral turpitude was based on the facts that the fees had been earned by the firm, that Kaplan did not realize that the bankruptcy court had to approve the withdrawal of the earned fees, and that an experienced bankruptcy attorney had told Kaplan that the funds were available for withdrawal. (*Id.* at p. 1070 & fn. 3.)

Respondent's reliance on *Kaplan* is misplaced. First, *Kaplan* demonstrates that reliance on counsel is not a complete defense to a charge, as Kaplan was still found culpable of failing to maintain client funds in a client trust account. Second, there is no evidence in the present case that respondent's attorney was experienced in disciplinary matters, such that respondent could reasonably rely upon his expertise regarding the propriety of agreeing to a withdrawal of a complaint to the State Bar. Finally, there is no evidence here that respondent had any discussion with his attorney regarding the propriety of such an agreement; therefore, respondent cannot be deemed to have relied upon counsel.

[7c] Respondent's final assertion with respect to count two is that there was neither evidence nor a finding below that he willfully violated section 6090.5 as charged in the NDC. Because we have concluded, based on our de novo review of the evidence, that respondent intended to agree to Ashjian's withdrawal of his State Bar complaint as a term of the civil settlement agreement, we find that respondent's violation was

19. Concurrently with the filing of this opinion, we refer to the Office of the Chief Trial Counsel of the State Bar for appropriate investigation and action the issue of respondent's counsel's conduct in negotiating this settlement for respondent. (See rule 218; *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 595, fn. 6.)

willful, "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. [Citations.]" (*In the Matter of Respondent X, supra*, 3 Cal. State Bar Ct. Rptr. at p. 603.)

In sum, our independent review of the facts leads us to conclude that clear and convincing evidence establishes respondent's culpability of willfully violating section 6090.5.

III. DISCIPLINE

To properly assess the discipline to be recommended, we must first consider evidence in mitigation and in aggravation.

Mitigating Factors

The hearing judge found respondent's long and unblemished career to be a strong mitigating factor. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(i).) We agree. Further, the hearing judge found the character testimony of two associates and respondent's wife to be mitigating factors but did not find this evidence to be an extraordinary demonstration of good character. (Std. 1.2(e)(vi).) We also so find.

Respondent additionally presented evidence of community service activities, which are to be considered as mitigating circumstances. (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521.)

Also in mitigation, respondent presented evidence that before requiring the signing of the release as a condition of receiving preliminary distribution funds, he consulted a financial manager, who advised him that requiring a release before distributing the funds was proper. We find respondent's good faith action under these circumstances to be a mitigating factor (std. 1.2(e)(ii)), although we give such mitigation very little weight in view of the fact that we did not determine whether the requirement of the release by respondent was improper.

However, respondent's claim in mitigation that he acted in good faith toward Ashjian is unpersuasive. His refusal to resolve the issue, even after the apparent settlement of March 7, 1997, is proof that respondent, for whatever reason, had no intention of delivering Ashjian's $20,946 share of the preliminary distribution funds to him.

Aggravating Factors

In aggravation, we find, as did the hearing judge, that respondent's conduct was surrounded by concealment. (Std. 1.2(b)(iii).) By providing Ashjian with K-1 forms that showed a positive balance until 1996, he misled Ashjian to rely on the fact that funds were available, even though respondent testified that the funds had been depleted by 1993. Further, respondent significantly harmed Ashjian in that he has been deprived of funds to which he was entitled no later than 1993, the time of the final distribution. (Std. 1.2(b)(iv).)

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by refusing to resolve the matter and deliver the funds even after Ashjian obtained a municipal court judgment and a bankruptcy court finding of non-dischargeability of the judgment. (Std. 1.2(b)(v).) In addition, as the hearing judge aptly noted, respondent does not appear to exhibit any remorse or even recognition of his wrongdoing. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1036-1037; *In re Rivas* (1989) 49 Cal.3d 794, 802.) Although respondent argues that he should not be criticized for his lack of remorse, since he is simply asserting his right to due process, we note that he failed to assert his right to request a trial de novo after the arbitration award or to file an appeal from the municipal court judgment. In view of respondent's failure to assert his rights at that time, we conclude that his argument in this respect is disingenuous and lacks credibility. Further, as to respondent's assertion that he lacks the ability to repay Ashjian, the record reflects that respondent had the ability to pay Ashjian for quite some time after Ashjian first obtained the municipal court judgment and during the bankruptcy court adversarial proceedings, since respondent through his attorney at that time offered to pay Ashjian $25,000 to settle the matter. And, in any event, respondent has not shown that he has made restitution/payment to Ashjian in accordance with his purpotted limited ability.

Level of Discipline

The hearing judge recommended disbarment pursuant to standard 2.2(a), which provides that willful misappropriation of entrusted funds shall result in disbarment subject to certain exceptions.

The primary purposes of the disciplinary proceedings 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; *In re Morse*, *supra*, 11 Cal.4th at p. 205.) As previously stated, 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.)

In our search to recommend the proper discipline, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts. (*In re Morse*, *supra*, 11 Cal.4th at pp. 206-207; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) By far the most serious of respondent's offenses was his grossly negligent or intentional breach of fiduciary duty and misappropriation of over $20,000, which conduct involved moral turpitude. Standard 2.2(a) sets forth disbarment as the discipline to be imposed for willful misappropriation unless either the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate. That standard further provides that if disbarment is not imposed, the discipline shall include an actual suspension of at least one year, irrespective of mitigating circumstances. In this case, the amount involved is not insignificantly small, nor do mitigating circumstances clearly predominate. Nevertheless, no fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The Supreme Court has stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) Disbarment is most frequently imposed where there are several instances of misappropriation of large sums, involving multiple clients. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 658.) However, the Supreme Court has even imposed disbarment on an attorney with no prior record of discipline in a case of a single misappropriation even though there was substantial mitigation. (*In re Abbott* (1977) 19 Cal.3d 249 [misappropriation of $29,500 of client funds, display of remorse, showing of manic-depressive condition with uncertain prognosis].)

Disbarment has also been imposed where, although the misappropriation appears to be an isolated instance of misconduct, additional aggravating circumstances are present. In *Chang v. State Bar* (1989) 49 Cal.3d 114, Chang was found culpable in one client matter of misappropriating approximately $7,900 in client funds, failing to render an accounting to his client, and making misrepresentations to his client and to the State Bar. (*Id.* at pp. 123-124, 127-128.) As in the present case, in mitigation, Chang had no prior disciplinary record, yet he never acknowledged the impropriety of his conduct. (*Id.* at pp. 128-129.) In determining that Chang should be disbarred, the court focused upon his lack of candor to the State Bar's investigator and the State Bar Court, the seriousness of the misconduct, and the lack of either remorse or restitution. (*Ibid.*)

However, the Supreme Court has indicated in other misappropriation cases that discipline of less than disbarment is warranted where extenuating circumstances show that the misappropriation of entrusted funds is an isolated event and other mitigating circumstances are present. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 [misappropriation of $1,355.75 of client funds resulting from negligence and inexperience, full restitution made with interest prior to State Bar investigation, two years' actual suspension].) In *Boehme v. State Bar* (1988) 47 Cal.3d 448, 451-452, 455, Boehme misappropriated $1,901.32 in client funds. In imposing a discipline of less than disbarment, the Supreme Court focused on Boehme's lack of prior discipline in over 20 years of practice, which the court found to be "an important mitigating circumstance" (*id.* at p. 454), and gave Boehme mitigating credit for

a life-threatening medical emergency which occurred less than one month after the misappropriation occurred (*id.* at pp. 451, 454).

Respondent's breach of his fiduciary duties and misappropriation constitute serious misconduct. Moreover, as a result of such misconduct, respondent has harmed Ashjian by depriving him, for several years, of over $20,000, far from an insignificant sum. We are troubled by respondent's lack of recognition of wrongdoing, lack of remorse, and failure to make any restitution, particularly after Ashjian obtained a municipal court judgment with respect to the $20,946 and a bankruptcy court finding of nondischargeability of the judgment. Finally, respondent's misappropriation and concealment of the misappropriation through the issuance of K-1 forms for several years "violated ' " 'the fundamental rule of [legal] ethics–that of common honesty–without which the profession is worse than valueless in the place it holds in the administration of justice' . . . ." ' [Citation.]" (*In re Menna* (1995) 11 Cal.4th 975, 989.)

[8] However, based on the cases cited above, we do not believe disbarment is needed in this case. First, this matter appears to have been an isolated instance of misconduct, as all of the misconduct found resulted from a single failure to distribute funds to Ashjian. Second, respondent has had no prior record of discipline in over 40 years of practice. Thus, although the record does not provide a justifiable explanation for the misconduct, the misconduct appears to be aberrational. In view of these two factors, combined with respondent's evidence of good character and community service, we decline to adopt the hearing judge's disbarment recommendation and instead conclude that a lengthy period of actual suspension will adequately serve the disciplinary goals of these proceedings.

RECOMMENDATION

We recommend that respondent Charles Connell McCarthy be suspended from the practice of law in the State of California for four years, that execution of the four-year 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 two years of probation and until: (a) respondent pays restitution to Nazar H. Ashjian, or the Client Security Fund if it has paid, in the amount of $27,493.22, plus 10 percent simple interest per annum from November 8, 1995, until paid, and provides satisfactory proof of such payment to the State Bar's Probation Unit in Los Angeles; and (b) if respondent's actual suspension extends for more than two years, respondent shows proof satisfactory to the State Bar Court of respondent's 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. We recommend that respondent be given credit for the period of his involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4) towards this recommended two-year period of actual suspension.

2. Respondent shall 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 shall 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 his probation. In each report, respondent shall state that it covers the preceding calendar quarter or applicable portion 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, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation during that period.

During the last 20 days of this probation, respondent shall 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 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 the assertion of applicable privileges, respondent shall fully, promptly, and truthfully answer any inquiries of the State Bar's Probation Unit and any assigned probation monitor referee 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. Within one year after the effective date of the Supreme Court order in this matter, respondent shall attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion 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.

6. 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 shall maintain that official address with the State Bar's Probation Unit in Los Angeles. Within ten (10) days of any change, respondent shall report to the State Bar's Membership Records Office and to the Probation Unit all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes.

7. Respondent's probation shall commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the terms and conditions of probation, the Supreme Court order suspending respondent from the practice of law for four years shall be satisfied, and the suspension shall be terminated.

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 one year after the effective date of the Supreme Court order in this matter or during the period of respondent's actual suspension, whichever is greater, and to provide satisfactory proof of such passage to the State Bar's Probation Unit in Los Angeles during the same period.

Rule 955

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 that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Costs

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar 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.

Order

Finally, because we reject the hearing judge's disbarment recommendation, we order that respondent's involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4) be terminated, effective immediately. This order does not affect respondent's ineligibility to practice law that has resulted or may hereafter result from any other cause.

We concur:
STOVITZ, P. J.
OBRIEN, J.*

*. Judge Pro Tem of the State Bar Court, appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS OSCAR GILLIS

A Member of the State Bar

No. 96-O-02494

Filed April 15, 2002

SUMMARY

The hearing department determined that respondent was culpable of three counts of misconduct in a single client matter. This misconduct arose from respondent's sale of his residential property to a client in exchange for a substantial portion of the proceeds of a settlement that respondent obtained for the client as the result of the wrongful death of the client's son. The hearing department recommended a stayed suspension of three years conditioned upon probation for that same period and an actual suspension of six months. (Hon. Eugene E. Brott, Hearing Judge.)

The review department found respondent culpable of additional charges of misconduct, determining that respondent (1) entered into a business transaction with a client which transaction was not shown to be fair and reasonable to the client or fully disclosed and transmitted in writing to the client in a manner which the client should reasonably have understood; (2) committed an act involving moral turpitude in entering into this business transaction; (3) failed to maintain inviolate the confidence of his client; (4) committed an act involving moral turpitude in permitting his office to provide a copy of the client's confidential settlement agreement to a third party; and (5) committed an act involving moral turpitude by attempting to mislead a State Bar investigation in response to a State Bar letter to respondent. After considering all of the relevant circumstances, the review department adopted the discipline recommendation of the hearing judge.

COUNSEL FOR PARTIES

For State Bar: Andrea T. Wachter

For Respondent: Thomas Oscar Gillis

HEADNOTES

[1a-d] 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.

Where respondent sold his residential real property to his client, the fact that the sale price was at or about the fair market value does not constitute compliance with the basic requirement that the transaction be both fair and reasonable to the client. The question is not merely whether the sale price is fair and reasonable, but rather whether the entire transaction is fair and reasonable. All of the client's circumstances must be considered to determine whether the transaction is a prudent investment for a person in the client's circumstances. Moreover, all terms of the transaction must be fully disclosed and transmitted in writing to the client in a manner that the client should reasonably understand. Where respondent failed to disclose to the client many potential problems and risks involved with the manner of the sale of the property, and it was clear that the client was not otherwise aware of these risks, respondent was overreaching and acting at least in part for his own benefit. Under these circumstances, the transaction constituted a breach of a fiduciary obligation and violated Rules of Professional Conduct, rule 3-300.

[2] **221 State Bar Act–Section 6106**
430.00 Breach of Fiduciary Duty
Where there was ample evidence demonstrating respondent's violation of his fiduciary duty to his client, arising from the unfairness of the manner in which his residential real property was sold to his client, and that the transaction was, at least in part, for his own benefit, respondent was culpable of committing an act involving moral turpitude in violation of Business and Professions Code section 6106.

[3] **213.50 State Bar Act–Section 6068(e)**
Where respondent knew, at a minimum, that a letter was being sent to a third party from his office on his letterhead and that it contained a copy of, at least, the greater portion of a client's confidential settlement agreement, respondent was culpable of failing to maintain inviolate his client's confidence in violation of Business and Professions Code section 6068, subdivision (e).

[4] **221 State Bar Act–Section 6106**
Respondent was culpable of an act involving moral turpitude in permitting his office to provide a copy of his client's confidential settlement agreement to a third party. The disclosure of the terms of that agreement placed the client at risk of action by the other party to the settlement agreement, and the sole purpose of providing the third party with information concerning the client's settlement was to aid respondent. In placing his interests above those of his client, respondent violated Business and Professions Code section 6106.

[5a, b] **221 State Bar Act–Section 6106**
Respondent's false statement in response to the State Bar's investigative letter, combined with respondent's ambiguous statement on a similar subject in response to the same letter, showed an intent to mislead the investigator. Such a deliberate attempt to mislead a State Bar investigation constitutes an act involving moral turpitude in violation of Business and Professions Code section 6106.

[6] **106.30 Procedure–Pleadings–Duplicative Charges**
213.10 State Bar Act–Section 6068(a)
Where respondent's failure to provide his client with a statutorily required disclosure statement when selling residential real property to the client was one of the factors used to determine that respondent entered into a business transaction with a client without disclosing all terms of the transaction and transmitting them in writing to the client in a manner that the client should reasonably understand, it would not be proper to again rely on that identical failure in order to establish respondent's culpability of failing to support the laws of this state.

[7] **582.39 Aggravation–Harm to Client–Found but Discounted**
While respondent's misconduct that arose in selling residential real property to a client was aggravated by foreseeable harm caused to the client, arising from the client's demonstrated inability to manage her funds or understand that she alone was responsible for making the payments to preserve the property, the client's failure to make any payments after four months or make any effort to either save or sell the property was not foreseeable, and the client must bear the primary responsibility for the resulting loss of the property.

[8a, b] **171 Discipline–Restitution**
221 State Bar Act–Section 6106
Although respondent's conduct in the sale of residential real property to his client involved moral turpitude, it was not shown by clear and convincing evidence to have been either intentionally dishonest or venal; there was potential for benefits to the client; and it was impossible to allocate responsibility for the client's loss between respondent, who acted at least partially for his own benefit, and the client, who failed to act responsibly. Under these circumstances, restitution to the client was not recommended.

Additional Analysis

Culpability
Found
213.51 Section 6068(e)
221.11 Section 6106–Deliberate Dishonesty/Fraud
221.12 Section 6106–Gross Negligence
273.01 Rule 3-300 [former 5-101]
430.01 Breach of Fiduciary Duty
Not Found
213.15 Section 6068(a)
221.50 Section 6106
Aggravation
Found
521 Multiple Acts
Mitigation
Found
710.10 No Prior Record
Declined to Find
765.50 Substantial pro bono work
Discipline
1013.09 Stayed Suspension–3 Years
1015.04 Actual Suspension–6 Months
1017.09 Probation–3 Years
Probation Conditions
1091 Substantive Issues re Discipline–Proportionality

OPINION

OBRIEN, J.:*

The hearing judge found respondent Thomas Oscar Gillis culpable of three counts of misconduct in a single client matter. Respondent sold his residential property to his client in exchange for a substantial portion of the proceeds of a settlement that respondent obtained for that client as the result of the wrongful death of the client's son. Respondent was found to have violated rule 3-300, Rules of Professional Conduct,[1] section 6106, Business and Professions Code[2] prohibiting acts of moral turpitude and section 6068, subdivision (e) requiring an attorney to maintain the confidences of his or her client. The hearing judge recommended a stayed suspension of three years conditioned upon probation for that same period and an actual suspension of six months.

Both the State Bar and respondent seek review. The State Bar argues that three additional counts involving moral turpitude (§ 6106) and one count of failure to support the law (§ 6068, subd. (a)) deserve findings of culpability. Based on these arguments, the State Bar seeks a recommendation that respondent be actually suspended for two years and until he complies with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.[3] It also seeks a recommendation that respondent be ordered to pay restitution in the sum of $110,000 to his client.

Respondent contends that the hearing judge committed error in not allowing respondent to qualify as an expert on real estate matters, giving insufficient weight to the value of the house he sold to his client and that there was insufficient evidence to find violations of section 6106 and section 6068, subdivision (e).

We agree with the hearing judge's findings of culpability of a violation of rule 3-300 and with his finding of moral turpitude in connection with respondent's transaction with his client. We also agree with the hearing judge's finding of culpability of a violation of section 6068 subdivision (e), by not maintaining confidential the amount of his client's settlement, but additionally find that violation involves moral turpitude in violation of section 6106. We further find culpability on one of two counts charging moral turpitude in respondent's response to letters of investigation from the State Bar. We recommend, as did the hearing judge, that respondent be suspended for three years, stayed, on the conditions that he be placed on probation for three years and that he be actually suspended for six months.

PROCEDURAL HISTORY

Respondent was charged with thirteen counts of misconduct involving two client matters. In the first client matter, respondent obtained a settlement of $250,000 for a client, we shall refer to as Anita, as the result of the wrongful death of her minor son. Respondent was charged with twelve counts of misconduct in his subsequent dealings with Anita. Counts 10, 11 and 12 were dismissed before trial on the motion of respondent. Those dismissals are not challenged on appeal, and we do not further consider them. Respondent was found not to be culpable in counts 7 and 8 (involving maintaining funds in trust and moral turpitude), and the State Bar does not challenge those findings. Following our review of the record, we agree with those findings of no culpability and do not further consider counts 7 and 8. In count 13, involving an unrelated client, the hearing judge found that culpability was not proven. The State Bar notes that it does not dispute the hearing judge's finding in that client matter, and following our review, we agree with that finding and do not further address count 13.

As noted, the State Bar seeks a finding of additional culpability on count four involving moral turpitude for failure to maintain inviolate his client's secrets, counts five and six, each involving alleged false state-

*. Judge Pro Tem of the State Bar Court appointed by the State Bar Board of Governors pursuant to rule 14 of the Rules of Procedure of the State Bar.

1. All further references to rules are to the Rules of Professional Conduct.

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

3. The standards are found in Title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

ments to the State Bar during the investigative stage of this proceeding, and count nine alleging that respondent willfully failed to comply with California law by not providing Anita with the written disclosures required by Civil Code section 1102 et seq. These issues are discussed *post*.

FACTS

Respondent was admitted to practice in 1967 and has been a member of the bar since that time. In August 1993 respondent was retained by Anita to represent her in a wrongful death action arising out of the death of her minor son Danny, one of her seven children. The retainer agreement provided that respondent's fee would be computed on the recovery before any deduction for costs at the rate of 25 percent before service of process and 33 1/3 percent thereafter. Respondent had previously represented Anita as one of a group of tenants, pro bono, in a successful action alleging "slum lord" conditions. In October of 1993, respondent was successful in reaching an agreement for the settlement of Anita's wrongful death action for $250,000. That settlement agreement and general release was signed by Anita and respondent on October 2, 1993, and contained a clause drafted by the insurance company, that neither respondent nor Anita would disclose the fact of a settlement or the amount of the settlement.

Between the time of respondent's retention and the time of reaching the agreement for settlement, Anita informed respondent that she was about to be evicted from her apartment. Respondent had lived for 20 years on a three acre parcel in French Camp, California[4], consisting of a house occupied by respondent as his residence and office, a cabin, a mobile home and various other buildings, including chicken coops, a barn with corrals, a swimming pool and associated improvements. Respondent offered to let Anita move onto his property rent free. Anita, her boy friend, Paco, and at least three of her children moved onto the French Camp property, occupying the cabin and mobile home. Respondent agreed to, and did, pay Anita modest sums for housekeeping following her moving onto the property.

Respondent knew that Anita lacked skills for employment other than housekeeping, was unemployed, received no financial or other assistance from the father of her children and had no other source of income. Respondent also knew that she was receiving financial assistance from Aid to Families with Dependent Children (AFDC).

The $ 250,000 settlement draft came into respondent's possession on November 16 or 17, 1993. Between the time of reaching the settlement agreement and the arrival of the settlement draft, there were discussions between respondent and Anita concerning the purchase by Anita of the French Camp property by use of a portion of Anita's share of the settlement proceeds. There is a conflict in the evidence as to who initiated that discussion. Respondent, his wife and former secretary testified that such discussion was initiated by Anita, who had overheard a discussion between respondent and his fiancee about where they would live. On the other hand, Anita asserted that the sale was the idea of respondent. There is no doubt that Anita, Paco and her children found living on the property most desirable.

While the hearing judge found that the discussion was initiated by respondent, we conclude that the evidence demonstrates that the discussion was in fact initiated by Anita and Paco.[5] The evidence clearly demonstrates that respondent, both of his secretaries and respondent's fiancee urged Anita, repeatedly, to look at other homes and to seek independent advice before purchasing the French Camp property. Respondent not only advised Anita in writing to seek independent counsel, but had follow-up discussions with Anita urging her do so, and offered to pay for any charges that were incurred. Respondent had one of his secretaries sit down with Anita and go over a directory of attorneys seeking to select an attorney to provide

4. French Camp is located in San Joaquin County.

5. Anita's first knowledge that the property was for sale appears to have been an overheard conversation between respondent and his fiancee.

advice to her. Anita left that discussion to talk with Paco, and on her return stated, in effect, she did not want to see another attorney. It is also clear that, independent of directions from respondent, one of the secretaries strongly urged Anita to look at other property and obtain independent advice.

In spite of these precautions by respondent, we must further examine the transaction in light of the charge of a violation of rule 3-300. In November 1993 respondent gave Anita a copy of an appraisal dated Augnst 28, 1992, showing the fair market value of the property to be $178,500.[6] As found by the hearing judge, on November 10, 1993, respondent gave Anita a letter, in effect, offering to sell the French Camp property to her for $175,000. That letter noted that the loan on the property was about $115,000 at an adjustable rate of 11 percent and that Anita would have to pay respondent $60,000 for his equity and also pay $50,000 to reduce the loan and "[y]ou would assume and pay the balance of the loan." That letter concluded: "You should look at other homes you might be interested in to buy (sic) before you make a decision on mine. You also should consult with another attorney to make sure the purchase would be in your best interest." Although Anita did not recall seeing that letter, the hearing judge found that such a letter was delivered to her. We agree.

At the time of that letter, the French Camp property was encumbered by a deed of trust securing a "line of credit" loan from Beneficial California Inc. (Beneficial) in the maximum amount of $116,000 in favor of respondent and his former wife. The monthly payment established by the promissary note was $1,104.69 plus insurance charges. The initial provision on the deed of trust securing that loan stated "[i]f trustor voluntarily shall sell or convey the Property, in whole or part, or any interest in that Property . . . without obtaining the written consent of [Beneficial], then [Beneficial], at its option, may declare the entire balance of the loan plus interest on the balance due and payable."[7]

At the time of respondent's November 10 letter to Anita, respondent was in arrears two payments of $1,045 each on the loan from Beneficial. This was not disclosed to Anita. In correspondence to Beneficial, a letter from respondent's office advised the Beneficial representative that he had just settled a large case and provided that representative a copy of Anita's confidential settlement agreement, showing the amount of the settlement reached on behalf of Anita. While that letter was not signed by respondent, it was sent on his letterhead, from his office and bore a signature in his name followed by initials. The hearing judge found that respondent knew the letter was being sent and, following our review, we reach the same finding, although we are unable to determine that respondent knew the exact language or content of that letter.

The record shows that Anita "dropped out" of high school in the eleventh grade as the result of the birth of her first child, never held a job, had no credit record, never had a checking account or credit card and had a bill with the telephone company for approximately $500 that she was unable to pay. During the course of negotiations for settlement of the wrongful death claim, respondent filed, as Anita's attorney, a dissolution of marriage action.

The record also shows that, at the same time, respondent was substantially indebted in addition to his delinquent obligations to Beneficial. He owed $22,000 to his former wife as an equalization payment on the dissolution of his marriage, $4,200 on a judgment against him, and various other bills, including salary to his secretary, law office advertizing bills and personal loans, all approximating a total of $60,000. We note however, that the equalization payment to his former wife was not due until that sale of the French Camp property and that the remaining creditors were not then pressing for payment.

The deposit and disbursement of the $250,000 settlement draft occurred on November 17, 1993, and a written agreement between respondent and Anita for

6. The only other evidence of the valne of the French Camp property is the testimony of respondent, who testified that, in his opinion, the fair market value of the property was $210,000 at the time of the sale to Anita.

7. In addition, the credit line account agreement provided a prepayment penalty of six months interest on any amount of prepayment in excess of 20 percent of the outstanding balance within a 12-month period.

the sale of the French Camp property was executed that same day. That agreement recited that respondent was Anita's attorney, that she had been advised to seek independent counsel, had time to do so, but elected not to follow that advice. That written agreement provided that Anita would accept the house in "as is" condition, that there would be no escrow or title insurance, that Anita would pay respondent $60,000 cash for his equity, pay $50,000 to Beneficial to reduce the existing loan and assume the balance of the existing loan. The agreement recited the approximate balance on the Beneficial loan to be $115,590 with an interest rate of 11 percent that was adjustable, that there were no liens on the property other than to Beneficial and that respondent would not repair an existing roof leak. The agreement further recited that Anita had been provided a recent appraisal showing the value of the property to exceed $175,000. That was the appraisal dated August 28, 1992, that we noted, *ante*, which was obtained in connection with the line of credit loan obtained by respondent and his then wife from Beneficial.

Respondent deposited the fully endorsed settlement draft into his client trust account, obtained instant credit from the bank for that deposit, wrote himself a check for $62,000, representing his attorney's fees of 25%, and wrote a check to Anita for $186,009.[8] That check to Anita was immediately deposited into a new account opened in her name. Drawing on Anita's new account, respondent immediately wrote, and Anita signed, a check in the amount of $50,000 to Beneficial and a series of 16 checks, totaling $60,000, to various other creditors of respondent. Included in this group of 16 checks was a payment to Beneficial for the installment accruing at the end of November 1993. This left a total of $76,009 in Anita's account. Respondent promptly delivered the $50,000 check to Beneficial and gave to Anita a deed to the property in apparently recordable form.[9]

Anita testified that she did not know what an escrow was or what it was for, what title insurance was or what it was for, what function a real estate broker performed or that she should take any action to formally assume the Beneficial loan. Respondent did not order a title report or provide Anita any other evidence of the condition of title, did not provide Anita with a real estate transfer statement as required by former section 1102.6 of the Civil Code,[10] nor did he offer or provide any assistance to Anita in assuming the Beneficial loan. Respondent advised Anita that it was up to her whether or not she recorded the grant deed, but that if she did so, there would be an increase in taxes. He also told her that, in the event he were sued, he would let her know before any liens could attach to the property. Respondent did not know whether there was a clause in the incumbrance recorded by Beneficial allowing a buyer to assume the Beneficial loan.

A long time district manager for Beneficial made clear that Beneficial would not permit the assumption of a loan by a person with Anita's record, which included being on welfare, unemployed, the sole support of four children and with no source of income. Beneficial would not rely on Anita's bank account because there was no assurance that it would remain available in the event of a default. The monthly statements were addressed to respondent following the execution of the contract of sale and up to the time of foreclosure, and the foreclosure was in respondent's name.

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8. Disposition of the balance of the $250,000 is not explained in the record. ($62,000 plus $186,009 equals $248,009.) A check in the amount of $1,991 cleared that account November 26, 1993.

9. Respondent received a deed from his former wife, dated November 15, 1993. That deed was recorded February 17, 1994. In February 1994 Anita expressed concern to respondent about the form the of the deed she had received from him, and he provided her a new deed, again in apparently recordable form.

10. Beginning in January 1987, former section 1102.6 of the Civil Code (enacted by Stats. 1985, ch. 1574, § 2, operative Jan. 1, 1987, and amended by Stats. 1986, ch. 460, § 5; Stats. 1989, ch. 171, § 1; Stats. 1990, ch. 1336, § 2; Stats. 1994, ch. 817, § 2; Stats. 1996, ch. 240, § 2; Stats. 1996, ch. 925, § 1; Stats. 1996, ch. 926, § 1.5; Stats. 2001, ch. 584, § 1) required covered residential real estate sellers to make detailed disclosures regarding the condition of the real estate using a specific form "real estate transfer disclosure statement." That statutory form disclosure statement was modified in 1990 and 1994. In 1996, a second version of the statutorily prescribed statement was enacted and became effective July 1, 1997 (Civ. Code. § 1102.6).

Anita made the payments to Beneficial that were due through April 1994, although the March 1994 payment was made in April, and in March she contacted respondent with a request that he either buy the property back or return her money. Some time prior to the middle of March 1994, Paco and a friend came to respondent's office carrying a baseball bat resulting in a call for law enforcement. In a March 14, 1994 letter, respondent advised Anita that he would not repurchase the house. In that same letter he provided advice on the maintenance of the pool and offered to plow the weeds and repair the pool and hot tub. That letter contained the following statement: "If you don't want the house, I will help you fix it up to sell it. You have more than $110,000 in equity. The prices are now moving up. I believe if you clean up the yard, you can sell it for more than you paid for it." This was followed by a series of letters from respondent to Anita covering April to August of 1994, advising her of the consequences of her failure to make payments to Beneficial and urging her to list the property for sale in order to obtain some return on her equity in the property. In April he asked Anita not to come to the office without an appointment because of recurring disturbances caused by Paco.[11] In the absence of further payments, Beneficial exercised its right of sale under the deed of trust in the fall of 1994, and Anita and her family were evicted from the property in December 1994.

DISCUSSION OF CULPABILITY

Respondent argues that, in selling the property to Anita, he complied with the requirements of rule 3-300, that he advised Anita to seek independent counsel, and that the hearing judge failed to give weight to the value of the property he sold to Anita. He further argues that there is not clear and convincing evidence of his moral turpitude in violation of section 6106 in his entering into that transaction with his client and contends that the evidence does not support a finding of violation of section 6068, subdivision (e), as he claims there is no evidence that he provided Beneficial with the confidential information concerning Anita's settlement. Finally, he argues at length that the hearing judge committed error in not allowing him to testify as an expert on real estate matters.

On the other hand, the State Bar urges that respondent committed an additional violation of section 6106 in sending the confidential settlement agreement to Beneficial, and is culpable of two additional violations of that section in his alleged untruthful responses to State Bar investigators. Finally, it urges that respondent is culpable of failing to support state law in violation of section 6068, subdivision (a) by failing to provide Anita with the disclosures required by Civil Code section 1102 et seq.

We first address the arguments of respondent, followed by our discussion of the position urged by the State Bar.

Counts One and Two, Rules 3-300 (Business Transaction with a Client) and Section 6106 (Moral Turpitude)

When an attorney enters into a business transaction with a client, the attorney must, at his or her peril, comply with rule 3-300.[12] A violation of any part of that rule gives rise to culpability. (Cf. *Read v. State Bar* (1991) 53 Cal.3d 394, 411 [construing the predecessor to rule 3-300, whose language was substantially identical to that of the current rule 3-300].) "The relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealing between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness [citation.]." (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) "When an attorney-client transaction is involved, the attorney

11. We note that, in February 1994, Anita closed her account with the bank, withdrawing somewhere between $10,000 and $16,000.

12. That rule provides: "[An attorney] shall not enter into a business transaction with a client; . . . unless each of the following requirements have been satisfied: [¶] (A) The transaction . . . and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction . . ."

bears the burden of showing that the dealings between parties were fair and reasonable and were fully known and understood by the client. [citation.]" (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372-373.)

With these principles in mind, we look to the facts and circumstances of the transaction between respondent and Anita. Respondent knew that any significant recovery in the wrongful death action would terminate even her financial aid from AFDC. By the time of the settlement, he knew that Anita was, at best, naive in financial matters, if not irresponsible.

On the other hand, respondent was two months behind in making payments on the loan from Beneficial and had assured Beneficial that he was receiving money from Anita's settlement, had made an unsuccessful effort to sell the property some three years earlier and was indebted to others, including his secretary, his former wife[13] and a judgment creditor for a total in excess of $60,000. For all practical purposes, the deposit of the settlement funds, the agreement for the sale of the property and the disbursement of the funds occurred simultaneously. On that same day, respondent delivered a grant deed to the property to Anita with the advice that, if she recorded it, her property taxes would be increased. He made no mention of the documentary transfer tax that would be imposed at the time of recording.

At the time of delivering the deed to Anita, respondent had not recorded the deed from his former wife conveying her interest in the French Camp property to him.[14] While he claimed to have personally done a title search to satisfy himself that he was conveying good title, there was no evidence of the extent of that search or what he included in that purported search. Respondent testified that he did not know of the "Notice of Code Violation" recorded by the San Joaquin County Redevelopment Department, giving notice of code violation consisting of building without a permit and electrical wiring without a permit. Nor did respondent have any concern for the recorded deed of trust that clearly provided that, if he should voluntarily divest himself of title, Beneficial could declare the entire balance of the loan due and payable.

Respondent testified that such "due on sale" provisions were not enforceable, and he was not concerned with whether Anita could assume the Beneficial loan. Respondent's understanding of the law is incorrect, as well established authority shows. In 1982 the Garn-St. Germain Depository Institutions Act (12 U.S.C. § 1701j-3) preempted state control, making all but a few "due on sale" clauses in deeds of trust nationwide enforceable, rendering ineffective *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943. (See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Security Transactions in Real Property, § 81, pp. 586-588; 4 Millar & Starr, Cal. Real Estate (3d ed. 2000) § 10:108.) We note that the Beneficial encumbrance was not a "purchase money deed of trust" and thus Beneficial was not precluded by Code of Civil Procedure section 580b from seeking a judicial foreclosure, that may not limit the recovery to the value of the property. This left Anita at risk in that Beneficial had the option, on learning of the sale by respondent, to declare the balance on the note secured by the deed of trust due and exercising its right of sale on the deed of trust or initiating a judicial foreclosure under Code of Civil Procedure section 725a.

For purposes of his own, and in contravention of normal business practice, respondent prepared for Anita's signature some 13 or 14 individual checks totaling $60,000, the amount he was to receive for his equity in the French Camp property, payable to his creditors directly from Anita's account. While respondent was entitled to a down payment of $60,000, such unique procedure was totally without benefit to Anita. While it is true conditioning the sale to Anita on the payment by her of $50,000 to Beneficial increased Anita's equity, to her benefit, it did not serve to reduce the monthly payment she was to make to Beneficial, or otherwise reduce her current cash demands to make her more secure in her ownership of the property. It

13. At least a portion of the sums due his former wife did not become payable until the sale of the French Camp property.

14. The record does not show whether the decree of dissolution that may have conveyed the property to respondent was recorded.

did, however serve to reduce respondent's risk in the event Beneficial elected to undertake a judicial foreclosure rather than exercise their rights under the power of sale in the deed of trust.

[1a] Respondent argues that he did give Anita notice in writing recommending that she consult with another attorney as required by rule 3-300, and we have found that to be true. Respondent complains that the hearing judge gave scant attention to the value of the property at the time of Anita's purchase. Because respondent has the burden to prove that the transaction was fair, he had the burden to prove the price Anita paid for the property was not excessive compared to the fair market value. The only evidence before us, as to the property's fair market value, is an appraisal estimating the value at $178,500 dated approximately one year before the sale and respondent's testimony placing the fair market value at $210,000. Thus, we must weigh the transaction with the view that the sale price was in the range of the fair market value of the property. This record does not demonstrate that the fundamental requirement of rule 3-300 has been complied with. The heart of that rule requires that the terms of the transaction be both "fair and reasonable to the client." The fact that the sale price was at or about the fair market value does not constitute compliance with that basic requirement. The question is not merely whether the sale price was fair and reasonable in an abstract sense, but rather whether the entire transaction, in the language of rule 3-300, was "fair and reasonable to the client." Further, we must consider all of the circumstances of the client to determine if the transaction was a prudent investment for a person in her circumstances. (*Rose v. State Bar (1989)* 49 Cal.3d 646, 662-663.) In weighing the circumstances of the transaction, we take particular note of the observation of the Supreme Court in *Hunniecutt v. State Bar, supra,* 44 Cal.3d at page 370; that "[a] client who receives the proceeds of a judgment or settlement will often place great trust in the investment advice of the attorney who represented him in the matter. This is especially likely when the client is unsophisticated and a large amount of money is involved. This trust arises directly from the attorney-client relationship, and abuse of this trust is precisely the type of overreaching that rule 5-101 [which was the predecessor to rule 3-300] is designed to prevent." Although we do not find a breach of trust in respondent's dealings with Anita, we do find there are a number of areas on the periphery of the transaction that preclude it from being fair and reasonable to Anita.

[1b] It is clear that, at the time of the sale, the property was encumbered with a deed of trust containing a "due on sale" clause which, based on the record before us, was enforceable. This information was not given to Anita; nor was Anita informed that Beneficial had the apparent right to collect the entire balance due on the promissory note secured by the French Camp property or to exercise their right of sale under the deed of trust as the result of the sale. Anita was not provided title insurance; she was not informed that such insurance was usual and customary; nor was she advised as to the purposes or benefits of such insurance. She was not advised to consult a real estate broker; nor was she informed of the services such a broker might provide her. She was not given the option of having the transaction handled through a formal escrow as is customary; nor was she advised of the services such an escrow agent might provide. She was not advised of the fact that a notice of code violations had been recorded, or of the effect that that recording might have on her future use, improvement or sale of the property. She was given an option not to record the deed from respondent on the basis that such a recording would trigger a reassessment of the property and a probable increase in taxes. She was not advised that by failing to advise the county assessor of the transfer of the title she subjected the property to a later assessment for escaped taxes, along with interest and penalties. For property tax purposes a deed need not be recorded, but Revenue and Taxation Code section 480 mandates, with exceptions not here relevant, that a buyer file a "change of ownership statement" within 45 days of the date of change of ownership. The failure to file such statement results in a statutory penalty of $100 or 10 percent of the assessed taxes. (Rev. & Tax. Code, § 480, subd. (c).) Finally, respondent failed to provide Anita with the disclosure statement as mandated by former section 1102.6 et seq. of the Civil Code.

[1c] Respondent argues that each of these omissions was for the purpose of reducing the cost to Anita. What he fails to acknowledge is that Anita was not given the opportunity to exercise any choice in these matters. She did not know what title insurance was, did not know what escrow was, did not know what a real

estate broker did, and had no idea of the risks she was assuming because of the rights of Beneficial to take action against the property. Further, respondent's arguments concerning costs savings are only partially true because in some cases he would have typically borne all or part of the expenses (brokers commission typically paid out of the proceeds of sale - escrow charges, etc.). We conclude that under the circumstances, the terms of the transaction were not fully disclosed to Anita, nor were all of the terms transmitted in writing to Anita in a manner that should have reasonably been understood by her.

When these deficiencies in the conduct of respondent are combined with the relationship between the parties and the manner in which the transaction was carried out, it is clear that respondent has failed to sustain " the burden of showing that the dealings between parties were fair and reasonable and were fully known and understood by the client [citation.]." (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d at 372-373.)

[1d] We cannot help but conclude that at least a partial purpose of respondent entering into the agreement for the sale of his long time home and office property was for his personal benefit, and not that of Anita. He had a fiduciary duty to work for Anita's benefit alone. (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d 362.) And that duty was clearly breached by the terms of the agreement and manner in which it was handled. As we have noted, respondent failed to disclose many potential problems with the sale and the assumption of the loan, the risks of no title insurance and the risks of not recording the deed. It is obvious that Anita was not otherwise aware of these risks. Nor can we overlook the manner in which the transaction was handled, occurring simultaneously with the disbursement of the proceeds of the settlement of Anita's wrongful death case, the opening of Anita's first bank account and the disbursement of funds directly to respondent's creditors. Each of these factors are considered and contribute to our findings that respondent was overreaching and acting in at least part for his own benefit. We conclude that the transaction was a breach of a fiduciary obligation and is precisely what rule 3-300 is designed to prevent.

Respondent argues that the hearing judge erred in not permitting him to qualify as an expert on real estate transactions. The errors of law we have outlined impeach respondent's qualifications as an expert, but even aside from that, we find no abuse of discretion on the part of the hearing judge in refusing to qualify respondent as an expert. "The trial court has broad discretion to determine whether a particular witness qualifies to testify as an expert. *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 738,...." (1 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar 3d ed. 1997) §29.18, p. 585 (hereafter Jefferson).) It is equally clear that when the trier of fact is able to form a conclusion from the evidence with the same intelligence as an expert, expert testimony is not admissible. (*McCleery v. City of Bakersfield* (1985) 170 Cal. App.3d 1059, 1074, fn. 10; Jefferson, § 29.23, p. 587.) In any event, the hearing judge gave respondent wide latitude in his testimony, allowing him to voice many opinions on his transactions with Anita. We find no abuse of discretion in the hearing judge's refusal to qualify respondent in real estate transactions.

[2] In addition to the charge of a violation of rule 3-300, respondent is charged with moral turpitude in selling the French Camp property to Anita. We do not see respondent's conduct on this record as venal, intentionally dishonest or corrupt. The evidence demonstrates that the property was worth at least what Anita paid for it, and respondent appeared substantially motivated to see Anita enjoy the property as owner, which she strongly desired. Moreover, not every wilful violation of rule 3-300 warrants a finding of moral turpitude. But those points do not exonerate respondent of the moral turpitude charges before us. For many years, moral turpitude has been broadly defined. (E.g., *In re Mostman* (1989) 47 Cal.3d 725, 736-737; *In re Strick* (1983) 34 Cal.3d 891, 901-903; *In re Higbie* (1972) 6 Cal.3d 562, 569-570.) Moral turpitude typically occurs whenever an attorney intentionally breaches a fiduciary duty to a client (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d 362, 372-373; *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472-473), and may occur even if an attorney acts non-deliberately to breach a fiduciary duty to a client where the breach occurs as a result of gross carelessness and neglect. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208, citing, inter alia, *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020.). As we have discussed in detail in connection with respondent's violation of rule 3-300, *ante*, there was ample evidence

demonstrating his violation of his fiduciary duty to his client, arising from the unfairness of the manner of the handling and the peripheral aspects of the transaction, and that the transaction was, at least in part, for his own benefit. As such, we are compelled to the conclusion that respondent violated section 6106 in connection with the sale of his property to Anita.

Counts Three and Four, Section 6068, Subdivision (e) (Maintain Confidences of Client), and Section 6106 (Moral Turpitude)

[3] In counts three and four, respondent is charged with violating his client's confidence by disclosing to Beneficial the amount of Anita's settlement of her wrongful death claim to Beneficial and for moral turpitude in that conduct. As we have noted, respondent denied authoring the letter to Beneficial enclosing the confidential settlement agreement resolving Anita's wrongful death claim. The hearing judge concluded that, at a minimum, respondent knew that letter was being sent from his office on his letterhead and that it contained a copy of, at least, the greater portion of the confidential settlement agreement. We concur in that finding, and further find that his knowledge of the sending of that letter renders him culpable of a violation of section 6068, subdivision (e).

[4] Following our consideration of the specific language of section 6068 subdivision (e), we, contrary to the finding of the hearing judge, find that respondent is culpable of moral turpitude in permitting his office to provide a copy of Anita's confidential settlement agreement to Beneficial. That section requires an attorney "[t]o maintain inviolate the confidence, *and at every peril to himself or herself to preserve the secrets, of his or her client.*" (Emphasis added.) The disclosure of the terms of that agreement placed Anita at risk of action by the insurance company that was a party to that settlement agreement. The sole purpose of providing Beneficial with information concerning Anita's settlement was to aid respondent in gaining time in which to bring his delinquent payments current, in violation of that subdivision of section 6068. In doing so he placed his interests above those of his client in violation of section 6106.

Counts Five and Six, Section 6106 (Moral Turpitude in Response to Investigative Letters)

In count 5, the State Bar charges that respondent lied in his response to an investigative letter sent by the State Bar, dated May 13, 1996, when he stated that he had not deposited Anita's settlement check in his trust account, but that at the bank's suggestion he had divided the settlement, deposited his fee in his general account, less $2,500 that was paid directly to him, and deposited $186,000 into Anita's account. The record shows the entire $250,000 was deposited into respondent's trust account, from which respondent's fee was taken and the balance transferred to Anita's newly opened account. While respondent's response to the State Bar's letter was not accurate, it is true that none of the funds came to rest in respondent's trust account. It is clear that respondent's response to the State Bar was negligent, but we do not find the gross negligence necessary to elevate that conduct to moral turpitude. Further, we find no benefit to respondent, either expected or actual that suggests a willful attempt to mislead the State Bar.

In count 5, the State Bar also charges respondent lied in his response to the May 13, 1996, letter when he stated that he paid Anita's December 1993 payment as a gift. We disagree. It is true that the payment made on November 17, 1993, covering the payment due November 28, 1993, was drawn on Anita's new account along with 15 or 16 additional checks, all prepared by respondent. The total of these checks represented the $60,000 that Anita paid respondent for the sale of the French Camp property. Thus, while the check was signed by Anita and drawn on her account, it did represent a portion of funds that were due respondent for the sale of the property under the terms of the agreement between them.

We conclude there is no clear and convincing evidence of moral turpitude in respondent's letter in answer to the State Bar's letter of inquiry dated May 13, 1996.

In count 6, the State Bar charges that in response to a July 2, 1997,[15] letter, respondent lied when he stated that after the sale to Anita, she assumed "the [Beneficial] note and mortgage as a part of our Contract of Sale. . . .They billed her for the payments after that."

[5a] Under the "Contract of Sale" for the French Camp property, paragraph 7 provided that Anita "also agrees to assume and pay the loan at Beneficial . . . ." Thus, as between respondent and Anita, she had assumed the loan. It is equally clear that as between Anita and Beneficial no such assumption took place. Standing alone, such a statement did not show that respondent was referring to a formal assumption by Anita of respondent's obligations to Beneficial when his response to the July 2, 1997, inquiry by the State Bar was made.

[5b] It is clear that Beneficial never billed Anita for the payment on the property and that they continued to bill respondent. It is equally clear that respondent knew that at the time of his response to the State Bar investigative letter of July 2. Contrary to the holding of the hearing judge, we find that this evidence, combined with respondent's ambiguous statement concerning Anita's assumption of the loan, shows an intent to mislead the investigator into believing that Anita had successfully assumed respondent's obligations under the Beneficial loan. We find that such a deliberate attempt to mislead a State Bar investigation constitutes moral turpitude in violation of section 6106.

Count Nine, Section 6068, Subdivision (a)
(Failure to Support State Law)

The State Bar contends that respondent's failure to provide Anita with the disclosure statement required by Civil Code section 1102 et seq. constitutes a violation of section 6068, subdivision (a). That subdivision requires an attorney to support the Constitution and laws of the United States and of this state. The hearing judge concluded that because the contract of sale with Anita contained a provision that the French Camp property was sold "as is," Anita waived the requirements of Civil Code section 1102 et seq. and that respondent was not required to comply with the provisions of Civil Code section 1102.6 as it then existed. We disagree with the hearing judge's conclusion regarding a waiver of the Civil Code section, but reach the same conclusion regarding respondent's culpability under this charge using different reasoning.

[6] It is true that at the time of respondent's sale of the French Camp property the apparent controlling law permitted a waiver of the requirements of Civil Code section 1102 et seq. (*Loughrin v. Superior Court* (1993) 15 Cal. App.4th 1188.) However, as *Loughrin* notes at page 1195, "a knowing and explicit waivers of the benefits of section 1102 et seq. can be effective." We conclude that there was neither a knowing nor an explicit waiver of those sections by Anita in the contract of sale. Anita had no knowledge of those Civil Code sections; nor is there any evidence that the existence or import of those sections was explained or described to her. However, this omission by respondent was charged in count one as one of the elements constituting his violation of rule 3-300 and is one of the factors that we use to determine that there was a violation of rule 3-300 as charged in that count. To again rely on that identical failure to provide a disclosure statement as a separate ethical violation is not proper. (Cf. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279.) We conclude that respondent is not culpable of a violation of section 6068, subdivision (a) as charged in count nine.

DISCIPLINE

In determining discipline we look first to mitigating and aggravating circumstances, each of which must

15. We invite attention to two factors that appear to have unduly prolonged the resolution of this matter. First, we note that the matter was taken under submission on March 1, 2000, and the decision of the hearing judge was not filed until January 22, 2001, in clear violation of rule 220(b), Rules of Procedure of the State Bar. Second, the first investigative letter to respondent was dated May 13, 1996, while the record shows no follow up on that investigation until August 18, 1997, some 15 months later. These factors, in combination, represent a delay of almost 26 months, the majority of which appear unjustified. While the delay is not jurisdictional (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 396), it is an unacceptable delay in public protection and determining the rights of respondent.

be established by clear and convincing evidence (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699; Std.1.2(b), (e).).

Mitigation and Aggravation

At the time of the found misconduct respondent had practiced in this state for 26 years without prior discipline. "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269 [20 years without complaint]; Std. 1.2(e)(i).) We agree with the hearing judge's finding that there is no clear and convincing evidence of significant pro bono activities. We note that respondent has not pursued that issue on appeal.

[7] The hearing judge found that respondent's misconduct was aggravated by harm caused to Anita by that misconduct. We agree in part, but believe that finding needs some additional explanation. It is true that Anita lost the property as the result of Beneficial exercising its right of sale under the deed of trust. That occurred as the result of Anita's lack of ability to manage her funds or understand that she alone was responsible for making the payments to preserve the property. It is clear that this lack of ability on the part of Anita was a risk that was foreseeable by respondent. However, we do not agree that Anita's failure to make any payments after four months, or make any effort to either save or sell the property was foreseeable. Anita must bear the primary responsibility for the loss of the property. Had she preserved any of her funds she would have at least been able to sell the property and recover at least some portion of her investment. We do not find that her inability to accomplish this small task was foreseeable. Following the sale, respondent repeatedly wrote Anita urging her to make the payments to Beneficial and offering to help clean up the property in order to permit her to sell it prior to foreclosure.

We do find respondent culpable of multiple offenses in his violation of rule 3-300 and three counts of moral turpitude, in breaching his duties to Anita in the property transaction, in sending the settlement agreement to Beneficial and in his response to the State Bar's second investigative letter. We do consider these multiple offenses to be aggravating. (Std. 1.2 (b)(ii).)

Discussion Regarding Discipline

[8a] We find that although respondent's conduct in the sale of the French Camp property to Anita involved moral turpitude, it has not been shown by clear and convincing evidence to have been either intentionally dishonest or venal. Even in retrospect, the potential for benefits to Anita and her children in the sale can be seen. It is impossible to allocate responsibility for Anita's loss between respondent and Anita. It is for this reason that we reject the State Bar's request that any recommendation for discipline include an order for restitution.

[8b] It is clear that at least some portion of the rationale for respondent entering into the sale was personal benefit. Nonetheless, had Anita acted responsibly the sale could have proven beneficial to her. In this sense, the sale of the property here is distinguishable from cases in which the total control of the investment was in the hands of the attorney or his associates. (See *Rose v. State Bar, supra,* 49 Cal.3d 646 [investment in restaurant equipment]; *Hunniecutt v. State Bar*, supra, 44 Cal.3d 362 [loan to attorney, originally secured, converted to unsecured].)

Violation of the predecessor rule to 3-300 has resulted in a wide range of discipline, from private reproval to two years' actual suspension. (*Hunniecutt v. State Bar*, supra. 44 Cal.3d at p. 373.) In arguing that respondent be actually suspended for two years as the result of his misconduct, the State Bar relies on *Rose v. State Bar, supra,* 49 Cal.3d 646, *Beery v. State Bar* (1987) 43 Cal.3d 802 and *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233.

In *Rose* the attorney was found culpable of willfully failing to communicate with clients, failure to promptly discharge obligations regarding client funds, improper solicitation of clients and improper business dealings with a client. Rose withheld proceeds of a personal injury settlement from a client for three years and delayed paying an expert he had hired, and then satisfied these obligations only after disciplinary proceedings had been commenced against him. In additional matters, Rose was found culpable of failing to promptly return a client's file and culpable of soliciting the victim of a helicopter crash on the victim being released from

intensive care, then failing to communicate with him and another client involved in that same crash. Also, Rose settled a wrongful death action on behalf of the deceased's widow. He then persuaded the widow to invest $70,000 of her approximately $93,000 settlement in a restaurant franchise without disclosing that he was receiving compensation as a promoter for that franchise. Rose was actually suspended for two years.

In *Beery v. State Bar, supra,* 43 Cal.3d 802 the client's personal injury action was settled for $250,000. The attorney solicited a loan from the client for a satellite venture without telling the client of his personal involvement in the venture or other material facts including the fact that funds were not available from other sources. The attorney personally guaranteed the investment, although he knew he could not perform on that guarantee. The attorney was found culpable of moral turpitude in soliciting the loan. In imposing a two-year actual suspension, the Supreme Court noted that the attorney persisted in his failure to recognize the seriousness of his misconduct. A two-year actual suspension was imposed in *In the Matter of Johnson, supra,* 3 Cal. State Bar Ct. Rptr. 233 where the attorney exploited a vulnerable relative for whom she had obtained a recovery in a personal injury action by borrowing the bulk of the relative's recovery and not repaying the loan. Moral turpitude as well as serious aggravation was found and the attorney was actually suspended for a period of two years.

In *Hawk v. State Bar* (1988) 45 Cal.3d 589, the attorney obtained a deed of trust on a client's property, without complying with the predecessor to rule 3-300, to secure his fee. He was also culpable of moral turpitude by misleading the clients in the time they had to pay off their indebtedness and changing the amount of indebtedness after the note had been executed. The Supreme Court adopted a recommendation of six months actual suspension, noting that there was mitigation and that, at that time, the application of the rule to Hawk's circumstances was a matter of first impression.

On the other hand, in *Connor v. State Bar* (1990) 50 Cal.3d 1047, the review department of this court recommended that the attorney be actually suspended for two years, but the Supreme Court rejected that recommendation and imposed the discipline of a public reproval. Connor had acquired title to the client's property in Lake Arrowhead and then obtained a home equity loan on the property, falsely stating on the loan application that his address was that of the Lake Arrowhead property, that he was then renting and buying the property from the client, and, by a check mark, that he intended to occupy the property as his primary residence. He then provided the proceeds of the loan to the client to avoid foreclosure. In light of the attorney's strong testimony that he did not intend to mislead the lender, the Supreme Court determined that the evidence did not support the review department's finding that Connor intended to deceive the lender.

In *Hunniecutt v. State Bar*, supra, 44 Cal.3d 362, the State Bar hearing panel recommended actual suspension for 90 days and that Hunniecutt make restitution. The Supreme Court adopted that recommendation. In that case, the attorney had abandoned two clients and violated the predecessor to rule 3-300. He persuaded his client, by personally guaranteeing the loan, to invest the proceeds of a personal injury settlement that he obtained for the client in an unsecured real estate transaction in which Hunniecutt had an interest. The real estate venture resulted in large losses to the attorney, and he was unable to repay the loan. The Supreme Court affirmed a finding of moral turpitude.

In *Ritter v. State Bar* (1985) 40 Cal. 3d 595, it was found that, although the transaction was reasonable, there was a violation of the predecessor to rule 3-300, because no opportunity was given for the client to discuss the transaction with a third person. There, the loan agreement between Ritter and the client was signed by the client upon presentation. Ritter was suspended for 60 days. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, the attorney loaned his client $100,000 without complying with rule 3-300. Thereafter, he represented the client, sued the client and was a co-defendant with the client, resulting in repeated violations of the Rules of Professional Conduct, but no finding of moral turpitude. In mitigation Lane showed 25 years of practice without discipline and a good reputation in the community. Lane was suspended for 60 days.

In considering the cases relied on by the State Bar, we find that they demonstrate more egregious miscon-

duct than that before us. In both the *Berry* and *Johnson* matters the attorney was found culpable of moral turpitude in the transaction with the client. While no moral turpitude was found in the attorney's transaction with his client, in *Rose v. State Bar*, supra, 49 Cal.3d 646 there was significant, if not controlling, additional misconduct resulting in a two-year actual suspension. Further, in each of the cases relied on by the State Bar, there was far less fairness, or potential for benefit to the client, in the dealings between the attorney and client.

Although we find no case setting forth facts that directly guide us, we look to *Hawk, Hunniecutt, Ritter* and *Conner* for assistance. In *Hunniecutt* it appears that the transaction between the attorney and client lacked the potential for fairness and reasonableness that existed in respondent's sale of the French Camp property to Anita. In our judgement these findings of three counts of moral turpitude make the present case more serious than *Hunniecutt.* In *Conner*, the Supreme Court rejected the finding of moral turpitude and the recommended two-year period of actual suspension and imposed a public reproval. Again in *Ritter*, the Supreme Court affirmed the transaction was fair and reasonable, but also affirmed that there was a violation of the rule concerning transactions between attorney and client. On balance, we find respondent's action to have been more egregious than that of the attorneys in either *Ritter* or *Hunniecutt*, and roughly equivalent to the misconduct of the attorney in *Hawk*.

Therefore, we adopt the recommendation of the hearing judge that respondent Thomas Oscar Gillis be suspended from the practice of law for a period of three years, that execution of that three-year suspension be stayed, and that he be placed on probation for three years on each of the conditions recommended by the hearing judge in his decision filed on January 22, 2001, including the condition that respondent be actually suspended from the practice of law for six months.

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 calender days, respectively, after the effective date of the Supreme Court's order in this matter.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court's order in this matter and that he be ordered to furnish satisfactory proof of his passage of that examination to the State Bar Probation Unit within that one-year period.

COSTS

Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6068.10 and that such costs be made payable to accordance with Business and Professions Code section 6104.7.

We concur:
STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MELANIE RAE BLUM

A Member of the State Bar

No. 96-O-03531

Filed May 24, 2002

SUMMARY

In this original disciplinary proceeding, the State Bar charged respondent with misconduct in two client matters. The parties entered into a stipulation as to facts and conclusions of law. (Rules Proc. of State Bar, rule 132.) In the first client matter, the parties stipulated that respondent collected an illegal fee and violated the client trust account rules. The parties further stipulated that both of the violations involved moral turpitude because they occurred as a result of respondent's gross negligence. In the second client matter, the parties stipulated that respondent again violated the client trust account rules and that the trust account violation involved turpitude because it occurred as a result of respondent's gross negligence. The hearing judge accepted the parties' stipulation and held a trial as to the appropriate level of discipline to recommend to the Supreme Court. At that trial, the parties presented evidence of aggravating and mitigating circumstances, and the hearing judge, thereafter, recommended that respondent be placed on three years' probation on conditions, including a nine-month period of actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review and contended that the hearing judge's discipline recommendation was excessive and that no actual suspension was warranted because respondent reasonably relied on her husband and law partner to properly manage their client trust account. The State Bar urged the review department to reject respondent's claims and to adopt the hearing judge's recommended nine-month period of actual suspension.

The review department held it had a duty to determine whether the parties' stipulated conclusions of law were supported by the record before accepting them. The review department independently determined that each of the parties' stipulations as to culpability was supported by the record and, therefore, accepted all of them just as the hearing judge had done. The review department rejected respondent's claim that she reasonably relied on her husband and law partner to manage their client trust account and held that respondent could not avoid her personal, nondelegable duty to properly monitor trust funds and the trust account by agreeing with her husband that he would handle and control the client trust account while she handled the litigation portion of their practice. The review department concluded that the hearing judge's discipline recommendation was excessive because of the substantial mitigation in the record. The review department recommended a three-year period of stayed suspension, but reduced the hearing judge's recommended period of probation from three years to two years and his recommended period of actual suspension from nine months to thirty days.

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

COUNSEL FOR PARTIES

For State Bar: Charles Weinstein

For Respondent: JoAnne Earls Robbins

HEADNOTES

[1 a-c] **130 Procedure–Procedure on Review**
135.30 Procedure–Revised Rules of Procedure–Pleadings/Motions/Stipulations
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers
139 Procedure–Miscellaneous
151 Evidence–Stipulations
165 Adequacy of Hearing Decision
166 Independent Review of Record

Even though the parties entered into a stipulation as to facts and conclusions of law (Rules Proc. of State Bar, rule 132) in which they agreed to be bound by stipulated facts regardless of the degree of discipline recommended or imposed and in which respondent pleaded nolo contendere to the disciplinary charges in the stipulation (Bus. & Prof. Code, § 6085.5, subd. (c)) and acknowledged that her "the plea of nolo contendere shall be considered the same as an admission of culpability" for disciplinary purposes, the State Bar Court still had an affirmative duty to independently determine whether the parties' stipulated conclusions of law were supported by the record before accepting them.

[2] **130 Procedure–Procedure on Review**
135.30 Procedure–Revised Rules of Procedure–Pleadings/Motions/Stipulations
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers
139 Procedure–Miscellaneous
151 Evidence–Stipulations
165 Adequacy of Hearing Decision
166 Independent Review of Record
169 Standard of Proof or Review–Miscellaneous

Regardless of whether respondent had the right on review to challenge the conclusions of culpability to which she stipulated to in the hearing department, the review department still had an affirmative duty to determine if the culpability findings were supported by the record.

[3] **163 Proof of Wilfulness**
164 Proof of Intent
204.10 Culpability–Wilfulness Requirement
221 State Bar Act–Section 6106
430 Breach of Fiduciary Duty

While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge.

[4] **163 Proof of Wilfulness**
164 Proof of Intent
204.10 Culpability–Wilfulness Requirement
204.20 Culpability–Intent Requirement

221 State Bar Act–Section 6106
430 Breach of Fiduciary Duty

Respondent violated statute proscribing acts of moral turpitude through her gross negligence in fulfilling her trust account duties. Even though respondent had an agreement with her husband and law partner that he would manage their client trust account, there was no evidence of established or agreed on procedures for the operation of trust account. And respondent overextended herself in the handling landmark litigation cases and in advocating for legislation dealing in that specialized area of law, allowed herself to be disconnected from management of law office over extended period of time during a period when her husband (whom respondent knew was abusive and controlling) was grossly mismanaging their trust account, and made no inquiry as to operation of the trust account even after she heard of specific complaint regarding the underpayment of trust funds to clients.

[5] **221 State Bar Act–Section 6106**
280 Rule 4-100(A) [former 8-101(A)]
280.20 Rule 4-100(B) [former 8-101(B)(1)]
280.30 Rule 4-100(B)(2) [former 8-101(B)(2)]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
430 Breach of Fiduciary Duty

An attorney has a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. These duties are nondelegable. This does not mean that an attorney is culpable of a moral turpitude violation by not personally managing his or her trust account, provided that attorney reasonably relies on a partner, associate, or other responsible employee to care for that account. However, even that reasonable reliance on another to care for the trust account does not relieve the attorney from the professional responsibility to properly maintain funds in that account. That is, in the handling of client funds, an attorney has a direct professional responsibility to his or her client, and the attorney does not avoid that direct professional responsibility by, even reasonable, reliance on a partner, associate or responsible employee.

[6] **135.30 Procedure–Revised Rules of Procedure–Pleadings/Motions/Stipulations**
151 Evidence–Stipulations
163 Proof of Wilfulness
164 Proof of Intent
169 Standard of Proof or Review–Miscellaneous
204.10 Culpability–Wilfulness Requirement
204.20 Culpability–Intent Requirement
280 Rule 4-100(A) [former 8-101(A)]

Because respondent allowed herself to be disconnected from management of her law office over extended period of time and did not undertake any effort to fulfill her personal and nondelegable duty to monitor client funds and her trust account, hearing judge properly accepted parties' stipulation and correctly found, on respondent's plea of nolo contendere, that respondent was culpable of violating trust account rules even though respondent relied on her husband and law partner to manage the trust account.

[7] **179 Discipline Conditions–Miscellaneous**
1092 Substantive Issues re Discipline–Excessiveness
1099 Substantive Issues re Discipline–Miscellaneous

Respondent was unable to confront her husband concerning his handling of the trust account. Absent equally strong evidence of respondent's recovery from such a disability concerning such a fundamental

duty of a lawyer the review department would recommend severe remedial discipline. Respondent's compelling evidence of her actions to terminate her relations with her husband and her continuing psychiatric treatment make clear that such a recovery is well under way. Respondent expressed remorse for the misconduct; was candid with the State Bar in stipulating to the misconduct; has taken effective steps to avoid a repetition of that misconduct including severing her relations with her husband and continuing in therapy; and has made a contribution to society in seeking, and obtaining, legislation dealing with human reproduction. While serious misconduct occurred as the result of respondent's inattention to financial matters, including the trust account she maintained with her husband, a future recurrence of such problems is unlikely. The hearing judge's recommended condition of continued psychiatric treatment lends assurance to this conclusion.

Additional Analysis

Culpability
Found
221.12 Section 6106–Gross Negligence
280.01 Rule 4-100(A) [former 8-101(A)]
290.01 Rule 4-200 (former 2-107)

Aggravation
Found
521 Multiple Acts
582.10 Harm to Client

Mitigation
Found
710.10 No Prior Record
725.11 Disability/Illness
735.10 Candor–Bar
740.10 Good Character
745.10 Remorse/Restitution

Discipline
1013.09 Stayed Suspension–3 Years
1015.01 Actual Suspension–1 Month
1017.08 Probation–2 Years
Probation Conditions
1023.40 Testing/Treatment–Psychological
1024 Ethics Exam/School

OPINION

OBRIEN, J.:*

Respondent Melanie Rae Blum seeks review of a decision recommending that she be placed on probation for a period of three years, conditioned, inter alia, on an actual suspension of nine months. Respondent entered into a "stipulation as to facts and conclusions of law" pursuant to rule 132 of the Rules of Procedure of the State Bar (Rules of Procedure). Contained in that stipulation is a provision that states "I plead nolo contendere to the charges set forth in this stipulation and I completely understand that my plea shall be considered the same as an admission of culpability except as stated in Business and Professions Code section 6085.5(c)."[1] In the balance of that "stipulation as to facts and conclusions of law," respondent stipulated to committing an act involving moral turpitude in violation of section 6106 and charging a fee contrary to the provisions of section 6146, subdivision (a), in violation of Rules of Professional Conduct, rule 4-200(A).[2] She further stipulated that by her gross negligence she failed to maintain client funds in her trust account in two client matters in violation of rule 4-100(A). That stipulation, including the plea of nolo contendere, was accepted by the hearing judge.

Respondent argues that the recommended discipline is excessive in that the understanding between her and her husband/law partner provided that he would handle the office operations, including billing and trust account control, while she became immersed in fertility litigation in a landmark case against the Center for Reproductive Health and the University of California, Irvine (UCI). Following our independent review of the factual matters stipulated to and the balance of the record before us, we had a question as to whether the facts stipulated to, in light of the hearing judge's finding in his discussion of mitigation that respondent reasonably relied on her husband/law partner to properly manage the law firm, supported a finding of moral turpitude in violation of section 6106. As a consequence, we advised the parties of that concern prior to oral argument pursuant to Rules of Procedure, rule 305(b) and invited them to address the issue by written memorandum. Following our review we do find that the record supports the stipulated conclusion that respondent is culpable of committing an act involving moral turpitude but further agree that the record, including the factual stipulation, supports a finding of substantial mitigation.

Respondent urges no actual suspension, while the State Bar argues in support of the hearing judge's recommendation of nine months' actual suspension. Following our review of the record and consideration of respondent's evidence in mitigation showing the abusive and controlling conduct of her then-husband/law partner, we believe that the recommended period of actual suspension is excessive and shall recommend that respondent's suspension be reduced to 30 days of actual suspension as a condition of a two-year period of probation, otherwise on the conditions recommended by the hearing judge.

We deny respondent's motion for augmentation of the record or remand for additional evidence, noting that the parties were offered, and took, the opportunity to provide extensive evidence concerning respondent's relationship with her then-husband/law partner, including the testimony of two psychiatrists and numerous character witnesses.

FACTUAL BACKGROUND

Respondent was admitted to practice law in California in December 1981. The stipulation of the parties, in addition to the plea of nolo contendere, provides: "The parties agree to be bound by the factual stipulations contained herein regardless of the degree of discipline recommended or imposed; [¶] . . . The factual statements contained in this Stipulation constitute admissions of fact and may not be withdrawn by

*. Judge Pro Tem of the State Bar Court, appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

1. That exception provides that such a plea may not be used against the attorney in a civil suit. All further references to sections are to the Business and Professions Code.

2. All further references to rules are to the Rules of Professional Conduct, unless otherwise indicated.

either party, except with Court approval; [¶] . . . This Stipulation relates only to the facts set forth below. Evidence to prove or disprove a stipulated fact is inadmissible at trial. Neither party waives its right to submit and present evidence relating to mitigation or aggravation."

We rely on the factual stipulation of the parties for the factual background pertaining to culpability and to aid us in recommending discipline. We also consider the testimony of respondent that does not contradict the stipulation, her medical experts' and character testimony, and the medical testimony presented by the State Bar as it pertains to aggravation and mitigation.

Respondent and her former husband, Mark Roseman (Roseman), an attorney,[3] were partners in the practice of law and were cosignatories on their client trust account at the Bank of America. During the relevant period, respondent took on more work than she could comfortably handle. In 1995, respondent became immersed in "fertility litigation" and served as lead counsel in a landmark case against UCI and its now-defunct Center for Reproductive Health, commonly devoting 18 hours a day to the matter, often interviewing clients all day, working in her office until 10:00 or 11:00 at night. The cases were brought on behalf of patients whose eggs and embryos had allegedly been stolen by nationally recognized UCI-affiliated physicians and implanted in other female patients. As a part of that litigation, respondent represented 36 couples in a settlement with the University of California Regents. Additionally, since she had the largest number of cases, as well as a wealth of documents, she assisted other attorneys involved in that litigation with their fertility cases, ultimately enabling 74 of the 100 cases to be resolved.

As a result of these activities respondent overextended herself. During this period of time she was also experiencing significant medical problems, including disabling migraine headaches occurring as frequently as once every one or two weeks, pain from a ruptured disc in her back, and Meniere's disease.[4] Respondent was also involved in obtaining California legislation relating to the unauthorized use of human eggs and embryos. As a result, respondent further overextended herself.

In the operation of the law practice it was clear that Roseman had time to manage the day-to-day operations of the law office. Respondent believed she could rely on Roseman to properly administer the practice. Prior to Roseman assuming management there had been no problems with the trust account, and it was only after he assumed those duties that trust account problems began. During the period he managed the office, Roseman grossly mismanaged the financial aspects of the practice. Some deposits were made to the incorrect account, some disbursements were made from the wrong account, bookkeeping was chaotic, and some client funds were improperly used for funding unrelated cases, resulting in trust fund deficiencies.

During the relevant period respondent heard that some complaints had come into the office, but Roseman insulated her from the full nature and extent of the situation. He instructed the office staff not to tell respondent anything that would upset her and divert her attention from the fertility cases, which Roseman anticipated would be very lucrative. Neither the stipulation nor the balance of the record discloses the time respondent heard complaints come to the office, however the stipulation does provide that respondent's "failure to make inquiry as to any office problems when she had reason to understand that such inquiry should have been made, constituted gross negligence." While the stipulated facts, including the quoted sentence, do not require a conclusion of gross negligence, those facts permit such a conclusion, and under the circumstances the plea of nolo contendere compels that conclusion.

Between March 1996 and November 1996 respondent learned that her clients, the Huffmans (discussed, *post*), had received less than their proper distributive share of the settlement of their case. While respondent saw to it that the Huffmans received the balance they were entitled to, this knowledge of the

3. Roseman resigned from the State Bar, effective March 19, 2000.

4. The record shows that disease to cause inflammation of the inner ear, resulting in a loss of balance or hearing, or both.

error in handling client funds may have put her on notice that the office was not handling those funds as required by the Rules of Professional Conduct. We note that the only other evidence in the record relating to the time that respondent knew or should have known of the mishandling of client funds came from respondent, who testified that she was uncertain when she heard the complaints, but that it was within approximately two years of the time she was testifying (January 2001). We note that the charges before us relate to events occurring in 1995 and 1996.

The factual portion of the stipulation concluded with, "[r]espondent allowed herself to be disconnected from the management of her office for an extended period of time due to her tremendous work load at a time when other personal demands made it difficult, if not impossible, to pay adequate attention to office management." [**1a**] Under Rules of Procedure, rule 132(b)(4)[5] we accept that not only has respondent admitted the stipulated facts, but she has also acknowledged her culpability of the charges numerated in the stipulation. As we will discuss, however, even in the face of respondent's acknowledgment of culpability under that rule we must satisfy ourselves that the record supports that admission of culpability. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 471.)

We note with interest, there is nothing in the record suggesting that respondent and Roseman had any discussion or understanding regarding the manner in which Roseman was to handle the trust account, nor does the record show any evidence regarding either Roseman's past experience in handling trust account matters or his experience in managing a law office.[6] Further the record is barren of any evidence of standards established by the office, or by respondent, for either the operation of the trust account or the general management of the office.

THE CLIENT MATTERS AND SPECIFIC CHARGES

In April 1995 Mr. and Mrs. Huffman employed respondent's firm to prosecute a claim for medical malpractice. The retainer agreement provided that respondent's firm would be compensated by a contingent fee of 40 percent of the first $50,000 recovered. Section 6146 restricts contingent attorney fees to 40 percent of the first $50,000 recovered, but measures the amount recovered as the net sum recovered after deducting any disbursements or costs incurred in the prosecution or settlement of the claim. When the case settled in November 1995, respondent's firm took, as fees, 40 percent of the gross settlement and then deducted the costs incurred in the settlement of the claim from the remainder and paid the amount left to the Huffmans. This resulted in a March 1996 underpayment of $5,618.25 to the Huffmans. When the Huffmans brought the underpayment to respondent's attention she saw to it that the matter was rectified in September 1996.[7] Between the time of the settlement and the initial payment, respondent's firm trust account on at least two occasions dropped far below the amount the firm was required to hold for the benefit of the Huffmans. On January 17, 1996, the balance dropped to about $712, and by February 6, 1996, it reached a low of about $67.

The stipulation acknowledges that respondent charged the Huffmans an illegal fee in violation of rule 4-200(A), mishandled their funds in violation of rule 4-100(A), and committed an act involving moral turpitude in the handling of respondent's trust account in violation of section 6106.

In a second client matter and as stipulated by the parties, on or about July 31, 1996, Judith and Richard Quinonez retained respondent to represent them in a medical malpractice claim. In September 1996 the claim was settled for $75,000, and the funds were

5. That rule provides, in part: "If the respondent pleads nolo contendere, the stipulation shall include an acknowledgment that the respondent completely understands that the plea of nolo contendere shall be considered the same as an admission of the stipulated facts and of his or her culpability of the statutes and/or Rules of Professional Conduct specified in the stipulation."

6. The record does show that Roseman changed his practice specialty "all the time" and that he had frequent emotional outbursts that had the office staff in fear of him.

7. The record does not show when the matter was called to respondent's attention.

deposited into the firm trust account. After the deduction of costs and attorney's fees it was required that there remain in the account $44,531 for the benefit of the Quinonezes. On September 27, 1996, the trust account balance fell to $36,880, on October 17 the balance was $2,102 and on October 25 the balance was approximately $3,554. The Quinonezes received their funds in March 1997.

In the Quinonez matter, respondent acknowledges a violation of rule 4-100(A), requiring an attorney to hold funds of a client in a client trust account, and section 6106, involving moral turpitude arising out of the alleged trust account violation.

DISCUSSION OF CULPABILITY

The Moral Turpitude Charges

[1b] Under the heading "Conclusions of Law" the stipulation of the parties provided, "[r]espondent's aforesaid gross negligence constituted moral turpitude in violation of section 6106 of the Business and Professions Code, and also resulted in charging the Huffmans an illegal fee in violation of Rule 4-200(A) of the Rules of Professional Conduct in that the charge violated Section 6146(a) of the Business and Professions Code. Also, by her gross negligence she violated Rule 4-100(A) of the Rules of Professional Conduct relating to the handling of client trust account funds for the Huffmans . . . ." As we have indicated, where there are stipulations as to conclusions of law, we must nonetheless satisfy ourselves that the factual record supports such a conclusion.

[1c] A plea of nolo contendere entered pursuant to Rules of Procedure, rule 132(b)(4) does not relieve this court of the obligation to determine that there is a factual record sufficient to support a determination of culpability. Rule of Procedure, rule 132(b) (4), by implication, requires stipulated facts that support an admission of culpability.[8] Section 6085.5, subdivision (c) acknowledges that this court requires a factual basis for a nolo contendere plea in that it provides that such factual basis may not be used against a respondent in a civil suit. The Supreme Court has made clear our obligation to determine the factual basis for a stipulation as to culpability. (*Giovanazzi v. State Bar, supra,* 28 Cal.3d 465, 471; *Inniss v. State Bar* (1978) 20 Cal.3d 552, 555.)

[2] The State Bar argues that a respondent cannot challenge on review culpability conclusions of trust account violations and other misconduct that was stipulated to at the hearing level, relying on *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 713. A reading of that case makes clear the record fully supported a finding of culpability as to the stipulated charges. Also, regardless of respondent's right to challenge the findings made below, we have an affirmative duty to determine that such findings of culpability are supported by the record.

Consequently, we consider the Supreme Court's definition of moral turpitude in measuring the charge of a violation of section 6106, and then we look to the conduct necessary to find culpability under that section.

[3] While moral turpitude as included in section 6106 generally requires a certain level of intent, guilty knowledge, or willfulness (see *Sternlieb v. State Bar* (1990) 52 Cal.3d 317), the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge (*Giovanazzi v. State Bar, supra,* 28 Cal.3d 465, 475; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020).

[4] Looking to the stipulated facts, there is no evidence that respondent established or agreed with Roseman on procedures for the operation of the trust account, even though she knew he was to be in control of that account for a substantial period of time. The record shows that respondent overextended herself in the handling of the fertility cases; further overextended herself in advocating legislation dealing with that subject; heard some complaints during the "relevant

8. That rule provides in part: "If the respondent pleads nolo contendere, the stipulation shall include an acknowledgment that the respondent completely understands that the plea of nolo contendere shall be considered the same as an admission of the stipulated facts and of his or her culpability . . . ."

period," apparently including a specific complaint from the Huffmans during that period; made no inquiry as to the operation of the firm trust account; and nonetheless "allowed herself to be disconnected from the management of her office for an extended period of time . . . ." This occurred during a period when Roseman, whom respondent knew to be abusive and controlling, was grossly mismanaging the firm's trust account. In our judgment this is sufficient evidence to establish respondent's gross negligence in violation of section 6106.[9]

Under these circumstances, we reject the hearing judge's observation, contained in his discussion of appropriate discipline, that respondent's "reasonable reliance" on Roseman led to her inattention to the trust account and conclude that such reliance was not reasonable.

The Trust Account and Unlawful Fees Charges

[5] As noted by the State Bar, an attorney 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.) These duties are nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) This does not mean that an attorney is culpable of a moral turpitude violation by not personally managing his or her trust account, provided that attorney reasonably relies on a partner, associate, or other responsible employee to care for that account. However, even that reasonable reliance on another to care for the trust account does not relieve the attorney from the professional responsibility to properly maintain funds in that account. That is, in the handling of client funds, an attorney has a direct professional responsibility to his or her client, and the attorney does not avoid that direct professional responsibility by, even reasonable, reliance on a partner, associate or responsible employee. (Cf. *Ibid.)*

[6] In both the Huffman and Quinonez matters it is clear from the factual stipulation that client funds were not retained in the trust account. Moreover, as noted, the stipulation establishes that respondent "allowed herself to be disconnected from the management of her office for an extended period of time . . . ." This portion of the stipulation indicates that respondent failed to take reasonable steps to comply with her personal, nondelegable duty to monitor client funds and her trust account. Respondent's reliance on Roseman did not relieve her of her obligation to see that those funds were retained in the firm trust account. Under the circumstances of this case, we therefore agree with the hearing judge's determination of culpability of violations of rule 4-100(A) in both the Huffman and Quinonez matters.

We note that we are not the only state to determine that an attorney is not relieved from professional responsibility when he or she relies on a partner to maintain client trust accounts. In *Matter of Pollack* (N.Y. App. Div. 1989) 142 A.D.2d 386 [536 N.Y.S.2d 437], attorney Pollack was determined to be culpable of professional misconduct where his partner deposited funds belonging to Pollack's client into an account which was not designated as a trust or escrow account and which contained both office and client funds. The partner also allowed the amount in the account to drop below the amount of client funds deposited therein. (*Pollack, supra*, 536 N.Y.S.2d at p. 438.) Notwithstanding Pollack's claims that he was not aware of his partner's withdrawal of funds from the account, the evidence established that during the time in question, Pollack failed to inquire of his partner about the client funds, failed to examine even one bank statement, and failed to inquire about his client account. (*Id.* at pp. 438-439.) The court held that Pollack was "'under a duty to know what was going on'" and therefore "'must share the burden of responsibility for the acts of his partner even though he claims he had no actual knowledge of some of the acts . . . .'" (*Id.* at p. 439.)

Later that same year, the same court held that an attorney was subject to discipline based upon his partner's mishandling of an escrow account "to the extent that [the attorney] assumed or should have assumed some responsibility for his partner's conduct

9. We consider respondent's and the State Bar's psychiatric evidence under the discussion of mitigation, *post*.

of their law practice and care of the escrow account." (*Matter of Sykes* (N.Y. App. Div. 1989) 150 A.D.2d 126, 127 [546 N.Y.S.2d 376, 377].) The court there disagreed with a referee's determination that Sykes was culpable of conversion and misappropriation of clients' funds but found him culpable of, inter alia, failing to maintain a duly constituted escrow account and commingling escrow funds with personal and business funds. (*Sykes, supra*, 546 N.Y.S.2d at p. 127.)

We conclude that *Sykes* and *Pollack* are consistent with our determination that respondent had a nondelegable duty to monitor the trust account, failed to undertake any effort to comply with this duty, and under the circumstances present here is culpable of trust account violations notwithstanding reliance on her partner to manage such account.

In both the Huffman and Quinonez matters it is clear from the factual stipulation that client funds were not retained in the trust account. Respondent's reliance on Roseman did not relieve her of her obligation to see that those funds were retained in the firm trust account, and we agree that the hearing judge's acceptance of the stipulation and nolo contendere plea was proper on the charges of violations of rule 4-100(A) in both the Huffman and the Quinonez matters.

The nolo contendere plea included an acknowledgment of charging an illegal fee in violation of rule 4-200(A) in the Huffman matter. The facts stipulated to clearly support respondent's culpability of that charge.

DISCUSSION OF DISCIPLINE

Mitigation

At the time of the found misconduct respondent had at least 14 years of discipline-free practice. This is a significant factor in mitigation. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [10 years discipline-free practice]; Std. 1.2(e)(i), Rules Proc., tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (Stds.).)

In addition to the stipulation, the record contains psychiatric testimony presented by both the State Bar and respondent that relates to respondent's relationship with Roseman and her inability to confront him in his handling of the office trust account. Dr. Kausal Sharma, who has done over 100 attorney evaluations for the State Bar, and in this case was called by the State Bar, testified that, based on his consultation with respondent, he was of the opinion that she was under extreme emotional difficulties during the time covered by the charging allegations and that her ability to cope with Roseman and his handling of financial affairs was substantially impaired.

Dr. Lawrence Sporty, a senior lecturer in the department of psychiatry and neurology at UCI and a well-qualified psychiatrist, started counseling both respondent and Roseman to determine if their marriage could be saved. At the second session, when Dr. Sporty confronted Roseman about his conduct, Roseman stormed from Dr. Sporty's office. At a subsequent session with respondent, Roseman burst into Dr. Sporty's office, unannounced, requiring Dr. Sporty to eject him from the office.

Dr. Sporty testified as respondent's treating physician that in his opinion respondent suffered from post-traumatic stress disorder; that Roseman was abusive, dominating and controlling; and that respondent had suffered abuse, both physical and mental, at his hands. He further testified, "[i]t is my opinion [respondent] was incapable of confronting and stopping her husband in his demands that she stay away from anything to do with the trust accounts and finances. . . ."

We agree that respondent suffered from extreme emotional difficulties during the time of found misconduct. This too is a mitigating circumstance. (Std. 1.2(e)(iv).) The record shows that upon her ultimately coming to grips with the activities of Roseman she, with psychiatric help, was able to confront him and disassociate herself from him. Upon her full understanding of what he had done she terminated their professional association and commenced dissolution of marriage proceedings. Through the time of trial in this matter, respondent continued to obtain psychiatric help. Dr. Sporty opined that respondent had gained insight into the conditions that permitted Roseman to manipulate her and that the control he gained over her "would not occur again in her life. . . ."

Respondent has fully and candidly acknowledged her misconduct by way of her stipulation to the facts set forth in the charges before us and stipulated to a mental examination by a State Bar-appointed psychiatrist. We consider this in mitigation. (Std. 1.2(e)(v).) She made restitution to the Huffmans and has repaid some $200,000 of the approximately $500,000 in debt that her husband has left her with. Respondent has taken charge of all aspects of the operation of her law office, including the handling of the finances and the trust account. Thus, respondent has taken objective steps to atone for the consequences of her misconduct, and this too is a mitigating factor. (Std. 1.2(e)(vii).)

As character witnesses, respondent called five attorneys and a senior police investigator for the California Medical Board. Three of the attorneys specialized in medical and dental malpractice, one represented physicians appearing before the California Medical Board, and one specialized in insurance defense work relating to environmental law and products liability. Each of the attorneys worked either with or against respondent, or was involved in litigation with respondent's then-husband. Each, whether opposing her or working with her, testified to her extreme honesty and truthfulness and her adhering to ethical lines. Each was familiar with respondent's misconduct and attributed it to respondent's husband and respondent's complete immersion in the UCI fertility matter. The senior investigator for the California Medical Board considers respondent the most outstanding attorney he has met and testified she has helped society by her work on the fertility cases, including working with the Federal Bureau of Investigation, United States Attorney's Office, United States Customs, Food and Drug Administration, and other police agencies. He believes that the disciplinary problems resulted from respondent being overworked because of the time she devoted to the fertility cases. This evidence meets the requirements for mitigation under standard 1.2.(e)(vi).

Aggravation

Respondent engaged in multiple acts of misconduct, constituting aggravation under standard 1.2(b)(ii) and, in further aggravation, her misconduct significantly harmed her clients, the Huffmans, in that it delayed their receiving the correct share of their settlement proceeds. (Std. 1.2(b)(iv).)

Discussion

In this case we take particular note of the Supreme Court's observation that "[t]he court's principal concern in disciplinary proceedings is protection of the public and preservation of confidence in the legal profession . . . ." (*Baker v. State Bar* (1989) 49 Cal.3d 804, 822.) "'[T]he circumstances in which the misconduct occurred or subsequent efforts by the attorney to correct the condition that precipitated the misconduct may demonstrate that the misconduct will not likely recur' [citation] and thus are relevant to the disciplinary sanctions, if any, to be imposed." (*Sternlieb v. State Bar, supra,* 52 Cal.3d 317, 331.) In the present case we consider it unlikely that the misconduct of which respondent has been found culpable will recur.

The hearing judge considered *Sugarman v. State Bar* (1990) 51 Cal.3d 609 to be the case most on point in considering discipline. There, Sugarman was found culpable of committing acts of moral turpitude in violation of the section 6106 and violating former rule 5-101, pertaining to business transaction with clients, and was actually suspended for one year. In the matter before us respondent has presented substantially more mitigating circumstances than did Sugarman. Among those mitigating circumstances are respondent's 14 years of prior discipline-free practice. "The absence of a prior disciplinary record is in itself an important mitigating circumstance." (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132, fn. 10.) Also, in *Sugarman,* the attorney relied on his secretary, and not on an attorney-partner, nor is there any evidence that such reliance was reasonable, and as the court said, "we do not find petitioner suffered from such extreme financial pressures that his two acts of misconduct can reasonably be understood as a desperate response to such pressure." (*Sugarman v. State Bar, supra,* 51 Cal.3d 609, 619.) Also, there is no evidence that Sugarman suffered from the psychological pressure and isolation from the trust account problems that Roseman imposed on respondent in the present case. We determine that in the matter before us the mitigation is far greater than that in *Sugarman.*

We deem *Waysman v. State Bar* (1986) 41 Cal.3d 452, *Giovanazzi v. State Bar, supra,* 28 Cal.3d 465, and *Sternlieb v. State Bar, supra,* 52 Cal.3d 317 to be more closely aligned with the factual situation before

us. In *Waysman* the attorney had formed a two person partnership and three weeks later the partner quit, leaving Waysman with 150 cases. (*Waysman v. State Bar, supra,* 41 Cal.3d at p. 454.) On receiving a $24,000 settlement check and learning that it would take three weeks to clear his trust account, Waysman telephoned his secretary to deposit the check in his general account where it would clear in seven days. (*Id.* at pp. 454-455.) On returning from an out-of-town trial Waysman learned his secretary had used a set of presigned checks drawn on the office account to pay office expenses, including the salary of herself and her husband, and had then quit, ultimately resulting in the expenditure of the entire $24,000. (*Id.* at p. 455.) Waysman was in the process of making restitution as of the time of the decision and had promptly acknowledged his misconduct. (*Id.* at pp. 455, 458-459.) The court noted that there was no prior record of discipline and that Waysman suffered from serious alcohol-related problems. Waysman was suspended from practice for six months, that suspension was stayed, and he was placed on probation for one year. (*Id.* at p. 459.)

In *Sternlieb* the court found that the attorney misappropriated slightly over $4,000 of funds belonging to a client and her husband, the opposing party in a divorce action that Sternlieb was handling, but that the evidence did not support a finding of moral turpitude. Sternlieb had no prior discipline and had an excellent reputation as an attorney, and the hearing referee in the State Bar proceedings found that the misconduct was not likely to recur. (*Sternlieb v. State Bar, supra,* 52 Cal.3d. at pp. 331-332.) Sternlieb was placed on probation for one year with a thirty-day actual suspension. (*Id.* at p. 333.)

In *Giovanazzi,* the attorney was found culpable of, among other things, the commission of acts involving moral turpitude and misappropriation. He did not repay an obligation to a client, approximately $75,000, until notified of the pending disciplinary investigation. (*Giovanazzi v. State Bar, supra,* 28 Cal.3d at pp. 474-475.) In that case a divided court added an actual suspension of 30 days to the recommended three years of stayed suspension. (*Id.* at pp. 468-475.)

[7] In the instant case, the record demonstrates that respondent was unable to confront Roseman concerning his handling of the trust account. Absent equally strong evidence of respondent's recovery from such a disability concerning such a fundamental duty of a lawyer we would recommend severe remedial discipline. Respondent's compelling evidence of her actions to terminate her relations with Roseman and her continuing psychiatric treatment make clear that such a recovery is well under way. Respondent has expressed remorse for the misconduct; was candid with the State Bar in stipulating to the misconduct; has taken effective steps to avoid a repetition of that misconduct including severing her relations with Roseman and continuing in therapy; and has made a contribution to society in seeking, and obtaining, legislation dealing with human reproduction. While serious misconduct occurred as the result of respondent's inattention to financial matters, including the trust account she maintained with Roseman, in our judgment a future recurrence of such problems is unlikely. The hearing judge's recommended condition of continued psychiatric treatment lends assurance to this conclusion.

RECOMMENDED DISCIPLINE

We recommend that respondent Melanie Rae Blum be suspended from the practice of law for three years, that execution of this suspension be stayed, and that she be placed on probation for two years on the conditions that she be actually suspended for 30 days and that she comply with each of the remaining conditions of probation recommended by the hearing judge.

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 one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Probation Unit in Los Angeles during the same period.

Costs

It is recommended 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.

We concur:
STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MIGUEL GADDA

A Member of the State Bar

No. 97-O-15010, 98-O-02100 (Consolidated.)

Filed August 26, 2002, as modified October 25, 2002

SUMMARY

The hearing department recommended respondent's disbarment after finding him culpable of 18 counts of charged misconduct in nine client matters and one non-client matter. (Hon. Eugene E. Brott, Hearing Judge.)

Respondent sought review. The review department found respondent culpable of 16 charged counts of misconduct in nine client matters and one non-client matter. This misconduct included: nine counts of recklessly or repeatedly failing to perform legal services competently; one count of failing to return a client's file promptly upon request upon termination of employment; two counts of failing to return unearned fees promptly upon termination of employment; two counts of failing to respond promptly to reasonable inquiries from clients or failing to notify clients of significant developments in their cases; one count of commingling attorney and client funds in a client trust account; and one count of committing an act of moral turpitude by issuing checks on an account which respondent knew or should have known had insufficient funds to cover them. The review department additionally determined that respondent had previously been disciplined once for the same type of misconduct but did not learn from his prior discipline, that he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, that he significantly harmed clients, and that the aggravating circumstances outweighed the mitigating circumstances. Under these circumstances, the review department concluded that disbarment was warranted.

COUNSEL FOR PARTIES

For State Bar: Sherrie B. McLetchie

For Respondent: Miguel Gadda, 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

[1a-e] **101 Procedure–Jurisdiction**
194 Statutes Outside State Bar Act

The ability of federal courts and federal agencies to discipline attorneys who practice before them does not deprive a state bar of jurisdiction to discipline one of its members for engaging in misconduct while practicing before the federal courts or agencies. While neither the State Bar Court nor the Supreme Court has jurisdiction to prevent a person from practicing law in federal courts or agencies, the Supreme Court has the inherent authority to discipline attorneys licensed to practice in the State of California, and the State Bar Court has authority to conduct disciplinary proceedings and make recommendations of discipline to the Supreme Court. The federal regulations pertaining to discipline of attorneys practicing before federal immigration agencies themselves contemplate that the disciplinary agency of a state in which an attorney is admitted to practice has authority to discipline the attorney for misconduct committed in federal immigration agencies. In addition, various cases from federal courts and from the Board of Immigration Appeals have indicated that the disciplinary agencies of the states in which immigration attorneys are licensed have jurisdiction to discipline these attorneys for misconduct committed in immigration cases in federal courts and agencies.

[2] **130 Procedure–Procedure on Review**
139 Procedure–Miscellaneous
165 Adequacy of Hearing Decision
166 Independent Review of Record
192 Due Process/Procedural Rights

In view of the review department's duty to independently review the record and make findings of fact and conclusions of law, any alleged denial of due process by the hearing judge's failure to clearly identify respondent's misconduct in the hearing judge's decision was remedied by the review department's issuance of an opinion that superseded the hearing judge's decision. Therefore, respondent's due process contention was rendered moot and was not addressed on the merits.

[3 a-c] **130 Procedure–Procedure on Review**
139 Procedure–Miscellaneous

Where neither the State Bar nor respondent addressed certain culpability issues on review, and further determinations regarding these culpability issues would not affect in any way the discipline recommendation, the review department determined that this was one of the rare instances in which it need not independently determine these culpability issues.

[4] **162.20 Proof–Respondent's Burden**
725.51 Mitigation–Disbility/Illness–Declined to Find
725.59 Mitigation–Disbility/Illness–Declined to Find
760.59 Mitigation–Personal/Financial Problems–Declined to Find

Where respondent failed (1) to establish through expert testimony that his depression, his physical maladies, and his financial difficulties were directly responsible for his misconduct and (2) to establish through clear and convincing evidence that he no longer suffered from the difficulties and disabilities or even that he could take, and was taking, steps to overcome them, the difficulties and disabilities were not treated as mitigating circumstances.

[5] **511 Aggravation–Prior Record–Found**

Where respondent's prior misconduct occurred between late 1980 and 1984 and his present misconduct spanned the period between 1994 and 1999, the review department concluded that the

prior misconduct was not too remote to be considered as an aggravating circumstance. In this case, particularly because the prior misconduct was very similar to that found in the present case, respondent's prior record of discipline was considered to be a serious aggravating circumstance, made even more serious as the prior discipline did not serve to rehabilitate respondent and prevent the present misconduct.

[6 a-e] 1010 Disbarment

Respondent was culpable of a total of 16 charged counts of misconduct in nine client matters and a trust account matter, which included 9 counts of failing to perform legal services competently, 1 count of failing to return a client's file promptly upon request at the termination of employment, 2 counts of failing to return unearned fees promptly at the termination of employment, 2 counts of failing to respond promptly to reasonable status inquiries from clients or failing to notify clients of significant developments in their cases, 1 count of commingling, and 1 count of committing an act of moral turpitude by issuing checks on an account which respondent knew or should have known had insufficient funds to cover them. Moreover, respondent had been previously disciplined once for the same type of misconduct; yet it appeared that he did not learn from his prior discipline. In addition, respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct and significantly harmed clients. These violations taken together show a clear disrespect for respondent's clients. In view of all of the circumstances of this case, the review department concluded that the public and the courts deserve the greater protection of a formal reinstatement proceeding before respondent is again entitled to practice law in this state.

Additional Analysis

Culpability

Found

178.10 Costs–Imposed
214.31 Section 6068(m)
221.19 Section 6106–Other Factual Basis
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.51 Rule 3-700(D) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.01 Rule 4-100(A) [former 8-101(A)]

Not Found

175 Discipline–Rule 955
214.35 Section 6068(m)
220.35 Section 6104
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client
591 Indifference

Mitigation

Found

720.10 Lack of Harm
735.10 Candor–Bar
745.10 Remorse/Restitution

OPINION

WATAI, J.:

In this original disciplinary proceeding, respondent Miguel Gadda seeks review of the recommendation of a State Bar Court hearing judge that he be disbarred. The hearing judge found that respondent repeatedly failed to perform legal services competently (Rules Prof. Conduct, rule 3-110(A)),[1] failed to refund unearned fees promptly upon termination of employment (rule 3-700(D)(2)), failed to adequately communicate with clients (Bus. & Prof. Code, § 6068, subd. (m)),[2] failed to return files and papers promptly upon a client's request at the termination of employment (rule 3-700(D)(1)), commingled client funds with his own funds in his client trust account (rule 4-100(A)), and committed acts involving moral turpitude by issuing trust account checks without sufficient funds to cover them (§ 6106).

Our independent review of the record shows that respondent's misconduct extended from 1994 to 1999 and that respondent was previously disciplined for similar misconduct in 1990. We agree with the hearing judge's recommendation that disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession.

PROCEDURAL BACKGROUND

On July 25, 2000, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent. The State Bar filed a second NDC against respondent on August 14, 2000. After respondent filed responses to these NDCs, the cases were consolidated on September 25, 2000.

On March 5, 2001, the parties filed a stipulation of facts.

Trial in this matter commenced on March 13, 2001, and concluded on March 28, 2001.[3] The hearing judge filed his decision recommending respondent's disbarment on July 30, 2001. Because the hearing judge recommended disbarment, he properly ordered that respondent be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on August 2, 2001, and respondent has remained ineligible to practice law in this state since that time. Respondent filed a timely request for review on August 27, 2001.[4]

JURISDICTION OF THE STATE BAR COURT[5]

Respondent initially challenges this court's jurisdiction to discipline him for his conduct in federal and immigration courts, asserting that attorney conduct standards regarding practice before such courts, as well as discipline for a breach of any such standards, is within the exclusive jurisdiction of the federal government. He argues that this disciplinary proceeding in the State Bar court is an attempt by the State of California to regulate the practice of law in the federal courts or to place restrictions or limitations on persons appearing before the federal courts and agencies within the state. He contends that since he practices only

1. All further references to rules are to the Rules of Professional Conduct of the State Bar of California unless otherwise indicated.

2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. During his opening statement at trial, respondent admitted culpability as to the charges of commingling and issuing checks drawn on account containing insufficient funds to cover them.

4. In an order filed on January 25, 2002, and an order filed on May 28, 2002, we granted multiple requests for judicial notice and motions to augment the record on review filed by respondent and the State Bar. In each of those orders, we expressly reserved the issue as to the weight that should be accorded the items that we judicially noticed and the additional evidence we accepted to augment the record on review. After independently reviewing the record, we conclude that no weight should be accorded to the judicially noticed items or the additional evidence because nothing therein is relevant to any issue in this proceeding.

5. We address only respondent's principal points of error on review. Any point of error or supporting argument that is not expressly addressed in this opinion has been considered and rejected.

immigration law, the State Bar of California does not have jurisdiction over him.

[1a] Respondent was admitted to the practice of law in California on August 4, 1975, and has been a member of the State Bar since that time. We acknowledge that, as the State Bar concedes, neither this court nor the California Supreme Court has jurisdiction to stop respondent from practicing law in federal court. (*Ex Parte McCue* (1930) 211 Cal. 57, 66.) We also acknowledge that neither this court nor the California Supreme Court may stop respondent from practicing law in or before federal agencies. (*Silverman v. State Bar of Texas* (5th Cir. 1968) 405 F.2d 410, 413-415.) However, respondent is licensed by the California Supreme Court to practice law in this state. And, based on that license, respondent applied to practice and practices law before the federal courts in this state. In addition, it is without question that respondent is permitted to practice law and represent individuals before the Board of Immigration Appeals (BIA), the immigration courts, and the Immigration and Naturalization Service (INS) only because he is licensed to practice law by the California Supreme Court.[6] (8 C.F.R. §§ 1.1(f), 292.1(a)(1); see also 8 C.F.R. § 292.1(e).)

[1b] The Supreme Court of California has the inherent power to discipline attorneys licensed to practice in the State of California. (*In re Paguirigan* (2001) 25 Cal.4th 1, 7; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592-593; accord, § 6100.) The State Bar Court, as an administrative arm of the Supreme Court, has the statutory authority to conduct disciplinary proceedings and make recommendations of discipline to the Supreme Court. (*In re Attorney Discipline System*, *supra*, 19 Cal.4th at pp. 599-600.) The focus of the disciplinary proceeding is the protection of the public, the courts, and the legal profession in California from attorneys who do not adhere to the standards and responsibilities of the legal profession as set forth in the State Bar Act (§ 6000 et seq.) and the Rules of Professional Conduct. (See Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.3; rule 1-100(A).) In this regard, the California Supreme Court clearly held more than 60 years ago that, "[i]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. [Citations.]" (*Geibel v. State Bar* (1938) 11 Cal.2d 412, 415, see also rule 1-100(D).) We conclude that this holding should be extended to attorneys practicing before federal agencies such as the BIA, the immigration courts, and the INS. (Accord *Stroe v. I.N.S.* (7th Cir. 2001) 256 F.3d 498, 501-502, 504 [Seventh Circuit referred attorney to the Illinois Attorney Registration and Disciplinary Commission for misconduct that attorney committed before the BIA expressly because attorney was "a member of the Illinois bar"].) In fact, respondent was disciplined in 1990 by the California Supreme Court for misconduct he previously committed while practicing law before the BIA, the immigration courts, and the INS. (*Gadda v. State Bar* (1990) 50 Cal.3d 344 (*Gadda I*).)

[1c] Respondent contends that the federal regulations pertaining to discipline of attorneys practicing before the BIA, the immigration courts, and the INS (8 C.F.R. §§ 3.102 et seq., 292.3 et seq.) preempt any state attempts to discipline attorneys practicing before these federal agencies. However, we note that these federal regulations themselves state that the EOIR (of which the BIA and the immigration courts are a part) and the INS may, in addition to or in lieu of initiating disciplinary proceedings against an attorney, notify any appropriate federal or state disciplinary agency of a complaint filed against the attorney. (8 C.F.R. §§3.106(d), 292.3(g).) These regulations also state that, if any final administrative decision is issued imposing sanctions other than a private censure, the

6. The BIA, the immigration courts, and the INS are all entities within the United States Department of Justice. The BIA and the immigration courts are part of the Department of Justice's Executive Office of Immigration Review (EOIR) (8 C.F.R. §§ 3.0(a), 3.1(a)(1), 3.9, 3.10). The EOIR (including the BIA and the immigration courts) is separate from and independent of the INS (see 8 C.F.R. §§ 100.1, 100.2, 103.1; see also 8 U.S.C. § 1101(b)(4) [immigration judges "shall not be employed by the [INS]"]).

EOIR or the INS must notify the disciplinary agency in every jurisdiction where the disciplined attorney is authorized to practice. (*Ibid.*) Thus, the regulations themselves contemplate that the disciplinary agency of a state in which an attorney is admitted to practice has authority to discipline the attorney for misconduct occurring in immigration courts.

[1d] In addition, various federal courts, as well as the BIA, have indicated that the disciplinary agencies of the states in which immigration lawyers are licensed have jurisdiction to discipline these lawyers for misconduct occurring while appearing before the BIA, the immigration courts, the INS, and the federal courts in immigration cases. For example, in *Matter of Lozada* (BIA 1988) 19 I. & N. Dec. 637, 639, the BIA held that a motion to reopen deportation proceedings on the basis of ineffective assistance of counsel should indicate, among other things, "whether a complaint has been filed with appropriate disciplinary authorities regarding [the alleged inadequate] representation, and if not, why not." In *In Re Rivera-Claros* (BIA 1996) 21 I. & N. Dec. 599, 603-604, the BIA clarified that one reason for this requirement of filing a complaint with the appropriate state disciplinary authority is to allow the BIA (and the immigration courts) to more easily monitor the conduct of immigration attorneys, since the federal regulations in existence at that time for the disciplining of immigration attorneys were not comprehensive rules governing the practice of immigration law and since the BIA (and the immigration courts) relied on the disciplinary process of the relevant local jurisdiction as the primary means of identifying and correcting misconduct. Moreover, federal courts have held that the BIA acted within its discretion in imposing the *Lozada* requirements (see, e.g., *Saakian v. I.N.S.* (1st Cir. 2001) 252 F.3d 21, 26; *Lu v. Ashcroft* (3d Cir. 2001) 259 F.3d 127, 129, 132-133) and have specifically approved the requirement of filing a complaint with the appropriate local disciplinary agency (e.g., *Lu v. Ashcroft*, *supra*, 259 F.3d at pp. 133-135; *Stroe v. I.N.S.*, *supra*, 256 F.3d at pp. 501-502, 504).

[1e] As the foregoing authorities recognize, the ability of the BIA, the immigration courts, the INS, and the federal courts to discipline attorneys who practice only before them does not deprive a state bar of jurisdiction to discipline one of its members for engaging in misconduct while practicing before the BIA, the immigration courts, the INS, and the federal courts. We find respondent's argument in this respect to be specious.[7]

CULPABILITY

Respondent's Background

Respondent came to the United States as an immigrant, and upon becoming an attorney admitted to practice law in California, he set up an immigration practice. By the year 1996, he had 500 to 600 active cases and was working Mondays through Saturdays. He maintained approximately this case load through the year 2000.

His clients came to the office and were seen on a first come, first served basis. They arrived at 9:00 a.m., as they were told to do, and often did not see respondent until 12:00 noon or later, or did not see him at all. The client appointments lasted approximately 10 to 20 minutes.

The immigration judges (IJs) who testified in the hearing department stated that respondent frequently missed court appearances and frequently seemed unprepared.

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7. Respondent also asserts that the federal regulations' one-year statute of limitations regarding ineffective assistance of counsel (8 C.F.R. § 3.102(k)) directly conflicts with the State Bar rules and that the complaints in this case "go back to 1994" and are barred. We note that Rules of Procedure of the State Bar, rule 51 provides that a disciplinary proceeding based upon a complaint alleging that an attorney violated the State Bar Act or the Rules of Professional Conduct must be initiated within five years from the date of the alleged violation, except that the five-year period is tolled when, among other things, the attorney continues to represent the complainant or a member of the complainant's family or when the attorney conceals facts constituting the violation. Respondent has failed to specify any charge barred under rule 51, and he has failed to cite any authority to establish that this court must impose a one-year limitation period for charging him with misconduct in these proceedings. In sum, we reject respondent's assertions because they are unsupported by authority and are otherwise meritless.

Respondent hired other attorneys on a contract basis to make court appearances for him and to file appeals. One such attorney was William R. Gardner.

There were signature stamps for respondent and for attorney Gardner for use by respondent's office staff.

Between the years 1998 and 2000, due to medical problems, respondent started working mostly at home, going to the office to see clients only on Tuesday and Thursday afternoons and some Saturdays.

The Saba matter

On or about October 4, 1991, the four Saba children, Anita, Perfecto, Samson, and Mariam, applied for political asylum. On May 14, 1993, the INS denied their political asylum applications because they failed to establish either past persecution or fear of future persecution. Sometime before November 2, 1993, the Saba children retained respondent to represent them before the immigration court. Respondent dealt mainly with their father. On November 2, 1993, respondent filed a notice of appearance on their behalf with the immigration court.

On November 3, 1993, the Saba children requested a de novo reconsideration of their applications for political asylum by the immigration court. However, on September 25, 1995, respondent represented them at an immigration court hearing, at which time the Saba children withdrew their asylum applications, and the IJ ordered them to voluntarily depart from the United States by September 6, 1996.

On June 18, 1996, Mrs. Saba became a naturalized citizen. Through error on the part of his office, respondent failed thereafter to take any action to adjust the status of the Saba children based on their mother's citizenship. As of June 18, 1996, the Saba children were all under the age of 21 and were minors for immigration law purposes.

On September 6, 1996, respondent filed a motion to reopen deportation proceedings on behalf of the Saba children to apply for adjustment of status to lawful permanent residents. Respondent also requested an extension of time for the Saba children to depart voluntarily, which request was denied. Although the IJ initially granted the motion to reopen deportation proceedings on October 22, 1996, on December 16, 1996, the IJ vacated the order granting the motion and entered a new order denying the motion.

On January 15, 1997, the last possible day, respondent filed a notice of appeal with the BIA. On January 22, 1997, the BIA rejected the appeal because it was not accompanied by the $110 filing fee. On January 31, 1997, respondent resubmitted the appeal with the required fee, but on January 23, 1998, the BIA again dismissed the appeal as untimely.

On November 25, 1997, Mr. Saba became a naturalized citizen. On April 29, 1998, respondent filed a petition on behalf of the Saba children for a stay of deportation until the conclusion of the school year. At some point during the proceedings regarding this petition, respondent left the Saba children and their parents unrepresented before an INS officer. Upon respondent's advice, the Saba children signed a statement that they would voluntarily depart the United States before the stay expired, and Mr. and Mrs. Saba signed statements that they understood that the Saba children would have to leave the United States at the expiration of the stay and that they would make arrangements for their children's departure. A stay was granted until August 1, 1998, but the Saba children did not depart the United States on or before that time. Respondent told them that he was taking care of everything. Respondent agreed to file an appeal of the BIA decision.

On August 18, 1998, respondent instructed attorney Gardner to file a petition for a writ of habeas corpus and a stay of deportation on behalf of the Saba children in the United States District Court for the Northern District of California.[8] Respondent routinely employed

8. As Gardner explained while testifying at trial in the hearing department, respondent made this request because the time for filing an appeal of the BIA decision in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) had expired.

Gardner on a contract basis to make master calendar hearing appearances in the immigration courts and to handle Ninth Circuit matters. Respondent only occasionally looked at Gardner's federal court pleadings before they were filed, although Gardner had gained all of his experience in federal court through respondent's office. Respondent did not supervise Gardner because he believed that Gardner did not need any supervision, as he was admitted to practice law in California, the federal district court, and the Ninth Circuit.

On August 24, 1998, the Saba children were ordered to report for deportation on September 21, 1998. On respondent's advice, they did not comply with this order.

Pursuant to respondent's request, at some point Gardner filed a petition for writ of habeas corpus on behalf of the Saba children. On September 24, 1998, the federal district court issued an order to show cause and a stay of deportation to permit a hearing on the writ. On February 8, 1999, the district court issued a decision ordering the deportation order vacated and remanding the matter to the immigration court with instructions to reopen deportation proceedings and to evaluate the children's eligibility for adjustment of status.

The district court remanded the matter upon its sua sponte finding of ineffective assistance of counsel, stating that among the egregious series of errors, going beyond mere procedural defects, "Petitioners [the Saba children] did not file for an adjustment of Petitioners' status within a reasonable time after Mrs. Saba became a naturalized citizen, which was three months before the last day to depart voluntarily. As immediate relatives of a citizen, Petitioners would have been given priority and their application expedited. Instead, the application was filed on the last day to depart, which caused Petitioners to disobey the voluntary departure order, which in turn led to the deportation order." (*Saba v. I.N.S.* (N.D. Cal. 1999) 52 F. Supp.2d 1117, 1126.) "But for counsels' ineffectiveness, the outcome of the proceedings would probably have been different: Petitioners would have become permanent U.S. residents." (*Ibid.*)

On October 6, 1999, respondent appeared on behalf of the Saba children at an immigration court hearing. At that time, the IJ refused to allow respondent to represent the Saba children and continued the matter to allow the children to obtain new counsel. Thereafter, the Saba children retained attorney Juliette Topacio Sarmiento.

In June 2000, after submitting supplemental documentation, the adjustment of status hearing was held for Samson and Mariam, the children who were still minors, and their adjustment of status was granted. Attorney Sarmiento testified in the hearing department that, had the application for adjustment of status been filed at the time Mrs. Saba became a naturalized citizen, all the Saba children would have qualified for adjustment of status because they were minors. Instead, the cases of Anita and Perfecto were still in deportation proceedings.

Over the course of respondent's representation, the Saba children paid respondent over $3,000. Although attorney Sarmiento requested that respondent refund this money to the Saba children, respondent had not refunded any fees as of the time of trial in this matter.

The Hearing Judge's Conclusions[9]

As to this matter, respondent was charged with two counts of violating rule 3-110(A), which provides

9. Respondent alleges that the hearing judge did not understand immigration law sufficiently to be able to render a just decision. "We will not discredit the decisions of the [hearing judge] on unsupported allegations" such as this. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 126.) Moreover, as the State Bar points out in its appellee's brief, even assuming the hearing judge did not understand immigration law, the hearing judge had the benefit of hearing testimony from Angela Bean, a certified specialist in immigration law, seven IJs, and three INS trial attorneys, as well as several other attorneys who practice immigration law. In view of the extensive evidence presented below regarding immigration law, we conclude that the hearing judge had sufficient evidence to support his conclusions in this case. And, in any event, respondent's specious allegation that the hearing judge did not sufficiently understand the relevant provisions of immigration law to render a just decision on respondent's culpability is mooted by our independent review of the record, wherein we must independently make the appropriate findings of fact and conclusions of law. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 346-347, citing *In re Morales* (1983) 35 Cal.3d 1, 7.)

that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Respondent was also charged with one count of violating rule 3-700(D)(2), which provides that a member whose employment has terminated shall promptly refund any unearned fee. The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully committed all of the charged acts of misconduct.

Discussion

Upon our independent review of the record, including the stipulation of facts, we conclude that, as to this matter, respondent is culpable of the two charged counts of recklessly and repeatedly failing to perform legal services with competence in willful violation of rule 3-110(A). We conclude that respondent performed legal services incompetently: (1) by leaving the children alone, unrepresented, in the middle of a hearing before an immigration officer and advising them to sign a voluntary departure form; (2) by failing to advise the Saba children to depart voluntarily on or before September 6, 1996; (3) by failing to move to reopen deportation proceedings until September 6, 1996; (4) by failing to file a petition for review with the Ninth Circuit; (5) by failing to file for adjustment of status for the children within a reasonable time after Mrs. Saba became a naturalized citizen on June 18, 1996, and instead filing for adjustment of status on the children's last day to depart voluntarily, approximately three months later; and (6) by failing to supervise Gardner in filing a petition for writ of habeas corpus.

Respondent contends that the hearing judge should have found that the failure to perform legal services competently in this matter was partly or entirely the fault of Gardner, since the mistakes occurred primarily in federal court. We disagree. The record establishes that respondent repeatedly and recklessly failed to represent the Saba children competently prior to the time Gardner became involved in the matter.[10]

We also conclude that respondent failed to refund unearned fees promptly upon termination of employment in willful violation of rule 3-700(D)(2). To justify retention of legal fees, respondent was required to perform more than he did (i.e., minimal services that were of no value to the client). (Cf. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229.) Here, the record fails to support a conclusion that respondent performed services worth over $3,000, the amount the Saba children paid. The only arguably competent actions respondent took in providing legal services to the Saba children were (1) filing a new application for political asylum, (2) obtaining a stay of deportation until August 1, 1998, and (3) filing a petition for a writ of habeas corpus. Respondent testified that he charged about $1,500 to $2,000 for representing clients in political asylum proceedings, which representation would include appearing at all asylum hearings, but in this case, the record indicates he merely filed the application for asylum and subsequently appeared at a hearing and withdrew it. Thus, he could not have earned $1,500 for that representation and must have earned far less, at most $500. Respondent also testified that he charged $250 to $500 or more for proceedings such as motions to reopen, depending upon the number of court appearances required. Because it appears from the record that respondent had to make only one court appearance and one appearance before an immigration officer for the petition for stay of deportation, we determine that respondent earned at most $500 for these proceedings. Finally, respondent testified that he paid attorney Gardner $1,000 to $1,500 to file the petition for a writ of habeas corpus. Gardner, however, testified that respondent gave him only $200 after the writ hearing. Even assuming that Gardner was paid $1,500, respondent and Gardner still only earned *at most* $2,500 for their legal services, and respondent was entitled to far less if he paid Gardner only $200 for the writ proceedings.

Significantly, respondent's failure to act competently in providing legal services to his clients was, as

10. We note that, on review, respondent repeatedly argues facts, without citing to supporting evidence as expressly required by Rules of Procednre of the State Bar, rule 302(a) and State Bar Court Rules of Practice, rule 1320. Many of these asserted "facts" are in contradiction to the facts found by the hearing judge based on the testimony of respondent's clients and other witnesses. On the record before us, respondent's iteration of his version of the facts does not provide us with a basis to disturb the hearing judge's adverse findings. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 846, citing *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 775.)

we have concluded, reckless and repeated, rather than the result of simple negligence. Moreover, although we have estimated the amount which respondent may have earned at most in this matter, we need not determine the precise amount which respondent and Gardner earned in this case, as we have concluded that respondent did not earn the entire amount of attorney fees the Sabas paid to him but failed to refund any of the Sabas' fees as of the time of trial in this matter and thereby violated rule 3-700(D)(2). (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324.)

The Garcia Matter

J. Sacramento Garcia, Maria Luisa Garcia, and Noel C. Garcia entered the United States without inspection in 1989. In May 1996, the Garcias met with Charles Stephens, a nonattorney immigration consultant, to obtain legal residency. Stephens advised the Garcias to file for political asylum, and the Garcias did so with Stephens's assistance. After becoming aware of the Garcias' illegal entry from their asylum application, the INS issued an order to show cause on September 6, 1996. On September 6, 1996, the matter was continued to November 12, 1996, to allow the Garcias to retain an attorney.

Stephens referred the Garcias to respondent. The Garcias met respondent immediately before the master calendar hearing on November 12, 1996. Respondent agreed to represent them for $1,000, and they paid him $500 that day.

At the hearing on November 12, 1996, respondent appeared with the Garcias, and the immigration court scheduled an individual hearing for January 22, 1997.[11] The Garcias did not understand what was going on and heard the judge and the clerk mention many dates. They thought they heard February 17, 1997, and understood this to be their hearing date. They received no letter or telephone call from respondent as to the next hearing date.

Respondent appeared at the hearing on January 22, 1997, but the Garcias did not, and the IJ ordered their deportation in absentia.

On or about February 6, 1997, the Garcias paid the remaining $500 to respondent.

At some point after the hearing of January 22, 1997, the Garcias received a telephone call from respondent's office telling them that they had missed their hearing date and were ordered deported. They went to see respondent immediately, and respondent told them to go directly to the IJ to explain why they had missed the hearing. They went without respondent, and the IJ told them to see their attorney, who would know what to do.[12]

On February 10, 1997, respondent filed a motion to reopen with the immigration court on the ground that the Garcias misunderstood the correct hearing date. The IJ denied the motion on February 26, 1997.

On June 11, 1997, respondent filed an appeal with the BIA and moved the court to reopen the matter on the ground that, at the hearing on January 22, 1997, the IJ failed to give the Garcias the proper admonitions regarding a failure to appear. The BIA denied the motion to reopen on January 28, 1999, and dismissed the appeal.

Prior to February 26, 1999, the Garcias terminated respondent's services. Respondent has not returned to the Garcias any of the fees they paid him. On February 26, 1999, attorney Donald Unger filed with the BIA on behalf of the Garcias a motion to reopen and motion to reconsider based on ineffective assistance of counsel. On the same date, he also filed a petition for review of the BIA's decision of January 28, 1999, in the Ninth Circuit. The petition for review has been denied, but the motion before the BIA was pending at the time of trial in this matter.

11. At an individual, or regular, hearing, the IJ takes testimony and receives documents regarding the merits of the alien's asylum claim. At the conclusion of the hearing, the IJ usually issues a ruling regarding the asylum application.

12. Angela Bean, an immigration law specialist, credibly testified at trial in the hearing department that a competent attorney would not send clients to visit an IJ to plead their case on their own after an order of deportation in absentia.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A) and one count of violating rule 3-700(D)(2). He was also charged with one count of violating section 6068, subdivision (m), which provides that it is the duty of an attorney "[t]o 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." Specifically, the NDC charged respondent with violating section 6068, subdivision (m): (1) "[b]y failing to inform the [Garcias] that they had to appear at the January 22, 1997 hearing or they would be deported"; (2) by "failing to inform [the Garcias] that [respondent] provided ineffective assistance of counsel"; and (3) "[b]y failing to respond to the [Garcias'] telephone calls of January 27, 1997, January 30, 1997, February 1, 1997, February 3, 1997[,] and February 4, 1997." The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) but concluded that the State Bar had failed to present clear and convincing evidence that respondent had willfully failed to return unearned fees or to respond promptly to the Garcias' reasonable status inquiries. The hearing judge also declined to find that respondent had failed to keep the Garcias reasonably informed of significant developments in their case by failing to advise them of their hearing date because that misconduct was part of the basis of his conclusion that respondent violated rule 3-110(A).

Discussion

Upon our independent review, we conclude that respondent recklessly failed to perform legal services competently in willful violation of rule 3-110(A) in this matter: (1) by failing to give his clients proper notice of the hearing of January 22, 1997; and (2) by failing to prepare his clients for their hearing of January 22, 1997.

Respondent contends that the hearing judge's conclusion of culpability in the Garcia matter was erroneous, since (1) respondent gave the Garcias notice of the hearing, and in any event the Garcias received a written notice of the hearing and received independent verbal notice from the immigration court, through an interpreter; and (2) respondent advised the Garcias to come to his office to prepare for the hearing, but the Garcias failed to appear at the office.

In making the first argument, respondent unconvincingly relies on his own version of the events. Contrary to respondent's argument, the Garcias testified that they did not see the court's written notice until they went to respondent's office after they had missed the hearing and that there was no interpreter at the master hearing to inform them of the date of their next hearing. They testified that since they were not given notice of the next hearing, they had to rely on the date they thought they heard the judge give, which date was February 17, 1997. They said they were in a state of shock when they learned that they had been ordered deported in absentia on January 22, 1997.

In making his second argument, respondent contradicts his trial testimony. At trial, respondent testified that the Garcias came to his office prior to the hearing and that he spent 30 to 45 minutes at a minimum preparing them for their individual hearing. We give great weight to the hearing judge's implied determination that respondent's testimony in this respect was not credible, which determination is supported by the contradiction indicated above.

We also conclude, consistent with the hearing judge's conclusion, that the State Bar failed to present clear and convincing evidence that respondent violated section 6068, subdivision (m), by failing to return the Garcias' telephone calls.[13]

We agree in part with the hearing judge's conclusion that the charge of failing to keep the Garcias

13. Mrs. Garcia testified that after she and her husband tried to explain to the IJ why they had failed to appear for their individual hearing, they called respondent's office many times to speak to respondent, but their calls were not returned. In contrast, respondent testified that he returned the Garcias' telephone calls personally. It appears that the hearing judge either found respondent's testimony in this respect to be credible, found Mrs. Garcia's testimony in this respect to be incredible, or was unable to resolve the issue of credibility and resolved this reasonable doubt in respondent's favor. (See, generally, *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 19.)

reasonably informed of significant developments in this case is duplicative of the charge of failing to perform legal services competently, since respondent's failure to inform the Garcias of their hearing date of January 22, 1997, is one of the bases of our conclusion of culpability of rule 3-110(A). Because "little, if any, purpose is served by duplicative allegations of misconduct" (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060), we decline to conclude for purposes of discipline that respondent is additionally culpable of violating section 6068, subdivision (m) in this respect.

Moreover, respondent's alleged failure to inform the Garcias that he provided ineffective assistance of counsel formed the basis for both the charge of failing to perform legal services competently and that of failing to keep the Garcias reasonably informed of significant developments in this case. We have concluded, however, that the State Bar failed to prove by clear and convincing evidence that this alleged failure constituted a violation of either charge.

As set forth above, the NDC additionally charges that respondent failed to keep the Garcias reasonably informed of significant developments in their case by failing to notify them that they would be deported if they did not appear at their individual hearing. We note that Mr. Garcia testified in this proceeding that nobody told him what would happen to his family if he did not appear at their individual hearing and that he did not understand what he was supposed to do after the master hearing. However, respondent's failure to inform the Garcias in this respect was not a failure to notify them of a development in their case; rather, respondent failed in this respect to provide legal services competently.[14] Upon our review of the record, we conclude that the State Bar failed to establish by clear and convincing evidence a basis for this charge that was independent of the basis for any other charge.

As previously stated, the hearing judge concluded that respondent was not culpable of violating rule 3-700(D)(2), and as we will discuss, along with our discussion of the charge that respondent committed moral turpitude by habitually disregarding clients' interests, we do not consider culpability of this charge in determining the appropriate level of discipline in this case.

In short, we hold that respondent willfully violated rule 3-110(A) as charged but dismiss the charged violations of section 6068, subdivision (m), and of rule 3-700(D)(2) with prejudice.

The Haesbaert Matter

In November 1995, Sergio Haesbaert, who is from Brazil, filed an application for political asylum, which application had been prepared by a nonattorney. On or about March 25, 1996, he employed respondent to represent him and his family on his political asylum application. Respondent charged $1,000 for the representation, to be paid in installments. Haesbaert paid a total of $500 in installments.

Respondent reviewed the political asylum application and found it to be satisfactory. Respondent was informed that a master calendar hearing was scheduled for April 17, 1996.

On April 17, 1996, respondent did not appear. The court scheduled another master calendar hearing for June 12, 1996.

At the hearing on June 12, 1996, attorney Gardner appeared for respondent, and the IJ set the matter for a regular hearing on September 9, 1996.

On or about September 6, 1996, Haesbaert went to respondent's office because he had had no communication with respondent regarding the hearing of September 9, 1996. Haesbaert made an appointment for September 7, 1996. On September 7, 1996, the Saturday before the Monday hearing, Haesbaert met with respondent for about 15 minutes and was assured by respondent that everything was in order.[15]

14. Because this failure to provide legal services competently was not charged in the NDC, we do not consider it as an additional ground of culpability.

15. According to Haesbaert, he had to force his way into respondent's office because respondent's staff denied that he had an appointment, and he was given approximately 15 minutes with respondent.

On September 9, 1996, respondent appeared with Haesbaert at the hearing. Haesbaert did not know what questions would be asked of him by respondent, the judge, or the attorney representing the government. Moreover, some of the documents in support of the asylum application were excluded from evidence at the hearing because they had not been translated into English and their relevance was unclear. At the end of the hearing, the immigration court found that Haesbaert had failed to establish either past persecution or a well-founded fear of future persecution and denied the asylum application.

Haesbaert discharged respondent soon after this hearing. Haesbaert employed attorney Geri Kahn who, upon review of the file, filed a notice of appeal on October 8, 1996. On August 21, 1998, she filed a motion to remand with the BIA based on ineffective assistance of counsel so that Haesbaert could introduce additional evidence that was not presented at the September 9, 1996, hearing. Kahn attached substantial additional documentation with the motion. Kahn determined that the asylum application was poorly done and that no evidence had been submitted at the hearing regarding the conditions in Brazil. Although Haesbaert had documents regarding the conditions in Brazil, they had not been translated into English and therefore had not been admitted into evidence. From the record of the proceedings on September 9, 1996, Kahn also noted that respondent did not ask questions of Haesbaert to elicit testimony in support of Haesbaert's contention of fear of future persecution.

The BIA granted the motion to remand on October 27, 1998, and remanded the matter back to the immigration court.

On or about December 29, 1999, Haesbaert sent respondent a letter requesting the return of the $500 in fees he had paid. Respondent returned the money on or about March 15, 2000.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to respond promptly to Haesbaert's reasonable status inquiries in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) and rule 3-700(D)(2) but concluded that the State Bar had failed to present clear and convincing evidence that respondent had violated section 6068, subdivision (m).

Discussion

We determine, upon our review of the record, that respondent is culpable of willfully violating rule 3-110(A), recklessly and repeatedly failing to perform legal services competently: (1) by failing to present additional evidence, both documentary and testimonial, to support Haesbaert's claim for political asylum; (2) by failing to have Haesbaert's documents translated into English for the asylum hearing; and (3) by failing to prepare Haesbaert adequately for the asylum hearing.

Respondent contends that the hearing judge's finding of culpability in this matter was erroneous for several reasons. He first asserts that the hearing judge's finding that he did not prepare Haesbaert for the asylum hearing was erroneous, since respondent met and prepared with Haesbaert, his wife and daughter several times, and with Haesbaert at least three times, before the asylum hearing.

Although Haesbaert testified in this proceeding that he met with respondent a *total* of three times, he also testified that he went to respondent's office to make an appointment on September 6, 1996, because he had not spoken with respondent since the master calendar hearing and his individual hearing was scheduled for September 9, 1996. He further testified that he met with respondent for about 15 minutes on September 7, 1996, the Saturday before the Monday hearing, after forcing his way into respondent's office, and respondent assured him that everything was fine. Based on the hearing judge's findings and conclusion of culpability, it is apparent that the hearing judge found Haesbaert's testimony in this respect to be credible, and we must give this credibility determination great weight. (Rules Proc. of State Bar, rule 305(a).) We therefore reject respondent's factual assertion that he prepared Haesbaert for the asylum hearing.

Respondent next contends that he could not have translated Haesbaert's documents himself, as he has no knowledge of the Portuguese language, and he asked Haesbaert several times to gather as much evidence as possible and to have documents translated

for the hearing, since no one in respondent's office could do it. However, as the attorney in charge of this matter, respondent bore the ultimate responsibility to have Haesbaert's documents translated so that they might be offered into evidence. Respondent also contends that there was insufficient evidence that he could have presented additional evidence supporting Haesbaert's asylum claim since: (1) the IJ testified in this matter that she could not even determine whether it was an asylum case; (2) although the IJ testified that she supplements respondent's examination of his witnesses with questions of her own, the IJ also testified that she asks questions to supplement the record more than other IJs, and the IJ did not specifically refer to the Haesbaert matter in testifying that respondent did not adequately prepare witnesses; (3) it was impossible to obtain additional wituesses, as Haesbaert told respondent that they were in Brazil and probably could not come to the United States; and (4) the INS normally presents evidence of conditions in a given country. However, we note that Kahn was able to attach additional documentation with the motion to remand, and Kahn credibly testified in these proceedings that respondent failed to ask Haesbaert any questions regarding a fear of future persecution. We therefore rejeet these contentions and conclude, as noted above, that clear and convincing evidence establishes that respondent could have, but failed to, present additional evidence to support Haesbaert's asylum application.

Respondent also contends that Kahn failed to raise the issue of ineffective assistance of counsel in her notice of appeal and was therefore barred from raising the issue in the BIA on appeal. We note that respondent has pointed to no legal authority to support this contention. In any event, we do not base our determination of professional misconduct in this matter on the BIA's finding of ineffective assistance of counsel. Instead, we have independently concluded, based on the evidence before us, that respondent failed to perform legal services competently.

We agree with the hearing judge's conclusion that there is no clear and convincing evidence in the record to prove that respondent violated section 6068, subdivision (m), by failing to respond promptly to Haesbaert's reasonable status inquiries. Therefore, the hearing judge correctly dismissed this charge with prejudice, and we adopt that dismissal.

We disagree with the hearing judge's conclusion that respondent willfully violated rule 3-700(D)(2). Although respondent ultimately refunded the fee paid by Haesbaert approximately two months after Haesbaert requested the refund, respondent asserts, and we conclude, that there was no clear and convincing evidence that the value of the services he provided was less than the $500 he was paid. Although the asylum application was already filed at the time respondent agreed to represent Haesbaert, Haesbaert admitted at trial in this matter that respondent met with him three times before the asylum hearing. In addition, respondent appeared at the individual asylum hearing and elicited testimony from Haesbaert in support of the asylum application. Although respondent failed to present all of the evidence which he could have presented in support of Haesbaert's claim, in view of the work respondent performed on Haesbaert's behalf, as well as respondent's testimony that he earned the fee that he charged Haesbaert, we conclude that respondent may have believed he had rendered valuable services to Haesbaert and that under these circumstances respondent did not violate rule 3-700(D)(2) by waiting two months to refund the $500. Accordingly, we reverse the hearing judge's culpability conclusion that respondent violated rule 3-700(D)(2) and dismiss that charge with prejudice.

The Flores Matter

In March 1998, Jose Flores and Johana Flores employed respondent to file applications for political asylum for them and to represent them before the INS on their applications. Respondent charged $2,000, to be paid in installments. The Floreses paid $600 when they employed respondent, and respondent filed applications for political asylum with the INS on April 24, 1998.[16] On June 1, 1998, the Floreses were inter-

16. Although the parties' stipulation states that the asylum applications were filed on June 17, 1998, the exhibits establish that the applications were actually filed on April 24, 1998. In addition, the stipulation and the exhibits establish that the INS asylum interview took place on June 1, 1998, which date was necessarily *after*, not *before*, the asylum applications were filed.

viewed by an INS asylum officer. Thereafter, their applications for political asylum were denied, and they were ordered to appear in the immigration court on July 2, 1998, to show cause why they should not be deported.

On July 2, 1998, at the master calendar hearing, attorney Gardner appeared for respondent. The IJ served Gardner and the INS attorney with a notice of hearing in removal proceedings indicating that an individual hearing was set for September 10, 1999. In August 1999, respondent met with the Floreses and, upon a review of the file, informed them that he would seek to continue the September 10, 1999 hearing to November 11, 1999, because they lacked sufficient evidence to support their claims for asylum. Respondent asked the Floreses for documentation on Mr. Flores's father and his political rank in El Salvador. Respondent also informed the Floreses that, because respondent would seek a continuance, they did not need to attend the hearing on September 10, 1999.

On September 2, 1999, respondent filed a motion to continue the individual hearing to allow the Floreses to obtain additional evidence to support their asylum request. On September 3, 1999, the court sent respondent a letter denying his motion and stating that the hearing remained scheduled for September 10, 1999. The Floreses were not informed that the motion to continue was denied.

The Floreses did not appear at the hearing of September 10, 1999, and the court ordered their removal in absentia. The court served respondent with a copy of that order that same day. Respondent told the IJ (1) that he had spoken to the Floreses two weeks earlier, (2) that they were trying to get documents from El Salvador, and (3) that he had told the Floreses to be at the hearing. The judge reminded respondent that notice to counsel is notice to the clients.

On September 13, 1999, respondent sent the Floreses a letter asking them to contact his office as soon as possible. This letter did not inform the Floreses that they had been ordered removed. On October 7, 1999, respondent sent the Floreses a second letter requesting that they contact his office and attached a copy of the removal order. The attached order indicated that the Floreses were to report to the INS for removal on October 20, 1999.

On October 11, 1999, the Floreses consulted with attorney Mario Bautista. On October 19, 1999, Bautista filed a motion to reopen and rescind the removal order due to exceptional circumstances. This motion was based on respondent's ineffective assistance of counsel. Bautista also reviewed the asylum application and determined that it was insufficient to support a finding of past political persecution or a well-founded fear of future persecution.

On December 17, 1999, the IJ granted the motion to reopen and scheduled a new individual hearing to be held in October 2002. As of the time of trial in the hearing department, the Floreses were eligible to apply for temporary protective status and could obtain employment.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to inform the Floreses of significant developments in their case in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) by recklessly and repeatedly failing to competently perform legal services and that respondent violated section 6068, subdivision (m) by failing to notify the Floreses immediately when the motion for continuance was denied. But the hearing judge concluded that the State Bar had failed to present clear and convincing evidence that respondent violated rule 3-700(D)(2).

Discussion

We conclude, upon our independent review, that the State Bar established by clear and convincing evidence that respondent willfully violated rule 3-110(A) because he repeatedly and recklessly failed to perform legal services competently: (1) by failing to file an application with sufficient evidence to support a claim of political asylum; (2) by failing to inform the Floreses that the motion to continue had been denied;

and (3) by failing to inform the Floreses that it was mandatory for them to appear at the scheduled hearing of September 10, 1999, instead telling them that they need not attend the hearing.

Respondent contends that the hearing judge made erroneous factual findings and an erroneous culpability conclusion as to this charge, since (1) respondent informed the Floreses that he would try to get a continuance but that they still had to show up in court; (2) respondent informed the Floreses that the motion to continue had been denied; (3) there is no evidence that respondent did not try to contact his clients immediately when they failed to appear at their individual hearing and, in any event, there is no rule or statute requiring an attorney to attempt to contact clients immediately; (4) respondent asked the clients to submit all documentation, affidavits and witnesses from this country (i.e., the United States) and their country of origin to support their asylum claim; and (5) respondent attempted to make the best case possible for the Floreses.

Respondent again relies on his version of the events to support his factual assertions. Respondent testified in these proceedings that he met many times with the Floreses, that they needed time to gather the documents he asked for, and that he told the Floreses that the motion to continue was denied and that they should appear at the hearing. No evidence was presented to corroborate his testimony that he told the Floreses that the motion to continue was denied and that they should appear on September 10, 1999. The Floreses testified that respondent told them he would be requesting a continuance of the individual hearing, so that they did not have to make an appearance at that hearing.

As indicated by our culpability determination, we adopt the hearing judge's express finding, consistent with the Floreses' testimony, that respondent told them that they need not attend the individual hearing because he would get a continuance. It is also clear, and consistent with the Floreses' testimony, that respondent never told them that his motion for a continuance was denied, that their attendance at the individual hearing was mandatory, and that their case must proceed on the merits at that hearing.

We note that respondent filed the Floreses' petition on April 24, 1998, yet it was not until August 1998 that he again reviewed the petition and made the determination that he did not have sufficient evidence to support the petition. Only then did he seek further documentation from the Floreses notwithstanding that the hearing was scheduled for September 10, 1998.[17]

We also conclude that two of the charged grounds for violating section 6068, subdivision (m) (i.e., (1) respondent's failure to inform the Floreses immediately when the motion to continue was denied and (2) respondent's failure to inform the Floreses that their appearance was required at their individual hearing) are included in the violation of rule 3-110(A). We therefore decline to find additional culpability under section 6068, subdivision (m). We agree with the hearing judge's conclusion that there was no clear and convincing evidence that respondent failed to keep the Floreses informed of significant developments in their case by failing to inform them immediately that they had been ordered deported in absentia and that they were to report for deportation on October 20, 1999, in view of the fact that respondent sent the Floreses letters on September 13, 1999, and October 7, 1999. In sum, we dismiss the charged section 6068, subdivision (m), violation with prejudice.

We also agree with the hearing judge's determination that the State Bar failed to prove by clear and convincing evidence that respondent did not return unearned fees to the Floreses. The Floreses paid respondent $600 to file an asylum application on their behalf and to represent them in related proceedings. While the asylum application itself lacked sufficient evidence to support the relief requested, that fact in and of itself was not fatal to the asylum claim, since respondent could have supplemented the application and the evidence in support thereof after it was filed.

17. Because we do not adopt the hearing judge's determination that respondent is culpable of failing to provide legal services competently due to the failure to attempt to contact the Floreses immediately when they did not appear at their individual hearing, we do not address respondent's assertions as to this issue.

Respondent had attorney Gardner appear for him at the master calendar hearing, and respondent met with the Floreses in August to prepare them for their individual hearing. Respondent's office then prepared a motion to continue, and respondent appeared at the individual hearing. In view of this work performed on behalf of the Floreses and respondent's testimony that he earned the entire $600 paid, we agree with the hearing judge's conclusions that respondent may have believed he had rendered valuable services and that under such circumstances respondent was not required to refund the $600 absent a demand for a refund by the Floreses or someone on their behalf. Therefore, we dismiss the charged rule 3-700(D)(2) violation with prejudice.

The Santiago Matters[18]

Zenaida Santiago

In March 1993, Zenaida Santiago employed respondent to file a petition for political asylum, to represent her before the INS on her petition, and to obtain and renew annually her employment authorization document. Ms. Santiago paid respondent $2,000 in 25 installments for his representation. Soon after he was employed, respondent filed a petition for political asylum and a request for employment authorization on behalf of Ms. Santiago. In September or October 1993, Ms. Santiago received her employment authorization document.

In 1994, Ms. Santiago moved to Reno, Nevada. In or about August 1994, she telephoned respondent to obtain assistance in renewing her employment authorization document and to inquire about the status of her asylum application. She left a message for respondent to return her telephone call.

On or about August 4, 1994, Ms. Santiago sent respondent a letter notifying him of her new address in Reno and requesting a status update on her asylum application. In August 1994, Ms. Santiago completed a renewal application for her employment authorization with the assistance of an INS officer.

From 1994 through 1998, Ms. Santiago telephoned respondent and left messages for him on several occasions inquiring about the status of her asylum application but received no response. She testified at her deposition that she had not seen or spoken to respondent since the initial interview. The only people she had spoken to since that time were George (Jorge Ureta), respondent's assistant, and the receptionist. Further, the only correspondence she had received from respondent were the monthly reminders of the fee payment.

On June 7, 1999, Ms. Santiago terminated respondent's services by sending him a letter via facsimile requesting the return of her file and a refund of the fees she had paid, since respondent did nothing to assist her with her employment authorization document renewal or with her asylum matter. She stated in the letter that she needed her file because she had a hearing before the INS the following week.

On July 2, 1999, Ms. Santiago sent respondent a second letter, again requesting her file and a refund of unearned fees, and attached her letter of June 7, 1999. On July 26, 1999, respondent returned the file. On July 29, 1999, Ms. Santiago sent respondent a third letter requesting a refund of unearned fees but received no response. She filed a complaint against respondent with the State Bar in October 1999.

On or about January 18, 2000, the State Bar notified respondent that Ms. Santiago had filed a complaint against him. Thereafter, on February 21, 2000, respondent refunded only $1,500 of the $2,000 to Ms. Santiago.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to respond promptly to reasonable status inquiries in violation of section 6068, subdivision (m). He was additionally charged with one count of violating rule 3-700(D)(1), failing to release client papers and property

18. We discuss our culpability conclusions in the matters of Mr. Arturo Santiago and Ms. Zenaida Santiago together.

promptly upon request of the client. The hearing judge determined that respondent willfully violated rule 3-110(A): (1) by failing to assist Ms. Santiago when she requested assistance with her employment authorization renewal; and (2) by failing to inform Ms. Santiago that the matter could be transferred to Reno, Nevada. The hearing judge also determined that respondent failed to refund unearned fees promptly to Ms. Santiago, failed to respond to Ms. Santiago's reasonable status inquiries, and failed to release Ms. Santiago's file promptly upon her request, instead waiting for over six weeks to release the file after Ms. Santiago had informed respondent, in her first request for the file, that she needed her file the following week.

Arturo Santiago

In or about January 1998, Arturo Santiago, Zenaida Santiago's husband, employed respondent. Respondent advised him that his only option was to file an application for political asylum. Respondent requested $2,500. Mr. Santiago paid $750 at the time he employed respondent.

In March 1998, Mr. Santiago received a written notice from the INS in San Francisco that he had an interview with an INS asylum officer on April 14, 1998, at 9:00 a.m. Mr. Santiago was instructed to bring his entire family. Mr. Santiago notified respondent's office and requested an appointment with respondent to discuss the interview. He spoke to George, respondent's assistant, who instructed him to come to respondent's office at 3 p.m. on April 13, 1998, to prepare for the interview.

On April 13, 1998, Mr. Santiago and his family flew to San Francisco from Reno to meet with respondent. However, when they arrived at respondent's office that day, respondent was not there. George told them that respondent would meet them the following morning at 8:00 a.m. at the INS office.

Respondent failed to meet with the Santiagos prior to the interview. After waiting until approximately 11:00 a.m., the Santiagos appeared at Mr. Santiago's INS interview without counsel. The INS asylum officer denied Mr. Santiago's asylum application and offered to transfer their files to the Reno office for a hearing before the immigration court.[19]

On June 25, 1998, Mr. Santiago sent respondent a letter via facsimile requesting a refund of the $750 he had paid to respondent. Respondent, however, did not refund the $750 until after Mr. Santiago filed a complaint with the State Bar.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with, and the hearing judge determined that respondent was culpable of, one count of failing to perform legal services competently in violation of rule 3-110(A).

Discussion

Our independent review of the record convinces us that in these two matters, respondent willfully violated rule 3-110(A): (1) by failing to inform the Santiagos that their cases could be transferred to Reno, where they resided; (2) by failing to assist Ms. Santiago with her renewal of her employment authorization; (3) by failing to meet with the Santiagos on the day before and the day of Mr. Santiago's interview; and (4) by failing to appear at the asylum interview on April 14, 1998, leaving the Santiagos without counsel for the interview.

We also determine that respondent is culpable of willfully violating rule 3-700(D)(2) by the delay in refunding unearned fees upon Ms. Santiago's request and termination of respondent's employment until after respondent learned of Ms. Santiago's complaint to the State Bar. We find that respondent did nothing for Ms. Santiago except for filing the political asylum application and obtaining the initial work authorization, which work was not worth $2,000. We further determine that respondent is culpable of willfully violating section 6068, subdivision (m), by failing to answer Ms.

19. Immigration law expert Angela Bean testified that a competent immigration law attorney would not send a client to an asylum interview without counsel because the interviews are wide open and because frequently, after the immigration officer is finished, the attorney is invited to cover areas that may not have been adequately covered by the questioning.

Santiago's many telephone calls and letters and of willfully violating rule 3-700(D)(1) by failing to promptly return Ms. Santiago's file upon request in time for her court hearing.

With respect to Ms. Santiago's matter, respondent asserts that he recommended to her that she should retain another attorney in Reno once she moved there but that she refused to do so. He also asserts that he and his office staff responded to her inquiries and that her file was returned to her late due to an office miscommunication but that no harm was done. He additionally asserts that he provided services of value to her during the many years he worked for her but nevertheless refunded her fees.

Respondent also asserts that, once the Santiagos married, he advised both of them that it would be better to retain counsel in Reno and to file a political asylum application there but that they both refused. He contends that he did meet with Mr. Santiago and prepared him the day before the INS asylum interview. According to respondent, at that time, he informed the Santiagos that he was scheduled to be in court at the time of their interview and offered to reschedule their interview, but the Santiagos refused, saying they wanted to go to the interview by themselves since they had flown to San Francisco from Reno.

In support of these assertions, respondent appears to again rely solely on his testimony that he met with the Santiagos for about an hour when they flew in from Reno the day before their asylum interview and that they went to the interview by themselves as agreed upon. He explained that he prepares clients for their asylum interviews but tells them to go to the interviews by themselves because an attorney cannot say anything at an interview. He also testified that he advised the Santiagos that they should find another attorney in Reno. He testified that he spoke to Ms. Santiago on the telephone, that she came to the office on one or two occasions, and that he responded to her inquiries on the status of the asylum application, though he could not recall whether he ever responded in writing. He further testified that after receiving a letter from Ms. Santiago requesting her file, he had given instructions, presumably to his office staff, to have the file copied and sent to her, but the file was not sent until almost two months after respondent received the letter.

However, it is clear from the hearing judge's culpability determinations that he rejected respondent's credibility as to these matters and accepted the credibility of the Santiagos. We give these credibility determinations great weight.

The Obis Matter

In or about October 1994, Alejandro Alberto Obis employed respondent to represent him regarding his political asylum application. Obis paid respondent at least $1,800 in attorney fees for representation through a regular hearing.

On June 21, 1995, respondent accompanied Obis to his asylum interview with the INS officer. Respondent left during the interview, stating he had to attend a court hearing. The interview continued without respondent. The officer denied the application, and the matter was referred to the immigration court for a hearing on September 7, 1995.

On September 7, 1995, attorney Gardner appeared at the hearing for respondent as counsel for Obis. The IJ set the case for a regular hearing on March 5, 1996. Respondent represented Obis at the March 5, 1996, hearing. At the conclusion of the hearing, the IJ denied Obis's asylum application but granted his request for voluntary departure by June 1, 1996. The IJ's finding was based upon Obis's failure to establish past persecution or a well-founded fear of future persecution.

At the conclusion of the hearing, Obis asked respondent what had happened.

On March 11, 1996, respondent filed a notice of appeal with the BIA, and on June 21, 1996, respondent filed a brief in support of Obis's appeal. On June 3, 1997, the BIA affirmed the IJ's decision and dismissed the appeal. Respondent failed to inform Obis that the BIA had dismissed his appeal.

In June 1997, Obis received a telephone call from respondent's office requesting that Obis come to the office for a meeting. Obis went to respondent's office, and respondent informed him that he would have to file an appeal in the Ninth Circuit. Respondent charged Obis $3,000 for the appeal, and Obis agreed to pay the

money in installments. Obis paid respondent $1,500 on or about June 17, 1997.

On December 17, 1997, the Ninth Circuit dismissed the matter for failure to file an opening brief.[20] Respondent's office received a copy of the dismissal order. Respondent failed to inform Obis that this appeal had been dismissed.

On January 24, 1998, Obis received a letter from the INS stating that his application for employment authorization was denied because his asylum application had been dismissed on June 3, 1997, and no appeal was filed.

After conducting further research, Obis learned that he was going to be ordered deported. On February 5, 1998, Obis returned to respondent's office and again questioned respondent about what would happen in his case.

In or about February 1998, Obis employed attorney Elif Keles to represent him. Keles notified respondent that Obis would be filing a motion based upon ineffective assistance of counsel. On or about March 5, 1998, respondent issued Obis a refund in the amount of $1,500.

On April 3, 1998, Keles filed a motion to recalendar scheduling order for petitioner's brief with the Ninth Circuit, requesting that the court recall its dismissal order due to ineffective assistance of counsel. On August 4, 1998, the Ninth Circuit reinstated the case. On May 18, 1999, the court held that Obis had demonstrated at his regular hearing that he had suffered from past persecution and had shown a well-founded fear of future persecution. The court remanded the case to the BIA.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with violating rule 3-110(A) and with failing to inform Obis of significant developments in his case in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar had proved all charges by clear and convincing evidence.

Discussion

We conclude upon our independent review of the record that the State Bar proved by clear and convincing evidence respondent's culpability of willfully violating rule 3-110(A): (1) by leaving Obis unrepresented in his interview with the INS officer; (2) by failing to file a timely opening brief in the Ninth Circuit; and (3) by failing to file a motion to reopen the Ninth Circuit appeal upon receiving notice of its dismissal.

We also conclude that respondent willfully violated section 6068, subdivision (m): (1) by not informing Obis of the BIA's dismissal of his appeal; and (2) by not informing Obis of the Ninth Circuit's dismissal of his appeal due to respondent's failure to file a timely opening brief.

Respondent contends that the hearing judge's finding of culpability of failing to perform legal services competently is erroneous because (1) although the hearing judge found respondent left his client in the middle of an INS interview to attend to another case, the client had previously waived respondent's presence after respondent had given the client the option of rescheduling the interview and (2) the hearing judge denied respondent due process by failing to indicate clearly in his decision whether respondent's alleged failure to take appropriate action on appeal was during the appeal before the BIA or during the appeal before the 9th Circuit.

Respondent testified in this matter that he had an agreement with Obis that he would be leaving during the interview due to a conflict and that Obis did not want to reschedule the hearing, so he completed it without counsel. However, Obis testified that he didn't remember respondent telling him beforehand that he

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20. Gardner testified at trial in this matter that he did not file the Obis petition for review in the Ninth Circuit and did not prepare, dictate, or authorize the petition. Gardner identified the signature on the pleading as his "stamped signature." He noted that the petition is made up of two sentences, which is the way Jorge Ureta, respondent's assistant, rontinely drafts them. This document was drafted without Gardner's knowledge.

would be leaving in the middle of the interview. Consistent with the hearing judge's implied finding, we find lacking in credibility respondent's testimony that Obis agreed to continue the interview without counsel.

[2] In view of our duty to independently review the record and make findings of fact and conclusions of law, any alleged denial of due process by the hearing judge's failure to clearly identify respondent's misconduct in this case will be remedied by our issuance of an opinion that supersedes the hearing judge's decision (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 87). Therefore, respondent's due process contention is rendered moot, and we do not address it on the merits. (*In the Matter of Respondent K*, *supra*, 2 Cal. State Bar Ct. Rptr at pp. 346-347.)

Respondent additionally appears to assert that, as to the Ninth Circuit appeal, it was attorney Gardner who failed to file a timely opening brief. Gardner testified, however, that he never knew about the Ninth Circuit petition for review until it had been dismissed and never received money for handling an appeal for Obis. We conclude that respondent was responsible for seeing to it that a brief was timely filed for Obis in the Ninth Circuit. In view of Gardner's testimony, we also determine that respondent is not culpable of failing to perform legal services competently by reason of his lack of supervision of Gardner but is culpable, as indicated above, for failing to file a Ninth Circuit brief.

Respondent also asserts that the hearing judge made the erroneous factual finding that respondent failed to inform Obis of the BIA's dismissal of his appeal. Respondent asserts that if he had not advised Obis of the BIA's dismissal of the appeal, Obis could not have consented to file a petition for review and that, therefore, there would not have been a Ninth Circuit petition to review the BIA decision. However, Obis's declaration attached to the motion to recalendar the scheduling order that was filed in the Ninth Circuit indicates that respondent never even told Obis that he was filing the BIA appeal and that, after the appeal was dismissed, he merely told Obis that he would have to file an appeal, not that he would have to file a new appeal with the Ninth Circuit because the BIA appeal had been dismissed. Based on the evidence, we agree with and adopt the hearing judge's finding that respondent did not inform Obis of the dismissal of the BIA appeal and conclude that this omission constituted a willful violation of section 6068, subdivision (m).

The Robles-Meza Matter

On or about April 30, 1996, Roberto Robles-Meza was placed in deportation proceedings because the INS alleged that he entered the United States without inspection in May 1987. Robles-Meza paid nonattorney immigration consultant Charles Stephens to prepare an application for suspension of deportation. Robles-Meza appeared for hearings before the immigration court on June 19, 1996, July 3, 1996, and September 9, 1996. At the last of these hearings, the IJ set a regular hearing for October 25, 1996, and required any notice of representation to be filed by September 16, 1996.

On September 16, 1996, respondent filed his notice of entry of appearance as attorney and filed and served the application for suspension of deportation.

On October 25, 1996, respondent appeared on behalf of Robles-Meza. During the hearing, the IJ indicated for the record that, based upon Robles-Meza's answers to questions at the hearing regarding dates he was out of the United States during the previous 13 years, some of the information on the application for suspension of deportation was incorrect. At the conclusion of the hearing, the court issued an oral decision (1) denying Robles-Meza's application for suspension of deportation on the ground that he failed to establish extreme hardship and (2) permitting Robles-Meza to depart the United States voluntarily.

Robles-Meza employed attorney Robert Yarra to appeal the court's order of October 25, 1996. On September 26, 1997, Yarra filed in the BIA a motion to remand based on ineffective assistance of counsel or, in the alternative, respondent's brief in support of appeal. Yarra argued in part that respondent failed to present substantial evidence that Robles-Meza met the extreme hardship criteria for suspension of deportation. Yarra then set forth the evidence that would have established extreme hardship had respondent presented it at the hearing. Based upon Yarra's argument, the BIA found that Robles-Meza had met the criteria and therefore granted his request to suspend deportation.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with, and the hearing judge determined respondent was culpable of, one count of violating rule 3-110(A).

Discussion

Based on our independent review of the record, we conclude that respondent willfully violated rule 3-110(A) by: (1) failing to correct errors in the application for suspension prepared by a nonattorney; (2) failing to properly prepare Robles-Meza for the hearing to establish the hardship requirement for suspension of deportation; and (3) failing to review the evidence for sufficiency to support his application. We do not find respondent's testimony as to his preparation to be credible.

Respondent contends that there is no evidence in the record to support the hearing judge's finding that respondent's questioning at the hearing showed a lack of preparation. Respondent testified in this matter that he spent about an hour and a half with Robles-Meza going over the application for suspension of deportation, that they discussed the necessary witnesses and documentation, that he believed he checked all supporting documents to be sure they were translated into English, and that he prepared Robles-Meza for the individual hearing.

On the other hand, Robles-Meza testified that he met with respondent twice, the first time for 10 or 15 minutes and the second time, prior to the hearing of October 25, 1996, for about half an hour. He testified that respondent told him that the papers prepared by nonattorney Charles Stevens were fine and that he was asked to bring letters from the church and the green cards from his father and brother. He further testified that, at the second meeting with respondent, they did not discuss what questions would be asked of him in the individual hearing, and there was never a discussion of witnesses to bring to court to support the application.

Moreover, Immigration Judge Phan Quang Tue testified at trial in the hearing department that untranslated documents in Spanish and unsigned or undated affidavits were returned to respondent. Immigration Judge Tue also testified that respondent was not very well prepared and failed to solicit some of the information necessary to support the application for suspension of deportation.

Based upon our independent review of the evidence, we conclude that the testimony of Robles-Meza and Immigration Judge Tue clearly establish that respondent recklessly and repeatedly failed to perform legal services competently in willful violation of rule 3-110(A).

The Franco Matter

In April 1996, Jose Franco was placed in deportation proceedings because the INS learned that he had entered the United States in October 1979 without inspection. Franco appeared at his first immigration court hearing on April 9, 1996, without an attorney and requested a continuance to employ an attorney. The court continued the matter to June 18, 1996.

In approximately April 1996, Franco employed respondent to represent him in the deportation proceedings. Respondent advised Franco to gather further documentation. Franco gathered the documentation and provided it to respondent before the hearing of June 18, 1996. Respondent prepared and submitted an application for suspension of deportation with supporting documentation.

On June 18, 1996, attorney Gardner entered an appearance for Franco. At the hearing of that date, the IJ set the matter for a regular hearing on March 17, 1997.

Respondent did not appear on March 17, 1997. When Franco appeared at that hearing, the IJ informed him that he needed additional documentation to support his application for suspension from deportation. The IJ rescheduled the hearing for October 9, 1997. However, neither respondent nor Franco appeared at that hearing, and Franco was ordered deported in absentia.

Franco thereafter employed attorney Robert Jobe to represent him in his deportation proceedings. On March 2, 1998, Jobe filed a motion to reopen based in part on ineffective assistance of counsel. The motion was unopposed, and the IJ granted the motion on

March 9, 1998. Attorney Jobe submitted substantial documentation to support the suspension of deportation proceedings in Franco's case. However, Franco died on July 8, 1999, before the final hearing on the application for suspension of deportation.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with one count of violating rule 3-110(A). The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of this violation.

Discussion

We agree with the hearing judge's statement in his decision that any reasonable doubts must be resolved in respondent's favor (see, e.g., *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216), and we conclude that, in view of Franco's death, we do not know the extent of respondent's preparation of and advice to Franco. We also agree with the hearing judge's conclusion that, notwithstanding the apparent lack of sufficient documentation attached to the original application for suspension of deportation, we cannot know what additional evidence respondent may have intended to present at the individual hearing. We therefore dismiss with prejudice the charge that respondent violated rule 3-110(A). As we will further discuss along with the charge that respondent committed acts of moral turpitude by habitually disregarding his clients' interests, we do not consider culpability in this matter in determining the appropriate level of discipline in this case.

The Bracamonte-Reyes Matter

In March 1997, Gladis Bracamonte-Reyes illegally entered the United States through Texas and was taken into custody by the INS. Her matter was referred to the immigration court in Texas. She retained Texas attorney Thelma Garcia, who assisted her in obtaining a change of venue to the immigration court in San Francisco. Before Bracamonte-Reyes left for San Francisco on May 9, 1997, Garcia's office suggested that she obtain counsel in San Francisco but did not recommend anyone in particular.

Bracamonte-Reyes provided Garcia's office with a forwarding address so that all documentation received from the immigration court in San Francisco could be forwarded to her. Bracamonte-Reyes decided she would wait until she received the notification of her initial hearing date in San Francisco before employing an attorney in San Francisco.

On May 22, 1997, the immigration court in San Francisco sent a notice of hearing for Bracamonte-Reyes to "William R. Gardner, Law Office of Miguel Gadda." The notice indicated that a master calendar hearing was set for August 26, 1997. Respondent's office received this notice in error, since no one at his office had notified the court that he was representing Bracamonte-Reyes. Bracamonte-Reyes did not receive notice of this hearing.

On August 26, 1997, John Pearson, a contract attorney for respondent, appeared at the master calendar hearing upon respondent's instructions. Pearson filed a Form EOIR-28, a notice of entry of appearance as attorney of record, indicating that respondent represented Bracamonte-Reyes. Bracamonte-Reyes did not appear at the hearing, Pearson never saw Bracamonte-Reyes, and Bracamonte-Reyes at no time paid respondent any fees. Pearson obtained a continuance of the hearing to September 16, 1997. Pearson returned to respondent's office and directed the staff to contact Bracamonte-Reyes, but she never received notification of the continued hearing date.

At the hearing of September 16, 1997, the IJ ordered Bracamonte-Reyes deported in absentia after she failed to appear. As Immigration Judge Laura Ramirez testified in this matter, because a notice of hearing appeared to have been mailed to counsel of record, Judge Ramirez had no discretion to do anything but order the deportation in absentia when Bracamonte-Reyes failed to appear in court.

In approximately September 1997, Bracamonte-Reyes contacted Garcia's office in Texas because she had not received any notification of her hearing date. Garcia's office informed her that she had missed her hearing of August 26, 1997, and that she was represented by an attorney in San Francisco.

On September 23, 1997, Bracamonte-Reyes employed attorney Sharon Dulberg to represent her in the matter. Attorney Dulberg obtained a copy of the

immigration court file and learned that respondent's office had made an appearance on behalf of Bracamonte-Reyes although Bracamonte-Reyes had never spoken with respondent and had not authorized such appearance.

Dulberg tried unsuccessfully to contact respondent by telephone and by letter but did finally obtain a copy of Bracamonte-Reyes's file from respondent. On November 25, 1997, she filed a motion to reopen deportation proceedings on behalf of Bracamonte-Reyes based on respondent's unauthorized representation of Bracamonte-Reyes. The court granted the motion.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with one count of violating section 6104. That section provides that "[c]orruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of this violation.

Discussion

Bracamonte-Reyes testified at trial in the hearing department that she had never met respondent, attorney Gardner, or attorney Pearson before that day in State Bar Court proceeding and that she had never been to respondent's law office before she hired attorney Dulberg.

Respondent, however, testified that, upon her arrival from Texas, Bracamonte-Reyes came to his office requesting representation and that he saw her after she failed to appear at the master calendar hearing. He testified that he also saw her at the INS building after the second scheduled hearing, that she told him she had just arrived two hours late, and that he spoke to her and asked her to come to his office.

Inasmuch as there is a direct conflict in the testimony of the parties and as there is no other evidence to support the parties' contentions except the notice of hearing sent to respondent's office, we adopt the hearing judge's conclusion that the State Bar failed to prove that respondent violated section 6104. The hearing judge either found respondent's testimony credible, found Bracamonte-Reyes's testimony incredible, or was unable to resolve the conflicting testimony and gave respondent the benefit of reasonable doubt. Accordingly, the charge of violating this section is dismissed with prejudice.

Moral Turpitude - Habitual Disregard of Client Interests

In this charge, the State Bar incorporated all the facts set forth in all of the foregoing client matters and alleged that respondent committed acts involving moral turpitude by habitually disregarding the interests of his clients.

The Hearing Judge's Conclusions

The hearing judge concluded that the State Bar failed to present clear and convincing evidence to establish a violation of section 6106.

Discussion

[3a] Upon our independent review, it appears that the record may very well contain clear and convincing evidence to support the charged section 6106 violations. " '[H]abitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. [Citations.]' [Citations.]" (*Kent v. State Bar* (1987) 43 Cal.3d 729, 735.) " 'Even when such neglect [of clients] is grossly negligent or careless, rather than willful and dishonest, it is an act of moral turpitude and professional misconduct, justifying disbarment . . . .' " (*Simmons v. State Bar* (1970) 2 Cal.3d 719, 729, quoting *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-684; see also *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 385.)

[3b] In addition, it also appears to us, upon our review of the entire record, that there may be clear and convincing evidence of respondent's culpability of violating rule 3-700(D)(2) in the Garcia matter, as it does not appear that respondent earned the fee paid by the Garcias, and of violating rule 3-110(A) in the Franco matter by failing to appear, without notice or

an explanation to Franco or the immigration court, at Franco's individual hearing.

[3c] However, neither the State Bar nor respondent has addressed these issues on review. In light of the very extensive misconduct and aggravating circumstances (including a prior record of discipline for very similar misconduct) that are clearly established by the record, we conclude that any further findings of culpability on these additional charges would not affect in any way our discipline recommendation in this case. Accordingly, this is one of the rare instances in which we need not and therefore do not independently determine whether the record establishes respondent's culpability on any of these additional charges. (Cf. *Himmel v. State Bar* (1973) 9 Cal.3d 16, 23.)

The Castro Matter

Nelly Castro, who is the spouse of a United States citizen, attempted to enter the United States as an intending immigrant without a valid immigrant visa or other valid entry document. The INS detained her for a hearing before an IJ.

In December 1996, Castro employed respondent to assist her in obtaining the status of legal permanent resident. Respondent advised her that the IJ could adjust her status in the exclusion proceedings currently pending. This advice was incorrect, as an alien can adjust status only if inspected and admitted or if granted advanced parole into the United States. Respondent charged Castro $1,000, which amount Castro paid at or near the time she employed respondent.

On December 12, 1996, attorney Gardner appeared for respondent at a master calendar hearing. Gardner was unfamiliar with the case and attempted to file an application for permanent resident status, which made Castro excludable as charged. The IJ continued the matter to May 12, 1997, so that Gardner could discuss the case with respondent. On May 12, 1997, Gardner appeared and obtained another continuance.

On December 2, 1997, respondent's office filed on Castro's behalf an application to register permanent residence or adjust status.

On December 15, 1997, respondent appeared on behalf of Castro. The IJ explained for the record that Castro was in exclusion proceedings and could not obtain an adjustment of status in those court proceedings. Respondent admitted that Castro was excludable as charged and requested to withdraw Castro's application for adjustment of status so that Castro could go back to Mexico and get a valid visa. The INS trial attorney indicated that respondent would have to obtain the consent of the INS district director to withdraw Castro's application for adjustment of status. Respondent then requested additional time to contact the INS district director to obtain this consent. The IJ continued the matter to March 2, 1998, to give respondent time to do so.

On March 2, 1998, respondent appeared on Castro's behalf and again attempted to withdraw the application for adjustment of status. The INS trial attorney again objected to the withdrawal of the application absent the consent of the district director, and the IJ once again explained to respondent that he did not have jurisdiction to decide an adjustment of status in an exclusion proceeding. Respondent continued to request that the court permit Castro to withdraw her application for adjustment of status, and the IJ reiterated that respondent was required to obtain the INS district director's consent in order for the court to do that. The IJ then ordered Castro excluded and deported from the United States since respondent had failed to reach a resolution with the INS district director.

On March 16, 1998, respondent filed a notice of appeal to the BIA on the ground that the IJ abused his discretion by advising Castro to file an adjustment of status application.

In or about March 1998, Castro terminated respondent's representation and employed attorney Stephen Shaiken, and respondent refunded the entire $1,000 fee to Castro. Shaiken filed a motion to reopen based upon ineffective assistance of counsel.

As Shaiken testified in these proceedings, when an alien is ordered excluded, he or she is barred from obtaining a visa without first obtaining a waiver.

Further, serious penalties can be imposed on an alien who remains in the United States for an extended period of time without authorization. For instance, if an alien remains in the United States without permission for more than one year, and then leaves, there is a 10-year bar on re-entry.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with violating rule 3-110(A) and section 6104. The hearing judge concluded that the State Bar had proved by clear and convincing evidence that respondent willfully violated rule 3-110(A). The hearing judge also determined, however, that the State Bar had failed to present clear and convincing evidence of this violation of section 6104.

Discussion

Upon our independent review of the record, we determine that respondent willfully violated rule 3-110(A) by repeatedly and recklessly failing to perform legal services competently. Despite the fact that the IJ advised respondent (1) that the IJ did not have jurisdiction in exclusion proceedings to adjust an alien's status and (2) that respondent had to obtain the INS district director's permission before Castro could withdraw her application for adjustment of status, respondent continued to attempt to withdraw the application for adjustment of status without proof of the district director's permission and to request that the IJ consider Castro's application to adjust status in the exclusion proceedings. Moreover, respondent incorrectly advised Castro that the IJ could adjust her status in the exclusion proceedings. In addition, respondent was aware or should have been aware that if Castro remained in the United States for a sufficient amount of time, she was subject to being barred from the entering the United States for up to 10 years unless she obtained a waiver. Respondent nevertheless failed to attempt to terminate the exclusion proceedings and instead obtained several continuances. Respondent also filed a frivolous appeal with the BIA, stating as a basis for the appeal that the IJ had erroneously advised Castro to file an application to adjust status in the exclusion proceedings.

Respondent asserts that Castro would not cooperate with him, as she refused his advice to return to Mexico to get her visa there and instead insisted on trying to obtain an adjustment of status in the United States. He also contends that he requested that the INS district director allow Castro to withdraw her application for adjustment of status or admit Castro to the United States, but the district director rejected these requests. Respondent asserts that he acted in the best interests of the Castros in every respect.

However, the record clearly establishes that respondent did not understand the proper procedure to pursue on behalf of Castro. He repeatedly tried to withdraw Castro's application for adjustment of status without the district director's consent. He requested that the IJ consider Castro's application to adjust her status in the exclusion proceedings notwithstanding that the IJ had told him that the relief he was pursuing was not available to Castro under the circumstances. Finally, he obtained continuances of the hearing dates in spite of the fact that respondent was aware that the continuances were likely to result in serious sanctions being imposed upon Castro due to the length of her unauthorized stay in the United States. Moreover, respondent falsely stated in his appeal to the BIA that the IJ gave Castro incorrect advice, when the transcripts establish that the IJ repeatedly gave Castro and respondent correct advice. We conclude that respondent's arguments as to this issue lack merit.

As to the charge of violating section 6104 by filing an appeal to the BIA without obtaining the Castros' authority, we give great weight to the hearing judge's apparent credibility determination based on respondent's testimony that Mr. Castro authorized respondent to file the appeal. We therefore adopt the hearing judge's determination that respondent is not culpable as to this charge, and we dismiss this charge with prejudice.

The Villalta Moran Matter

On or near October 6, 1999, Alexev Villalta Moran employed respondent to represent him in removal proceedings. Respondent filed a notice of appearance as attorney with the immigration court on

October 6, 1999. On October 20, 1999, respondent was served with a notice of a master hearing on January 24, 2000.

On January 24, 2000, respondent appeared, but Villalta Moran failed to appear. The IJ ordered Villalta Moran removed in absentia.

On May 12, 2000, respondent filed a motion to reopen. The motion stated that the reason Villalta Moran failed to appear was that he had not received notice of the hearing of January 24, 2000. On June 13, 2000, the IJ granted the motion to reopen based upon her sua sponte finding of ineffective assistance of counsel. She noted that it was clear that respondent had received notice of the hearing and failed to notify Villalta Moran of the hearing. Since notice to the attorney is notice to the client (8 C.F.R. § 292.5(a)), she found respondent's motion to be frivolous but granted it, as indicated, based on ineffective assistance of counsel.

The Hearing Judge's Conclusions

As to this client matter, respondent was charged with violating rule 3-110(A) and with failing to inform Villalta Moran of significant developments in his case in violation of section 6068, subdivision (m). The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of either of these violations.

Discussion

Upon our independent review of the record, including the stipulation, we adopt the hearing judge's conclusion that the State Bar failed to present clear and convincing evidence that respondent willfully violated either rule 3-110(A) or section 6068, subdivision (m). The NDC charged that respondent violated rule 3-110(A) by (1) failing to inform Villalta Moran of the hearing on January 24, 2000; (2) failing to inform Villalta Moran that respondent provided ineffective assistance of counsel; (3) failing to advise Villalta Moran to seek new counsel to file a motion to reopen based upon ineffective assistance of counsel; and (4) failing to state in his motion to reopen that he provided ineffective assistance of counsel. The NDC charged that respondent violated section 6068, subdivision (m), by failing to inform Villalta Moran that respondent provided ineffective assistance of counsel.

The hearing judge impliedly found credible respondent's testimony that he sent the notice to the address of Villalta Moran's mother, where he had been told Villalta Moran would be living. Under these facts, respondent did all he could to inform Villalta Moran of his hearing and did not provide ineffective assistance of counsel. Therefore, the counts charged as to this matter are dismissed with prejudice.

The Trust Account Matter

Beginning sometime before January 1, 1999, and continuing until December 31, 1999, respondent maintained an attorney-client trust account at Bank of America. Respondent maintained his personal funds in this trust account.

Between March 9, 1999, and October 6, 1999, respondent issued at least 24 checks on the trust account for personal and non-client business expenses. In addition, between about March 1999 and September 1999, respondent repeatedly issued checks drawn on his trust account against insufficient funds when he knew or should have known that there were insufficient funds in the account to pay them.

The Hearing Judge's Conclusions

As to this matter, respondent was charged with: (1) commingling personal and client funds in his trust account and using his trust account for personal purposes in violation of rule 4-100(A); and (2) committing acts involving moral turpitude in violation of section 6106 by issuing checks from his trust account when he knew or should have known that there were insufficient funds in the trust account to pay them. The hearing judge concluded that the State Bar presented clear and convincing evidence that respondent committed both violations.

Discussion

On the first day of trial in this matter, March 13, 2001, respondent admitted culpability as to these charges, and respondent also admitted culpability in his opening brief on review. Upon our independent review

of the record, we adopt the hearing judge's conclusion that respondent is culpable of committing the two violations charged in this matter.

Respondent asserts that at the time of these violations, he had a new bookkeeper and was out of his regular office checks. However, respondent had a duty to adequately supervise his staff (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 681-682), and the evidence that the violations lasted for months establishes that respondent did not comply with this duty. Therefore, the fact that respondent had a new bookkeeper at the time constitutes no defense to these charges.

DISCIPLINE

Mitigation

[4] The hearing judge found no evidence of mitigating circumstances. However, the record reflects that respondent suffers from painful maladies called torticollis and dysphonia, which have caused respondent to miss many court appearances, and he has been diagnosed with Parkinson's disease. In addition, respondent has been going through an emotional divorce, and his mother and father died a couple of years ago, causing him to suffer from depression. Respondent has also suffered from financial difficulties lately and owes the Internal Revenue Service approximately $20,000. However, we note that standard 1.2(e)(iv) directs that, in order for us to consider these kinds of emotional difficulties and physical disabilities mitigating, respondent was required (1) to establish through expert testimony that his emotional difficulties and physical disabilities were directly responsible for his misconduct and (2) to establish through clear and convincing evidence that he no longer suffers from the difficulties and disabilities. There is no expert testimony in the record to establish that respondent's depression, his physical maladies, and his financial difficulties were directly responsible for his misconduct. Similarly, there is no evidence in the record to establish that respondent no longer suffers from these difficulties and disabilities or even that he can take, and is taking, steps to overcome them. We therefore decline to find these circumstances mitigating.

Respondent contends that his cooperation with the State Bar during the proceedings below and his remorse are also mitigating factors. Respondent entered into an extensive stipulation of facts and freely admitted the trust account violations in this case, for which conduct respondent is entitled to some mitigation. (Std. 1.2(e)(v).) In addition, he returned the fee Castro had paid immediately upon Castro's termination of his services, demonstrating some recognition of misconduct in that client matter. We give respondent some mitigating credit for this conduct as well. (Std. 1.2(e)(vii).)

Respondent next contends that there was no harm to clients in the trust account matter. Again, we give respondent some mitigating credit for the apparent lack of harm to clients resulting from his misuse of his trust account. (Std. 1.2(e)(iii).)

Aggravation

As noted above, respondent has a prior record of discipline. (Std. 1.2(b)(i).) In *Gadda I*, respondent was given two years of stayed suspension and three years of probation on conditions including an actual suspension lasting six months and until respondent paid restitution to two immigration clients. In that case, the Supreme Court found that respondent had been dishonest; had failed to protect the interests of his immigration law clients by failing to perform legal services competently; and had blamed his own misconduct on his independent contract attorney, for whom respondent failed to take responsibility. The misconduct occurred between late 1980 and 1984.

[5] In the present case, the misconduct spanned the period between 1994 and 1999. Although respondent argues that his prior discipline was remote in time and therefore should not have been considered as an aggravating circumstance, we previously determined that a prior record of discipline was not too remote in time to be considered as aggravating where the prior discipline had been imposed 14 years before the imposition of discipline in the more recent case and 7 years before the commission of misconduct in the more recent case. (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) We conclude that in this case, particularly because the prior misconduct was very similar to that found in the

present case, respondent's prior record of discipline must be considered to be a serious aggravating circumstance, made even more serious as the prior discipline in *Gadda I* did not serve to rehabilitate respondent and prevent the misconduct we now review.

The record in this case establishes that respondent engaged in multiple acts of misconduct over an extended period of time. (Std. 1.2(b)(ii).)

As further aggravation, we adopt the hearing judge's determination that respondent's misconduct caused significant harm to the Saba children, the Garcias, the Floreses, Obis, and Castro. (Std. 1.2(b)(iv).) We additionally determine that respondent's misconduct significantly harmed Z. Santiago, A. Santiago, and Robles-Meza. (*Ibid.*)

We also determine in aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent continues to deny responsibility by blaming others (i.e., his contract attorney Gardner, who was not given any guidance or information; his staff; his clients for missing their hearing dates when they were not informed of these dates; and his new bookkeeper for causing his trust account violations).

Level of Discipline

No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

As previously indicated, the hearing judge recommended disbarment as the only appropriate discipline to be imposed in this matter for the protection of the public, the courts, and the legal profession. (Std. 1.3; *In re Morse* (1995) 11 Cal.4th 184, 205.)

[6a] Under the circumstances reflected by this record, we also doubt that any discipline less than disbarment can adequately protect the public against future acts of misconduct of the type which respondent has repeatedly committed. We are confronted here with a continuing course of misconduct over a period of six years, coupled with prior discipline for very similar misconduct. There is no evidence that respondent is cognizant of the seriousness of his misconduct. Instead, respondent continues to rationalize his conduct by blaming others. He refuses to take responsibility for his conduct.

[6b] The record reflects that five of respondent's clients were ordered deported in absentia by the immigration court due to respondent's misconduct. That this happened once was considered very serious by the Supreme Court in *Gadda I, supra*, 50 Cal.3d at pages 354-355. Moreover, there were at least six instances of courts finding ineffective assistance of counsel on respondent's part. Respondent argues that the issue of ineffective assistance of counsel has been refined by immigration courts and that this issue is used as a loophole when there is no other avenue for relief for an alien and comforts attorneys and judges alike. Immigration law expert Angela Bean disagreed with respondent's analysis however. She testified at trial in this matter that it is not easy to have a case reopened by making a claim of ineffective assistance of counsel. She testified that a court would have to find that the representation was so poor that it affected the fundamental rights of the client and that the client's right to due process was denied. She further testified that sometimes ineffective assistance of counsel is the only issue an attorney can argue because it is the only thing that prevented the client from having his or her rights protected.

The hearing judge remarked that, despite respondent's serious misconduct, he is liked by everyone; that witnesses brought to testify against him had good things to say about him; and that he was courteous to the court and to opposing counsel. We agree with the hearing judge, however, who opined that being a nice guy is not enough and stated that respondent must learn that being a lawyer means complying with certain professional standards, duties, and responsibilities.

In determining the appropriate level of discipline, we are guided by *Cannon v. State Bar* (1990) 51 Cal.3d 1103. In that case, Cannon had a large immigration practice and relied on his office staff to take calls and process incoming mail. He was found culpable in five different matters of, among other things, failing to refund unearned fees upon termination of employ-

ment, failing to perform competently the services for which he was retained, withdrawing from employment without taking steps to avoid prejudice to the client, and failing to return telephone calls. Although Cannon had no prior record of discipline, and no other aggravating factors were specified, there was also no mitigation. The Supreme Court found disbarment to be appropriate for multiple instances of misconduct involving moral turpitude, i.e., repeatedly refusing to return unearned fees, even after judgment was taken against him; issuing checks against insufficient funds; and failing to maintain communication with clients.

[6c] In the present case, we have determined that respondent is culpable of a total of 16 charged counts of misconduct in nine client matters and the trust account matter, far more misconduct involving far more clients than were involved in *Cannon*. He is culpable of 9 counts of failing to perform legal services competently, 1 count of failing to return a client's file promptly upon request at the termination of employment, 2 counts of failing to return unearned fees promptly at the termination of employment, 2 counts of failing to respond promptly to reasonable status inquiries from clients or failing to notify clients of significant developments in their cases, 1 count of commingling, and 1 count of committing an act of moral turpitude by issuing checks on an account which respondent knew or should have known had insufficient funds to cover them. Moreover, as indicated, respondent was already disciplined once for the same type of misconduct; yet it appears that he did not learn from his prior discipline. In addition, the record reflects that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct and significantly harmed clients. We therefore determine that respondent's overall misconduct is more serious than that found in *Cannon*. (See also *In the Matter of Phillips*, *supra*, 4 Cal. State Bar Ct. Rptr. 315 [disbarment recommended where, over a period of nearly 4 years, attorney committed 13 acts of misconduct involving 5 separate clients and 2 separate non-clients as well as 10 different rule and code violations in a case with slight mitigation and serious, extensive aggravation].)

[6d] The violations taken together in this case show a "clear disrespect for [respondent's] clients." (*In the Matter of Phillips*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 346.) Although there are fewer aggravating circumstances in this case than there were in *Phillips*, the aggravating circumstances in the present case nevertheless outweigh the mitigating circumstances.

[6e] In view of all of the circumstances of this case, we conclude that the public and the courts deserve the greater protection of a formal reinstatement proceeding before respondent is again entitled to practice law in this state. We therefore adopt the hearing judge's recommendation that respondent be disbarred.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Miguel Gadda be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of persons admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this matter. We further 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. Since we also recommend respondent's disbarment, as did the hearing judge, we do not vacate the hearing judge's order of inactive enrollment (Bus. & Prof. Code, § 6007, subd. (c)(4)), which has remained in effect since August 2, 2001.

We concur:

STOVITZ, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CAREY BRENT SCOTT

A Member of the State Bar

No. 94-O-17860

Filed October 25, 2002

SUMMARY

Respondent filed and pursued a series of four related lawsuits. After each action was resolved unfavorably to respondent, he filed the next. The hearing judge found that respondent was culpable of filing a frivolous lawsuit in bad faith and for a corrupt motive with respect to the fourth matter, but was not culpable of the same charges for filing and pursuing the first three actions. The hearing judge recommended that respondent 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 on conditions, including 60 days' actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Both the State Bar and respondent sought review. The State Bar asserted that respondent should have been found culpable for filing and pursuing the first of the four lawsuits as well as the fourth, but did not seek an increase in the recommended discipline. Respondent argued that he was not culpable of any misconduct with respect to any of the four lawsuits, but that if he was culpable the discipline should be reduced to a reproval at most. The review department concluded that the notice of disciplinary charges alleged that respondent was culpable of single violations of Business and Professions Code section 6068, subdivisions (c) and (g) and section 6106 as a result of his conduct in filing and pursuing the four lawsuits as a whole. It did not charge four separate violations of each of these statutes. Viewed from this perspective, the review department concluded that the record clearly and convincingly demonstrated that respondent was culpable of filing and pursuing frivolous actions in bad faith and for a corrupt motive. Although modifying the hearing judge's culpability conclusions, the review department found that the discipline recommendation was appropriate based on the record as a whole.

COUNSEL FOR PARTIES

For State Bar: Jerome H. Craig, Special Deputy Trial Counsel

For Respondent: R. Gerald Markle, Ellen A. Pansky

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] **147 Evidence–Presumptions**
159 Evidence–Miscellaneous
165 Adequacy of Hearing Decision
191 Effect/Relationship of Other Proceedings
199 General Issues–Miscellaneous

Civil verdicts and judgments have no disciplinary significance apart from the underlying facts. Nevertheless, civil findings made under a preponderance of the evidence test are entitled to a strong presumption of validity in disciplinary proceedings if they are supported by substantial evidence. Where the trial judge in a civil proceeding found that respondent knew prior to filing a lawsuit that he had not been defamed, that his law firm had not been disparaged, and that his retainer contract with his clients had not been interfered with at all, and those findings were supported by substantial evidence in the record, the hearing judge's conclusion in the disciplinary proceeding that respondent filed the lawsuit based on his honest and reasonable belief in its validity was contrary to the civil findings and did not appear to have accorded the civil findings the strong presumption of validity to which they were entitled.

[2] **147 Evidence–Presumptions**
161 Duty to Present Evidence
162.11 Proof–State Bar's Burden–Clear and Convincing
162.20 Proof–Respondent's Burden
191 Effect/Relationship of Other Proceedings

There is no authority for the proposition that the strong presumption of validity accorded to civil findings in a disciplinary proceeding shifts the burden of proof in the disciplinary proceeding to the respondent attorney to rebut the presumption. As in any discipline case, the State Bar bears the burden of proving culpability by clear and convincing evidence.

[3] **191 Effect/Relationship of Other Proceedings**
199 General Issues–Miscellaneous

As respondent did not appeal the dismissal of a civil lawsuit, he could not assert in the discipline proceeding that the dismissal was in error, as collateral attack is not available to challenge non jurisdictional error in a judgment.

[4] **159 Evidence–Miscellaneous**
191 Effect/Relationship of Other Proceedings
213.30 State Bar Act–Section 6068(c)
213.70 State Bar Act–Section 6068(g)

A cause of action in a civil proceeding based on factual allegations that respondent knew he could not prove was patently frivolous and unjust, and respondent's continued pursuit of the meritless factual allegations was strong circumstantial evidence that he was motivated by vindictiveness.

[5] **106.90 Procedure–Pleadings–Other Issues**

In determining culpability, the review department declined to view respondent's conduct in each of four lawsuits separately where the notice of disciplinary charges charged that the totality of respondent's conduct in filing and pursuing all four of the actions was the basis of his misconduct.

[6] **213.30 State Bar Act–Section 6068(c)**
213.70 State Bar Act–Section 6068(g)
584.10 Aggravation–Harm to Public–Found
586.11 Aggravation–Harm to Administration of Justice–Found
620 Aggravation–Lack of Remorse/Failure to Appreciate Seriousness
1013.08 Discipline–Stayed Suspension–Two Years
1015.02 Discipline–Actual Suspension–Two Months
1017.08 Discipline–Probation–Two Years

Respondent's failure to have gained insight into his misconduct was troubling. The discipline imposed for his misconduct of filing and pursuing frivolous actions in bad faith and for a corrupt motive must reflect this lack of insight as well as the harm to the victims and assurance to the public and bar that such conduct will not be tolerated. The discipline recommended, that respondent 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 on conditions, including 60 days' actual suspension, appropriately balances these values and the record as a whole.

ADDITIONAL ANALYSIS

Culpability
Not Found
221.50 Section 6106
Discipline
Probation Conditions
1024 Ethics Exam/School
Other
106.30 Procedure–Pleadings–Duplicative Charges

OPINION

OBRIEN, J.:[1]

Both the State Bar of California (State Bar) and respondent Carey Brent Scott seek review of a hearing judge's decision finding respondent culpable of filing a frivolous lawsuit in bad faith and for a corrupt motive. The hearing judge recommended that respondent 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 on conditions, including 60 days' actual suspension.

Respondent filed and pursued a series of four related lawsuits. After each action was resolved unfavorably to respondent, he filed the next. The hearing judge found that respondent was not culpable with respect to the first three actions, but had "crossed the line" with respect to the filing of the fourth matter and therefore was culpable. On review, the State Bar asserts that respondent should be found culpable for filing and pursuing the first of the four lawsuits as well. The State Bar does not seek an increase in the recommended discipline. Respondent argues on review that he is not culpable of any misconduct with respect to any of the four lawsuits, but that if he is culpable the discipline should be reduced to a reproval at most.

We have independently reviewed the record in this proceeding and conclude that the hearing judge's factual findings are supported by the record, and we adopt them with the modifications noted below. The notice of disciplinary charges alleges that respondent is culpable of single violations of Business and Professions Code section 6068, subdivisions (c) and (g) and section 6106 as a result of his conduct in filing and pursuing the four lawsuits as a whole.[2] It does not charge four separate violations of each of these statutes. Viewed from this perspective, we conclude that the record clearly and convincingly demonstrates that respondent is culpable of filing and pursuing frivolous actions in bad faith and for a corrupt motive. Although we modify slightly the hearing judge's culpability conclusions, we find that the discipline recommendation is appropriate based on the record as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

James Cooke, a pipe fitter, was severely injured in an explosion at his workplace in October 1988. Cooke's wife, Ann, employed respondent to represent Cooke in the personal injury and worker's compensation cases arising from the accident. Although Cooke did not sign the retainer agreement, he orally approved of respondent representing him and fully ratified that representation.

Thereafter, Allen Jones, business manager of Cooke's union, became concerned that respondent was not properly representing Cooke. In February 1989, during a dinner seminar conducted by the law firm of Silver, McWilliams, Stolpman, Mandel & Katzman (Silver firm), Jones met attorney Krissman, a partner in the Silver firm. A few days later, Jones called Krissman and asked him to check respondent's credentials. Krissman researched respondent in Martindale-Hubbell and O'Brien's Evaluator and found neither an ability rating for respondent nor evidence that he had conducted any jury trials. Krissman informed Jones of the results of his research and informed him that none of his partners at the Silver firm had ever heard of respondent.

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1. Judge Pro Tem of the State Bar Court, appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

2. All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6068, subdivision (c) provides that an attorney has a duty to maintain or counsel only such proceedings, actions, or defenses which appear just or legal. Section 6068, subdivision (g) provides that an attorney has a duty "[n]ot to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for suspension or disbarment.

3. Although we have adopted the hearing judge's factual findings, we set forth here only those findings relevant to our disposition. In addition, we have added factual findings that we conclude are clearly and convincingly established based on our independent review of the record.

Jones called Cooke and informed Cooke of his concern about respondent's handling of Cooke's case and of his conversation with Krissman. Jones also told Cooke that he would arrange to have a lawyer call Cooke. Jones then informed Krissman that Cooke was interested in a second opinion, gave Krissman Cooke's telephone number, and asked Krissman to call Cooke to "render a second opinion" regarding Cooke's case.

In February 1989, Krissman called Cooke, confirming that he was calling at the behest of Jones to give Cooke a second opinion about his case. Krissman told Cooke about the Silver firm's experience in handling industrial accident cases, that respondent had never before handled a case as big as Cooke's, and that he could do a better job. Krissman's conversation with Cooke lasted approximately 15-20 minutes and resulted in an appointment for a meeting at Krisssman's office three days later.

After Krissman's telephone call, the Cookes were briefly concerned about whether they had employed a qualified attorney by hiring respondent. Cooke called respondent the next day and informed him of the conversations with Jones and Krissman. Cooke told respondent that Krissman told him that respondent had never had a case that size and that Krissman claimed he could do a better job than respondent. However, Cooke assured respondent that he was "totally and completely satisfied" with respondent's representation, that he had complete confidence in respondent, that he (Cooke) knew before he hung up the phone with Krissman that he (Cooke) was not going to go to the meeting, and that he had no intention of changing attorneys. Nevertheless, at the end of their conversation respondent was uncertain whether Cooke would use another lawyer's services and did not know whether the appointment with Krissman would be cancelled. Respondent, however, believed he had convinced Cooke not to go to Krissman's appointment.

Mad and "extremely upset," respondent called Jones the next day. Jones relayed to respondent his concerns about the way respondent was handling Cooke's case. Respondent then called the Silver firm that same day but was unable to speak to Krissman. Two days later, fearing that Cooke would not continue to employ him as Cooke's attorney and not having heard from Krissman, respondent filed a lawsuit in the superior court against Krissman and the Silver firm for intentional interference with contract, for allegedly interfering with respondent's retainer agreement with Cooke, and for disparagement and defamation, for allegedly publishing to Jones and Cooke false statements that defamed respondent's legal reputation (lawsuit #1). Respondent arranged to have the complaint served on Krissman at the time of Cooke's scheduled appointment with Krissman. Cooke did not meet with Krissman.

Concerned that Cooke might leave him, respondent hired his wife to work in his law firm so that he could devote more attention to the Cooke case. Respondent and his wife also began socializing with the Cookes and went with them to Hawaii and on camping trips. Respondent also began to encourage Cooke to attend other trials that respondent was litigating and to participate in each step of his own case.

In November 1991, respondent settled Cooke's civil case for $5.2 million. Respondent received over $1.6 million in legal fees from the settlement.

Respondent knew prior to filing lawsuit #1 that Jones had asked Krissman to call Cooke. Respondent filed lawsuit #1 for several reasons: "To put a stop to the practices of [the Silver firm's] and Mr. Krissman's actions;" to get the attention of the defendants; for a $150 filing fee, respondent could "prioritize [the defendants'] calendar;" to recover "the damages that were caused to my reputation and my law firm;" and to teach a lesson to the defendants. Respondent also filed lawsuit #1 because he had no explanation from Krissman for his actions as he had not received a follow-up call from Krissman.

In April 1991, respondent offered to settle with the defendants for $5,867, the amount of respondent's costs up to that point in time. The offer was not accepted. The defendants' motion for summary judgment in April 1991 was denied.

Lawsuit #1 was tried before a jury in January 1992. At the close of respondent's case-in-chief after six days of trial, the trial court granted a judgment of

nonsuit in favor of Krissman and the Silver firm. The court, on its own motion, ordered a Code of Civil Procedure section 128.5 sanctions hearing. The hearing was held in February 1992, and the court awarded sanctions against respondent in the amount of $218,299 for having filed and pursued a frivolous lawsuit in bad faith.

After the sanctions were awarded on the record at the hearing but before the written order was signed, respondent moved to disqualify the trial judge, Honorable James R. Ross. The grounds for the motion were, inter alia, that Judge Ross was biased against respondent due to his strong personal and professional relationship with the Silver firm in that Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and that Judge Ross was indebted to one of the named partners, Stolpman, because Stolpman had assisted Judge Ross in getting his judicial appointment. Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal. Respondent's petition for a writ of mandamus was denied by the Court of Appeal, and review was denied by the California Supreme Court.

Respondent appealed the judgment and sanctions award in lawsuit #1. In an unpublished opinion filed in December 1993, the Court of Appeal affirmed both the nonsuit and sanctions award. The Court concluded that the intentional interference with contract claim failed for several reasons. First, there was no evidence of intentional or unjustified acts by Krissman intended to disrupt the contractual relationship as: Jones asked Krissman to call Cooke, Jones contacted Cooke and suggested he speak to Krissman, and Cooke agreed and told Jones to have Krissman call him. Next, there was absolutely no disruption of Cooke's contract with respondent as: Cooke was completely satisfied with respondent and told him so, Cooke had some doubts about respondent's abilities for one day at most, and there was no evidence that Cooke ever had any intention of finding another lawyer. Finally, respondent was not damaged as spending money to cement his relationship with Cooke was simply not legal damage.

The Court of Appeal also concluded that there was no defamation or disparagement shown. Cooke never understood the statements to be defamatory, and respondent's reputation in the community was not damaged as the statements were not made to anyone other than Jones and Cooke and the uncontroverted evidence showed that respondent enjoyed great success as a lawyer and had a good reputation. Further, Krissman's statements were subject to a qualified privilege as he was providing a legally permissible second opinion to Cooke, and there was no evidence that Krissman's statements were motivated by hatred or ill will and therefore respondent failed to show actual malice sufficient to overcome that privilege.

Finally, the Court of Appeal concluded that no abuse of discretion was shown with regard to the sanctions award. The evidence supported the trial court's conclusion that respondent's action was meritless and brought in bad faith as respondent did not file the lawsuit to recover damages but to teach the defendants a lesson, and it was apparent that before the lawsuit was filed, not to mention before trial, respondent knew that his relationship with Cooke had not been disrupted and that he had not been defamed. Further, the Court rejected respondent's argument that there was insufficient evidence presented to support the amount of the award. Respondent unsuccessfully sought a rehearing in the Court of Appeal and review by the California Supreme Court and United States Supreme Court.

In August 1994, respondent filed a second petition for a writ of mandate with the Court of Appeal seeking to set aside the judgment and sanctions in lawsuit #1 on the grounds that newly discovered evidence showed that Judge Ross was prejudiced against respondent. The alleged new evidence was that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and that Judge Ross had an undisclosed professional relationship with the

Silver firm attorneys in that they had all been active members of the Los Angeles Trial Lawyers Association (LATLA) for 15 years. Respondent's petition was denied, and review by the California Supreme Court was denied.

In January 1995, respondent filed a civil rights action in the United States District Court against Judge Ross, Krissman, Stolpman, and Robert Baker (defense counsel in lawsuit #1), alleging in one cause of action that Judge Ross violated his civil rights and in a second cause of action that the remaining defendants conspired to violate his civil rights (lawsuit #2). Respondent asserted, inter alia, that Judge Ross was a biased decision maker due to his close personal and professional relationship with Stolpman and Baker in that they were personal friends and had all been members of LATLA, that Judge Ross attended several private parties hosted by Baker, and that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office both before and during the trial of lawsuit #1; that Judge Ross's bias was evidenced by his conduct during the trial of lawsuit #1 and by his legally erroneous rulings in the case in that Judge Ross became an advocate for the defendants in lawsuit #1 and awarded the sanctions without sufficient evidence; and that Judge Ross and the other defendants entered into a conspiracy to violate his civil rights by, inter alia, improper ex parte communications and agreeing beforehand to produce a verdict against respondent in lawsuit #1 for financial and professional gain.

Motions to dismiss by the defendants for, inter alia, failure to state a claim upon which relief could be granted were denied by the district court. Judge Ross filed a motion for summary judgment or for judgment on the pleadings. Judge Ross's motion was granted on collateral estoppel grounds in that the issues raised against him regarding the alleged personal and professional relationship were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits and that the remaining issues were decided against respondent on the merits by the Court of Appeal opinion in lawsuit #1. Judgment was entered in favor of Judge Ross and against respondent in July 1995.

In August 1995, the district court, sua sponte, issued an Order to Show Cause as to why lawsuit #2 should not be dismissed for lack of subject matter jurisdiction based on a then-recent decision of the Ninth Circuit. In September 1995, the district court dismissed lawsuit #2 as to all defendants for lack of subject matter jurisdiction and vacated the judgment in favor of Judge Ross as well as the order granting his summary judgment motion. No appeal was filed.

In September 1995, respondent filed a complaint for equitable relief against Krissman and the Silver firm in the superior court (lawsuit #3) seeking to set aside the judgment and sanctions award in lawsuit #1. The complaint alleged that Judge Ross, Baker and the defendants, Krissman, the Silver firm, and members of that firm, concealed material facts and procured the judgment and sanctions in lawsuit #1 by extrinsic fraud. The factual allegations were substantially the same as the factual allegations in lawsuit #2 and included that Judge Ross had a close personal and professional relationship with Stolpman and Krissman and that all three had been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in lawsuit #1; and, that Judge Ross assumed a partisan role and made legally erroneous rulings in lawsuit #1.

The defendants' demurrer in lawsuit #3 was overruled. Thereafter, the defendants filed a motion for summary judgment which was also denied. In denying that motion, the court noted the following triable issues of disputed fact: (1) whether Judge Ross had personal or professional relationships with Baker, Stolpman, and/or Krissman which should have been disclosed but were not and the impact of those facts, if any, on the decisions made by Judge Ross in lawsuit #1; (2) whether Judge Ross had a private telephone line in his chambers or court which was utilized for ex parte communications with Krissman, Stolpman or Baker; and (3) the number and extent of telephone calls or contacts between Judge Ross and Krissman, Stolpman or Baker during the pendency of lawsuit #1. The defendants' petition for a writ of mandate was denied.

A bench trial was held in lawsuit #3 in October 1996. At the close of respondent's case-in-chief following the extensive testimony of 10 witnesses and 58 exhibits, the trial court entered judgment against respondent under Code of Civil Procedure section 631.8. The court held that respondent failed to prove who made any of the telephone calls; that there was no evidence of a close personal relationship between Judge Ross and the other attorneys; and, that there was no evidence that Judge Ross had any kind of bias or prejudice against respondent. The court also commented on the merits of lawsuit #1, stating "I really sincerely feel that anyone who heard the case, any judge who heard the case would have granted the non-suit." Lawsuit #3 was dismissed, but no sanctions were ordered against respondent. No appeal was filed.

One week after the dismissal, respondent filed an action against Baker and Judge Ross in superior court (lawsuit #4), alleging civil rights violations and defamation against Judge Ross and fraudulent billing by Baker. The lawsuit alleged that respondent's civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuits #2 and #3, and included that Judge Ross had a close personal and professional relationship with Stolpman and Baker and that Ross, Baker, and Stolpman had all been members of LATLA; that Judge Ross attended parties hosted by Baker; that numerous telephone calls were made from Judge Ross's courtroom to Baker's law office during the pendency of lawsuit #1; that Judge Ross avoided service of the motion to disqualify him in lawsuit #1; and, that Judge Ross assumed a partisan role and made erroneous rulings in lawsuit #1.

The defamation cause of action against Judge Ross alleged that after he retired from the bench in July 1995, Judge Ross told several other judges in the judges' lunchroom in the courthouse, "I've got another lawsuit by C. Brent Scott," to which the other judges replied, "Oh, my god, no. Him again," to which Ross replied, "Yeah, He'll never quit; same allegations." The complaint also alleged that Judge Ross sent written communications to several judges regarding Judge Ross's defense of charges brought by respondent with the Commission of Judicial Performance, which communications allegedly "blamed" respondent for the attorney's fees Judge Ross had incurred in defending the Commission action. The fraud cause of action against Baker alleged that Baker had submitted false billings to Judge Ross in support of the sanctions motion in lawsuit #1.

The defendants' demurrers to the complaint in lawsuit #4 were granted without leave to amend in February 1997. The court ruled that the first cause of action against Judge Ross for violating respondent's civil rights was barred pursuant to the doctrines of collateral estoppel and judicial immunity; that the second cause of action for defamation against Judge Ross was barred as all statements allegedly made by Judge Ross were mere opinion; and, that the third cause of action alleging fraud against Baker was barred based on the statute of limitations and the doctrine of collateral estoppel. Stolpman's motion for sanctions against respondent was denied. No appeal was filed.

The defendants in lawsuit #1 recovered approximately $130,000 of the $218,299 sanctions ordered in that case by way of a levy on a bank account in which respondent had an interest. The remainder has apparently been discharged as a result of respondent's bankruptcy.

As indicated above, the notice of disciplinary charges alleges that respondent violated sections 6068, subdivisions (c) and (g), and 6106 as a result of the above conduct. With respect to lawsuit #1, the hearing judge determined that although respondent had some improper motives in filing lawsuit #1, such as to teach the defendants a lesson, he also had an honest and reasonable belief that Krissman and the Silver firm were attempting to solicit the Cooke case away from him and his firm; that Krissman and the Silver firm might be attempting to obtain for their own financial gain the biggest case of respondent's career; and, that Krissman had defamed the reputations of respondent and his law firm. The hearing judge concluded that respondent had an honest and reasonable belief that the causes of action alleged in lawsuit #1 were well-founded and viable and that the State Bar had therefore failed to prove by clear and convincing evidence that by filing lawsuit #1 respondent violated any of the charged statutory provisions.

With respect to lawsuit #2, the hearing judge noted that the facts alleged in lawsuit #2 regarding the conspiracy by Judge Ross and attorney Baker were not alleged in lawsuit #1, that initial motions to dismiss by the defendants were denied, and that lawsuit #2 was dismissed and not decided on its merits. The hearing judge concluded that respondent was therefore not culpable of violating any of the charged statutes in filing and pursuing this lawsuit.

With respect to lawsuit #3, the hearing judge concluded that respondent was not culpable as the State Bar failed to prove by clear and convincing evidence that respondent lacked good faith in filing lawsuit #3 in state court after lawsuit #2 was dismissed and not decided on the merits in federal court.

With respect to lawsuit #4, the hearing judge determined that by filing and pursuing lawsuit #4 against Judge Ross and attorney Baker, respondent "crossed the line" and "reached the point that he was engaging in an obsessive pattern of conduct, the sole purpose of which was designed to harass and to be vindictive" towards those he considered responsible for the judgment and sanctions in lawsuit #1. The hearing judge concluded that the claims raised by respondent in lawsuit #4 had "essentially been raised and litigated in lawsuit #3 and/or were not meritorious or just" and that respondent therefore violated section 6068, subdivisions (c) and (g) by filing lawsuit #4. Furthermore, the hearing judge concluded that respondent either intentionally, recklessly, or with gross negligence filed lawsuit #4, a frivolous action, and was therefore culpable of an act of moral turpitude in violation of section 6106.

In mitigation, the hearing judge found that respondent had no prior record of discipline in eight years of practice before the misconduct and three years after the misconduct and before the State Bar trial. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[4] Respondent presented evidence of his good character and community service. However, the hearing judge gave little weight to the good character evidence as other evidence indicated that respondent was "impulsive, revengeful, arrogant, and lack[ed] responsibility," and the character witnesses were not aware of the full extent of respondent's misconduct.

In aggravation, the hearing judge found that respondent's misconduct significantly harmed Judge Ross, Baker and the administration of justice (std. 1.2(b)(iv)); that respondent demonstrated indifference to the consequences of his misconduct and had shown no remorse or recognition of his wrongdoing (std. 1.2(b)(v)); and that respondent's testimony in the State Bar proceeding lacked candor and credibility (std. 1.2(b)(vi)).

DISCUSSION

As indicated above, both the State Bar and respondent have sought review of the hearing judge's decision. The State Bar agrees with the hearing judge's culpability conclusions regarding lawsuit #4, but argues that we should also find respondent culpable for filing and pursuing lawsuit #1. Respondent agrees with the hearing judge that he is not culpable with respect to the first three lawsuits, but asserts that he engaged in no impropriety in filing and pursuing the fourth.

The three-count notice of disciplinary charges in this case charges in the first cause of action that respondent's conduct in filing and pursuing all four lawsuits and the related actions was a violation of section 6106. The second cause of action charges that by filing and pursuing all four lawsuits and the related actions, respondent repeatedly filed lawsuits, motions, and petitions which were unfounded in violation of section 6068, subdivision (c). The third cause of action charges that in filing and pursuing all four lawsuits and the related actions respondent acted in bad faith, out of spite, with a retaliatory motive, and with the purpose to harm others and cause delay in the judicial process in violation of section 6068, subdivision (g).

4. All further references to standards are to these standards unless otherwise noted.

In reaching his culpability conclusions, the hearing judge examined respondent's conduct in each of the lawsuits separately. The parties have done the same in their initial briefs on review. As a result of the manner in which the misconduct was charged, we conclude that the issue to be determined is whether respondent's conduct in filing and pursuing the four lawsuits and related actions as a whole violated the specified statutory provisions. We gave the parties an opportunity to file supplemental briefs addressing this issue. In its supplemental brief the State Bar takes the position that the determination of culpability should be made from respondent's entire course of conduct. In his supplemental brief, respondent argues that his four lawsuits must be individually evaluated and, even if respondent's actions are considered in the aggregate, they do not constitute a violation of the charged statutes.

[1a] At the outset we note, as did the hearing judge, the general rule that a civil verdict and judgment have "no disciplinary significance apart from the underlying facts." (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) Nevertheless, civil findings made under a preponderance of the evidence test are entitled to a strong presumption of validity in disciplinary proceedings if they are supported by substantial evidence. (*Ibid.*)

[1b] The trial judge in lawsuit #1 found that respondent knew prior to filing that lawsuit that he had not been defamed, that his law firm had not been disparaged, and that his retainer contract with the Cookes had not been interfered with at all. These findings are supported by substantial evidence in the record before us. The allegedly defamatory statements were made to Cooke and Jones only. Cooke did not understand the statements to be defamatory and told respondent prior to lawsuit #1 being filed that he was completely happy with respondent and had no intentions of changing lawyers. Further, there was simply no evidence showing that respondent's reputation in the community, or that of his firm, was damaged as a result of the statements. The hearing judge's conclusion that respondent filed lawsuit #1 based on his honest and reasonable belief in its validity is contrary to these civil findings and does not appear to have accorded the civil findings the strong presumption of validity to which they were entitled.[5] **[2 - see fn. 4]** Nevertheless, the hearing judge's conclusions with respect to lawsuit #1 focused entirely on the propriety of the filing of that lawsuit. By their express language both section 6068 subdivisions (c) and (g) apply not only to the filing of an action or proceeding, but to the continuation of that proceeding in violation of the subdivisions.

By the time of the trial in lawsuit #1 respondent had settled Cooke's case for $5.2 million and received over $1.6 million in legal fees. Absolutely no evidence was presented at that trial showing that Cooke ever had any intention of changing lawyers. Absolutely no evidence was presented showing that respondent's or his firm's reputation in the community had been damaged. In fact, it is clear from respondent's and his wife's testimony in lawsuit #1 that his legal business was flourishing throughout this time. The only evidence respondent presented even remotely pertaining to damages related to the interference with contract cause of action and showed that he hired his wife to work in his firm and spent time and money to cement his relationship with the Cookes. As the Court of Appeal held, this "simply cannot be considered legal damage."

Respondent knew before filing lawsuit #1, not to mention before the trial of that action, that the controversy involved a single 15-20 minute conversation between Krissman and respondent's client which was initiated by Krissman at the behest of Jones and which had not caused respondent any harm. He had the lawsuit served on Krissman at the same time as Cooke's scheduled appointment. Without ever serving any written discovery on the Silver firm, respondent noticed and deposed all of the partners of the firm at a location that was a two-hour drive from the Silver

5. [2] The State Bar asserts that "once that strong presumption of validity is established, the burden shifts to the respondent attorney to rebut the presumption." The State Bar cites no authority for the proposition and we are aware of none. As in any discipline case, the State Bar bears the burden of proving culpability by clear and convincing evidence. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 725.)

firm. None of the deponents had any knowledge of the telephone call. Respondent did not believe that Cooke was going to change lawyers, but, none the less, continued the action.

In short, respondent suffered absolutely no damages as a result of the telephone conversations between Krissman and Jones and between Krissman and Cooke. Yet, he doggedly pursued the case through a several-day jury trial to its unsurprisingly unsuccessful completion. Clearly, respondent selected a means of redress that was out of all proportion to what can only be characterized as a minor and rather innocuous incident. This is strong circumstantial evidence showing that in pursuing lawsuit #1 respondent was motivated in large measure by spite and vindictiveness.

Respondent's dogged pursuit of questionable claims continued following the sanctions award. In his motion to disqualify Judge Ross, respondent asserted that Judge Ross was biased against him due to his strong personal and professional relationship with the Silver firm in that Judge Ross knew several firm attorneys and had attended dinner parties sponsored by the firm and in that Judge Ross was indebted to Stolpman because Stolpman had assisted Judge Ross in getting his judicial appointment. Respondent also asserted that Judge Ross's bias was evidenced by his comments and questions to the witnesses and demeanor towards respondent during the trial and his erroneous rulings in the case, including the granting of the nonsuit and sanctions. The motion was denied as respondent had failed to prove any disqualifying relationship and the remaining contentions were grounds to be pursued on direct appeal.

In his direct appeal of lawsuit #1, respondent contended that Judge Ross made erroneous rulings in the case and that the motion to disqualify was wrongly decided. The Court of Appeal found no merit to the former and did not review the disqualification ruling as it was reviewable only by mandamus.

In respondent's second mandamus petition he again asserted that Judge Ross was biased against him based on newly discovered evidence showing that Ross avoided service of respondent's motion to disqualify him until after Ross had signed the sanctions order; that telephone records showed six calls from Judge Ross's courtroom to the Silver firm in January and February 1992; and, that Judge Ross had an undisclosed professional relationship with the Silver firm attorneys in that they had all been active members of LATLA for 15 years. The second petition was denied.

Respondent again raised the issue of Judge Ross's alleged bias in lawsuit #2. There he alleged that Judge Ross's bias was evidenced by his strong personal relationship with the Silver firm attorneys, by telephone calls between Judge Ross's courtroom and the Silver firm, by his erroneous rulings made in lawsuit #1, by Judge Ross's conduct during the trial of lawsuit #1, and by his award of sanctions based on insufficient evidence. The trial judge in lawsuit #2 granted Judge Ross's summary judgment motion on collateral estoppel grounds, concluding that the issues raised against Judge Ross regarding the alleged personal and professional relationship were the same as the issues raised in the state court motion to disqualify Judge Ross and were decided against respondent on the merits, and the remaining issues were decided against respondent on the merits by the Court of Appeal's opinion in lawsuit #1. We recognize that the district court ultimately dismissed lawsuit #2 and vacated the summary judgment order. Nevertheless, the summary judgment ruling should have caused respondent to reconsider the merits of his claims.

Undeterred, respondent asserted virtually identical claims regarding Judge Ross's alleged bias in his complaint for equitable relief in lawsuit #3.[6] Respondent was given a full opportunity at the trial of this lawsuit to present any and all evidence he had to prove his claims regarding Judge Ross's bias. He was

6. Even though Judge Ross was not named in lawsuit #3, the allegations of his misconduct were substantially identical to those in lawsuit #2.

not able to do so. He failed to prove who made any of the telephone calls; he failed to prove that there was a close personal relationship between Judge Ross and the other attorneys; and, he failed to prove that Judge Ross had any kind of bias or prejudice against respondent. Respondent's lawsuit was dismissed and he did not appeal.

One week after the dismissal respondent filed lawsuit #4, alleging in part that his civil rights were violated because Judge Ross was biased and prejudiced against him. The factual allegations supporting this charge were virtually identical to the factual allegations contained in lawsuit #2 and were the very same allegations that he was unable to prove following a full evidentiary trial in lawsuit #3.

In arguing on review that he is not culpable of any misconduct with respect to lawsuit #4 respondent asserts that the trial court's dismissal of lawsuit #4 was legally and factually erroneous as the doctrine of collateral estoppel could not have applied because he had sued Judge Ross for civil rights violations only in lawsuit #2 and that action was not decided on the merits of that claim. [3] We first note that respondent did not appeal the dismissal of lawsuit #4 and therefore cannot now assert that the dismissal was in error. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 6, pp. 513-514 [collateral attack not available to challenge non jurisdictional error].) In any event, respondent's argument misses the point. [4] The factual allegations in support of the civil rights cause of action in lawsuit #4 were the same factual allegations that respondent had made repeatedly against Judge Ross in the prior litigations. Respondent had failed to prove those allegations time and again. A civil rights cause of action based on allegations that respondent knew he could not prove was patently frivolous and unjust. In addition, respondent's continued pursuit of Judge Ross based on meritless factual allegations is strong circumstantial evidence that he was motivated by vindictiveness, as found by the hearing judge in the present case.

Based on the above, we conclude that the record before us discloses clear violations of section 6068, subdivisions (c) and (g). Although the hearing judge found that respondent also violated section 6106, we conclude that any such violation would be duplicative of the above violations and would not change our determination of the appropriate discipline.

[5] The State Bar has asked that we find culpability of the charged sections based on respondent's conduct in both lawsuit #1 and lawsuit #4. We decline to do so, and instead, we look to the charges and find that the totality of respondent's conduct in filing and pursuing all four of the actions is the basis of those charges.

Turning to the degree of discipline, respondent contends that if we find culpability, the discipline should be no more than a reproval. The State Bar asserts that the hearing judge's discipline recommendation is appropriate. We, in turn, are obligated to exercise our independent judgement in recommending discipline. (*In re Morse* (1995) 11 Cal.4th 184, 207.)

Respondent apparently takes issue with several of the hearing judge's findings in mitigation and aggravation. We find no merit to these arguments. Respondent's misconduct belies his claim that he acted in good faith and that his misconduct did not cause harm. In addition, the asserted prejudice from any delay in this proceeding is simply not cognizable; respondent's files regarding the four lawsuits were available for his review.

We agree with the hearing judge that respondent's lack of other discipline before and since his present misconduct is a mitigating factor. We also agree that respondent's community service and good character evidence are mitigating factors. However, contrary to respondent's assertion, we agree with the hearing judge that the good character witnesses were not aware of the full extent of respondent's misconduct, and therefore we discount the weight to be accorded this evidence. (See std. 1.2(e)(vi).) For the most part the witnesses testified that they had a "general understanding" of the misconduct based in large measure on their conversations with respondent and his then-attorney, and most did not believe that respondent had done anything wrong. We do not further discount the good character evidence based on the other factors cited by the hearing judge.

We also agree with the hearing judge that the record clearly and convincingly establishes that respondent's misconduct harmed Judge Ross and the administration of justice and that respondent has shown no recognition of his wrongdoing. We do not agree that respondent's testimony in the State Bar proceeding regarding Baker's billings (one of the subjects of lawsuit #4) lacked candor. We do not find clear and convincing evidence that his testimony was dishonest or deceptive.

The hearing judge considered *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, to be instructive regarding the appropriate discipline. We agree. In *Sorensen*, the attorney sued the owner of a court reporting firm for fraud and deceit, seeking $14,000 in punitive damages, in connection with a simple $45 billing dispute. The court reporter incurred $4,375 in legal fees and expenses. The Supreme Court found that Sorenson pursued the action out of spite and vindictiveness and that "he acted on those base impulses by selecting the most oppressive and financially taxing means of redress . . . ." (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1042.) The Court imposed one year stayed suspension with two years' probation on conditions including 30 days' actual suspension.

In *In the Matter of Varakin*, *supra*, 3 Cal. State Bar Ct. Rptr. 179, the attorney repeatedly filed frivolous motions and appeals in four different cases over a dozen years for the purpose of delay and harassment of his ex-wife and others. He continued this pattern despite being sanctioned numerous times. Varakin greatly harmed the individuals involved and the administration of justice, lacked insight into his misconduct, expressed no remorse, and refused to mend his ways. We recommended, and the Supreme Court imposed, disbarment.

[6] We agree with the hearing judge that respondent's misconduct was more extensive than Sorensen's but less than Varakin's. As was the hearing judge, we too are troubled by respondent's failure to have gained insight into his misconduct. He continues to paint himself as the victim despite the many courts that have held otherwise. The discipline imposed for the misconduct here must reflect this lack of insight as well as the harm to the victim and assurance to the public and bar that such conduct will not be tolerated. (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1044.) We conclude that the hearing judge's discipline recommendation appropriately balances these values and the record as a whole.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Carey Brent Scott be suspended from the practice of law for a period of two years, that execution of the 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 60 days' actual suspension. We also recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and furnish satisfactory proof of such passage to the Probation Unit of the Office of the Chief Trial Counsel within said period. Finally, 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 section 6140.7 of that Code.

We concur:
STOVITZ, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GREGORY SCOTT BODELL

A Petitioner for Reinstatement

No. 99-R-12244

Filed November 22, 2002

SUMMARY

Between 1985 and 1989, petitioner was a principal in "the Alliance" – a group of about 15 defense attorneys in the Los Angeles area who joined together to defraud insurance companies. The Alliance conducted unneeded discovery and litigative steps; billed excessively for legal services; and appeared for both plaintiff and defendant in the same action, then had another Alliance member represent one client to falsely create the appearance that each client was represented by independent counsel (such independent counsel are often referred to as "*Cumis*" counsel), and thereafter billed the involved insurance company for the false independent *Cumis* counsel. In addition, Petitioner admitted that, in 1988, he tried to frustrate any investigation into the Alliance. In May 1990, after the Alliance fraud was discovered, petitioner pleaded guilty to and was convicted on one felony count of mail fraud in federal court. Effective in August 1990, petitioner resigned from the State Bar with disciplinary charges pending. In 1999, petitioner sought reinstatement. The hearing judge found that petitioner established his rehabilitation and recommended his reinstatement. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar requested review, but challenged only the hearing judge's finding that petitioner was rehabilitated. Although several witnesses testified that petitioner should not be reinstated, their adverse testimony did not stem from an assessment of petitioner's rehabilitative steps, but from their view of his extremely serious involvement in the Alliance. Further, the remaining reasons offered by the State Bar for denying reinstatement were not persuasive on this record. The review department concluded that respondent established his rehabilitation through multiple witnesses who testified that he overcame the moral weakness which led to his earlier dishonest conduct, was a successful law clerk in a law office, made important contributions to his church, and was now sensitive to ethical behavior. The review department recommended petitioner's reinstatement.

COUNSEL FOR PARTIES

For State Bar: Paul O'Brien

For Respondent: Susan 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

[1a, b] **135.87 Procedure–Revised Rules of Procedure–Division VII–Reinstatement**
159 Evidence–Miscellaneous
2504 Reinstatement–Burden of Proof
Reinstatement petitioner established requisite learning in law by passing California Bar Examination, Attorneys' Examination.

[2a, b] **141 Evidence–Relevance**
159 Evidence–Miscellaneous
2504 Reinstatement–Burden of Proof
2590 Reinstatement–Miscellaneous
Although earlier admissions cases do not consider the time a petitioner is in custody or under court or State Bar supervision to be particularly weighty in assessing rehabilitation, the petitioner in each of those cases had engaged in extremely serious misconduct for an extensive time and had not adequately shown rehabilitation in light of the seriousness of the offenses. In contrast, in this case, petitioner's misconduct, though clearly serious, spanned four years, but there was no evidence that petitioner acted in less than an exemplary fashion while on probation. Further, some of petitioner's positive conduct, notably his cooperation with the State Bar, occurred despite his understanding that he would get no benefit from it. The review department therefore concluded that it was appropriate in this case to accord some weight to petitioner's activities while on probation, but it gave far greater weight to the last four years of petitioner's showing, which were after he completed his criminal probation.

[3] **159 Evidence–Miscellaneous**
2504 Reinstatement–Burden of Proof
Concern in reinstatement proceeding is not just in counting correct number of years for measuring petitioner's rehabilitation, but is to assess quality of petitioner's rehabilitation showing in light of prior very serious misconduct.

[4] **148 Evidence–Witnesses**
2504 Reinstatement–Burden of Proof
In the very heavy burden a reinstatement petitioner must surmount in proving his rehabilitation, character evidence alone, no matter how positive, is not determinative.

[5] **148 Evidence–Witnesses**
159 Evidence–Miscellaneous
2509 Evidence–Procedural Issues
Testimony of members of the bar and bench of high repute is entitled to careful consideration in assessing a petitioner's rehabilitation when the petitioner has been close to their observation. This is because such witnesses are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character.

[6 a, b] **148 Evidence–Witnesses**
159 Evidence–Miscellaneous
2504 Reinstatement–Burden of Proof
2590 Reinstatement–Miscellaneous
Opinion testimony of an attorney as to the ultimate issue that petitioner was qualified for reinstatement was not precluded, although that ultimate issue was for the State Bar Court and the Supreme Court to decide.

[7 a-c] **141 Evidence–Relevance**
148 Evidence–Witnesses
159 Evidence–Miscellaneous
2504 Reinstatement–Burden of Proof
2590 Reinstatement–Miscellaneous

Negative testimony regarding petitioner's rehabilitation did not rebut petitioner's favorable testimony for a very important reason: the negative testimony was based solely on the severity of petitioner's earlier misconduct and not on his rehabilitative steps since resignation. The witnesses had no personal observation of petitioner for most, if not all, of the 10 years that elapsed between the time petitioner resigned and the State Bar Court hearings. Thus, while the negative testimony of each of these witnesses was relevant on the issues of the seriousness and the nature and extent of petitioner's prior misconduct, it was of little relevance on the issues of petitioner's present character and of whether petitioner has maintained a sustained period of unblemished and exemplary conduct.

[8 a-d] **191 Effect/Relationship of Other Proceedings**
2504 Reinstatement–Burden of Proof
2590 Reinstatement–Miscellaneous

Reinstatement petitioner's outstanding income tax delinquencies of $458,000 and his offer to compromise and settle the delinquency with Internal Revenue Service for $50,000 did not show adverse moral character. This was not a case where petitioner concealed assets or his delinquencies. Nor was this a case where petitioner failed to file tax returns. Further, petitioner should not be deprived of the ability to take advantage of the offer in compromise procedures open to any citizen seeking to resolve a large delinquency, particularly when that delinquency consists of sizeable penalties and interest.

ADDITIONAL ANALYSIS

Other
2510 Reinstatement Granted

OPINION

STOVITZ, P. J.:

Petitioner Gregory Scott Bodell resigned from the State Bar in 1990 with disciplinary charges pending after he was convicted of mail fraud stemming from a nefarious scheme practiced by a group of insurance defense attorneys in the 1980s referred to as "the Alliance." The State Bar's Office of Chief Trial Counsel (State Bar) seeks our review of a decision of a State Bar Court hearing judge recommending that petitioner be reinstated.

Independently reviewing the record as we must (Cal. Rules of Court, rule 951.5; Rules of Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the hearing judge's decision. As we shall discuss *post*, well-established law provides that an applicant for reinstatement must make a very high showing of rehabilitation to succeed. On this record, petitioner has made the required showing. Although several witnesses testified that petitioner should not be reinstated, this adverse testimony did not stem from an assessment of petitioner's rehabilitative steps, but from the witnesses' view of his extremely serious involvement in the Alliance. We have also concluded that the remaining reasons offered by the State Bar for denying reinstatement are not persuasive on this record. We shall conclude, for the following reasons, that petitioner should be reinstated.

I. ISSUES IN THE PROCEEDING

The relevant authorities set forth clearly the issues in a reinstatement case. Petitioner must establish by clear and convincing evidence that he is learned in the general law, that he has passed a professional responsibility examination, and that he has established his rehabilitation and is morally fit to be readmitted. (Cal. Rules of Court., rule 951(f); Rules Proc. of State Bar, rule 665(a), (b); e. g., *In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 3; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

[1a] The State Bar has no dispute with the hearing judge's findings that petitioner has satisfied the examination and learning requirements and we adopt those findings.[1] **[1b - see fn. 1]**

We then turn to the issue of rehabilitation and note that there is no evidence that petitioner has engaged in further substantive misconduct since his resignation. The State Bar has defined the focus we should place on petitioner's rehabilitation in the following sub-issues: (1) whether petitioner's nearly three years' of unsupervised status between the end of his criminal probation and his filing the petition for reinstatement show the required rehabilitation; (2) whether petitioner's failure to pay in full his tax obligation is consistent with the rehabilitation required for reinstatement; (3) whether petitioner showed adequate rehabilitation in view of his very serious acts which led to his federal conviction; and (4) whether petitioner's failure to remember evidence that he once formed a partnership with the central figure in the Alliance is consistent with the requirements of reinstatement.

Prior to discussing the issues, we set forth briefly the background leading to this reinstatement proceeding.

II. PETITIONER'S MISCONDUCT LEADING TO CONVICTION AND RESIGNATION

Although petitioner resigned with charges pending and was not disbarred, the standards for reinstatement are the same in either case. (E.g., *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092, fn.4; *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 428, fn.1; see also Rules Proc. of State Bar, rules 660, 665.) It is well settled that we assess the showing of rehabilitation in light of the moral shortcomings which preceded petitioner's

1. [1b] As the hearing judge found, petitioner passed the California Bar Examination, Attorneys' Examination, in July 1998 and the Multistate Professional Responsibility Examination in March 1999. (Cf. Cal. Rules of Court, rule 951(f).)

resignation. (*Hippard v. State Bar*, *supra*, 49 Cal.3d at p. 1092; cf. *In the Matter of Salant, supra*, 4 Cal. State Bar Ct. Rptr. at p. 3). Evaluating the misconduct which led to resignation, we conclude that it was most serious. It not only defrauded insurers, but it constituted an affront to the honest administration of justice. In brief, the hearing judge made the following findings, which we adopt.

After four earlier failures, petitioner passed the California Bar Examination in late 1983 and was admitted to practice in December 1983. He had been working for attorney Lynn Stites since March 1982 as a law clerk. Attorney Stites continued to support petitioner despite his several bar exam failures. Petitioner felt loyalty to Stites because of this support. After admission, petitioner became an associate in Stites' office.

Stites put together a group of about fifteen defense attorneys in 1984 or 1985 referred to as "the Alliance" to defraud insurers. The Alliance would conduct unneeded discovery and litigative steps in cases, bill excessively for services, or appear for both plaintiffs and defendants in the same action and then have different Alliance members undertake separate representation of the clients to falsely create the appearance that the clients were represented by independent counsel.

The parties in this reinstatement proceeding argued extensively over whether petitioner's role in the Alliance was that of a peripheral researcher or a central figure. While we adopt the hearing judge's findings that petitioner was more of a researcher and drafter of pleadings to create insurance coverage, than a mastermind of the scheme, he clearly was a principal in it and was close in proximity to Stites who was a central Alliance figure.[2] Alliance duties petitioner undertook were to prepare cross-complaints against the clients of Stites' law office in order to extend litigation, to meet with Alliance members to strategize in bringing more litigation to be defended ultimately by insurers, and to aid in preparation of bills for legal services that would eventually be paid by insurers.[3]

Petitioner's first act to further the Alliance was in 1985, and his last acts were in 1989. At first, petitioner went along with Stites, relying on his judgment as to the most effective way of creating litigative events for his clients. By 1987, petitioner became depressed over his Alliance activities and hoped the problems would go away; but, because of his loyalty to Stites, he remained involved with him until late 1987. Petitioner then opened his own law office within Stites's offices. He ceased working on Alliance cases but represented Stites in various matters.

In the fall of 1988, after Stites had moved to Switzerland, petitioner agreed to Stites's request to send him computer media containing Alliance case pleadings and documents. Petitioner kept copies in the California law office of what he sent Stites, and no documents or media were destroyed. However, petitioner admitted that in 1988, he had intended in part to frustrate any investigation into the Alliance. In 1989, Stites wished to return to the United States, but was concerned about his ability to re-enter. Unaware of any intended enforcement action against Stites, petitioner gave him advice that entry into the U.S. from Canada was likely to provoke less scrutiny.

In May 1990, petitioner was convicted in federal court on his plea of guilty to one felony count of mail fraud (18 U.S.C. § 1341) arising out of his misconduct with the Alliance. Petitioner immediately tendered his resignation from State Bar membership with disciplinary charges pending, and it became effective on August 24, 1990. Before petitioner was sentenced, the government reported that he had cooperated with them. These cooperative steps included petitioner's discussion of his involvement with the Alliance, his agreement to help the government in arresting Stites,

2. The hearing judge gave several reasons in his findings for concluding that petitioner was not a central Alliance figure, including petitioner's salary at the time, the number of witnesses who testified to petitioner's more limited role in the Alliance and decisions made while prosecuting petitioner.

3. For situations in which insurers would be required to pay fees of independent counsel see, for example, *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 375.

and his testimony in the trial of some Alliance members. Petitioner was sentenced to five years' probation on conditions, which included 150 days in a halfway house. Petitioner complied with his probation, and it ended in October 1996.

III. HEARING JUDGE'S ASSESSMENT

The hearing judge considered the favorable character testimony petitioner introduced, his significant involvement with his church, his speaking to law students on many occasions about his crime, and his psychological therapy to understand why he engaged in improprieties with the Alliance. The hearing judge also considered the State Bar's unfavorable evidence that petitioner still owes the Internal Revenue Service a large amount of back taxes and that five witnesses offered by the State Bar testified that petitioner should not be reinstated.

[2a] In the hearing judge's view, although petitioner's criminal conduct was repugnant, he sustained his burden of showing his rehabilitation. The judge did not consider the negative testimony of some witnesses to dilute petitioner's showing. Nor was it deemed adverse that much of petitioner's reform occurred during his felony probation. The hearing judge recommended that petitioner be reinstated. The State Bar's appeal followed.

IV. DISCUSSION OF THE ISSUES AND EVIDENCE RE PETITIONER'S REHABILITATION

We now turn to the issues framed by the State Bar, which are asserted to be indicative of lack of satisfactory reform to warrant reinstatement.

A. Petitioner's Proof of Rehabilitation from His Misconduct

[2b] As we noted *ante*, we must view petitioner's rehabilitation in light of the moral shortcomings that preceded his resignation. Moreover, as the Supreme Court reiterated in an admissions moral character case, *In re Gossage* (2000) 23 Cal.4th 1080, 1096, the more serious the earlier misconduct, the stronger the rehabilitative showing required. The State Bar points to the seriousness of petitioner's Alliance misconduct and argues that the proper time period for measuring his rehabilitation is from the end of his criminal probation in 1996 to the 1999 date of filing his petition for reinstatement (citing *In re Gossage, supra,* 23 Cal.4th at pp. 1099-1100). Judged as such, the State Bar contends that petitioner has failed to meet his burden. We disagree with the State Bar's analysis as unduly narrow in this case. Although *Gossage* and the earlier admissions case it cites, *In re Menna* (1995) 11 Cal.4th 975, 989, do not consider the time an applicant is in custody or under court or State Bar supervision to be particularly weighty in assessing rehabilitation, the applicant in each of those cases had engaged in extremely serious misconduct for an extensive time and had not adequately shown rehabilitation in light of the seriousness of the offenses. In *Gossage* the misconduct spanned a total of 14 years and in *Menna*, 5 years. Moreover, the Court in *Gossage* noted that that applicant did not behave in an exemplary fashion while on parole. (*In re Gossage, supra*, 23 Cal.4th at p. 1099, fn. 22.) In contrast, in this case, petitioner's misconduct, though clearly serious, spanned four years, but we have no evidence that petitioner acted in less than an exemplary fashion while on probation. Further, as we shall discuss, some of petitioner's positive conduct, notably his 1990 cooperation with the State Bar, occurred despite his understanding that he would get no benefit from it. We therefore conclude that it is appropriate in this case to accord some weight to petitioner's activities while on probation, but we give far greater weight to the last four years of petitioner's showing, which were after he completed his criminal probation.

[3] Our concern, however, is not just in counting the correct number of years for measuring petitioner's rehabilitation; but more importantly, to assess the quality of petitioner's showing in light of his very serious misconduct surrounding his conviction of a crime involving moral turpitude. Whether petitioner was only a researcher for Attorney Stites or was more involved in Alliance strategy, he was clearly a principal in a scheme, which was not only dishonest, but for a lawyer, especially reprehensible in its affront to the fair administration of justice. **[4]** We also acknowledge that in the very heavy burden petitioner must surmount in proving his rehabilitation, character evidence alone, no matter how positive, is not deter-

minative. (*Hippard v. State Bar, supra,* 49 Cal.3d at p. 1095; *In the Matter of Salant, supra,* 4 Cal. State Bar Ct. Rptr. at p. 5.)

Examining petitioner's showing independently, we agree with the hearing judge that it offers clear and convincing evidence that petitioner met his burden.

First, we note that there were many witnesses whose opinions were entitled to weight who knew petitioner for a sufficient period of time and were reasonably familiar with his misconduct regarding the Alliance. Second, we note that the witnesses gave specific, convincing reasons for holding favorable opinions of petitioner's rehabilitation or present moral fitness. We do not find it necessary to detail all the evidence, but will discuss some examples. Petitioner called 11 outside witnesses. Eight of the eleven were attorneys, and several of them had backgrounds that would be expected to make them critical in cases of unrehabilitated misconduct or inadequate cooperation to address the harm petitioner earlier caused. **[5]** "Testimony of members of the bar and bench of high repute is also entitled to careful consideration when the petitioner has been close to their observation. [Citations]." (*Preston v. State Bar* (1946) 28 Cal.2d 643, 651.) This is because "[s]uch witnesses are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character. [Citations.]" (*Ibid.*; see also Rules Prof. Conduct, rule 1-200(B) [attorneys have a duty not to further the application for admission or readmission to the bar of a person they know "to be unqualified in respect to character, education, or other relevant attributes"].)

[6a] Robert Amidon, an attorney for 25 years, had worked in Naval intelligence, had served as an assistant United States attorney, and then practiced civil law. In 1989, Aetna Insurance Company hired Amidon to investigate Alliance activities and to determine what losses Aetna might have incurred as a result. Amidon's investigation for Aetna was wide-ranging. He reviewed numerous documents, and he spoke with the federal prosecutors on the case and also with Alliance defendants. That is how Amidon met petitioner in either 1989 or 1990. From Amidon's extensive investigation of the harm done by Alliance members, he concluded that petitioner was one of the few Alliance figures who cooperated with the prosecution and insurer victims and that petitioner's activities did not cause losses for Aetna. Moreover, it was Amidon's view of petitioner's role that he was more of a new attorney-researcher and not a central Alliance strategist. Amidon opined that petitioner was very candid and truthful with him. Amidon felt that his experience as a former prosecutor helped him judge petitioner's character and he ultimately opined that petitioner was qualified for reinstatement.[4] **[6b - see fn. 4]** Although Amidon had had only a few contacts with petitioner since his investigation, which lasted from 1989 until 1996 or 1997, Amidon knew of nothing to change his opinion.

William Hodgman, an assistant district attorney of Los Angeles County who had 20 years of experience in that office and who oversaw all of the District Attorney's line operations as well as its investigation bureau, had known petitioner for about 10 years. Hodgman's contacts with petitioner have been social, involving mutual activities of their respective families such as childbirth classes and Cub Scout activities. Hodgman believed that he had acquired a very positive opinion of petitioner's rehabilitation from those activities, particularly watching petitioner's teaching and leadership with young children. As Hodgman testified, petitioner appreciated the wrongfulness of what he earlier did and showed a very strong sense of "never wanting to get into that situation ever, ever again." In Hodgman's words,

4. **[6b]** As Amidon testified, "My personal view is that he should be given a second chance. From the time that we first interviewed [petitioner] and with the Aetna representatives, we again had formed our conclusion and my opinion was the same that he was just at the wrong place at the wrong time. He was young and inexperienced. He didn't know how to get unstuck from the tar baby and that he should be given a second chance. . . ." Amidon testified as to an ultimate issue in this proceeding, but his testimony was not precluded thereby, although that ultimate issue is for our Court and the Supreme Court. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277, fn. 7.)

petitioner felt a lot of shame and humiliation over what he did and never wanted anyone who knew him to have to look askance at him again.

The testimony of State Bar Deputy Trial Counsel Jan Oehrle was also noteworthy. Oehrle had been admitted to practice for nearly 25 years and had spent the past 13 years as a Deputy Trial Counsel for the State Bar. She was the principal attorney for the Office of Chief Trial Counsel assigned to evaluate complaints of attorney misconduct regarding the Alliance. Oehrle's purpose in testifying was to affirm petitioner's cooperation with the State Bar in its investigation. She first met petitioner in 1990 when his attorney contacted her with petitioner's offer to assist the State Bar. Petitioner gave Oehrle detailed information about the Alliance, including the relationship of the participants *inter se* and with Stites. According to Oehrle, this information was most helpful.[5] One matter of concern to Oehrle was that petitioner might expect some benefit in return for helping the State Bar as she had never had such an offer of assistance before from an attorney who was involved in State Bar proceedings. However, petitioner understood that he would receive no benefit from cooperating with the State Bar. Oehrle was able to verify that petitioner's information about the Alliance was honest, as it fully corroborated evidence she received from other sources. Although we do not regard Oehrle's appearance as an intent to act as petitioner's general character witness, we cannot recall another instance in which a State Bar senior trial attorney testified as favorably for a party to State Bar Court proceedings.

Petitioner's current employer, attorney Henry Gradstein, also testified impressively for petitioner. Gradstein, a lawyer for 20 years, knew petitioner since the summer of 1985. He was aware of petitioner's misconduct, criminal conviction, and bar resignation, and he has observed petitioner's successful course of rehabilitation. Gradstein gave detailed reasons for considering petitioner rehabilitated, including pointing out his prominent role in ensuring high ethical standards for practice in Gradstein's law office, although petitioner served but as a law clerk.[6] Should petitioner be reinstated, Gradstein would like to see petitioner as a partner in the practice.

Other witnesses' testimonies of petitioner's rehabilitation were also impressive, particularly for the detailed reasons the witnesses gave for their favorable opinions.

We also note the evidence of petitioner's personal expression of sufficient insight into and sincere remorse over his Alliance misconduct. We observe this both in his own testimony and as a key aspect of the testimony of many of his witnesses. Petitioner took meaningful steps to learn of the factors associated with his misconduct, and he took considerable steps to correct and enhance his life, including intense involvement with his church, which led to a position of significant leadership in those religious activities. He also spoke to classes of law students to share with them the misconduct he committed and the importance of honest conduct as a lawyer.

B. The State Bar's Negative Evidence of Petitioner's Reform.

[7a] The State Bar offered five witnesses who gave negative opinions of petitioner's rehabilitation. Because these five witnesses are attorneys, their testimonies are entitled to great weight if "petitioner has been close to their observation." (*Preston v. State Bar, supra*, 28 Cal.2d at p. 651.) The testimony of Edwin Warren was indicative. Warren, a liability defense lawyer for 35 years was asked to help insurers look into billings of Alliance members. Although Warren looked into petitioner's conduct during the mid-1980s, he was unaware that petitioner had been convicted of a crime and unaware of whether petitioner had made any efforts at rehabilitation.

5. Oehrle testified in part: "[The Alliance] was a very, very large case and at the time, my perception was, that the State Bar didn't really have the resources to do the kind of investigation that we really needed to do without the information [petitioner] gave us."

6. Petitioner served as a law clerk for Gradstein's and other law offices from 1990 or 1991. Gradstein gave petitioner full-time employment since the mid-1990s.

Warren opined that petitioner should not be rehabilitated because petitioner's conduct with the Alliance was so grave that "no one who would engage in that conduct could at some point in time be rehabilitated."

[7b] Thomas Brown, a lawyer for sixteen years and partner of a major law firm representing insurers seeking to assess damages to their clients from Alliance activities, opined that petitioner should not be reinstated. Brown had had contacts with petitioner only between about 1987 or 1988 and 1991. Brown's opinion was that petitioner should not be reinstated because, by 1990 or 1991, he had still not accepted responsibility or shown remorse for his misconduct and because petitioner either discounted or falsified the extent of his involvement with Stites and other Alliance figures.

[7c] The hearing judge found these witnesses' opinions to be weak in view of pertinent case law or to be outweighed by other more credible testimony. We agree, and we find that the negative testimony did not rebut petitioner's favorable testimony for a very important reason: in all but the testimony of Brown, the negative testimony was based solely on the severity of petitioner's earlier misconduct and not on his rehabilitative steps since resignation. In short, these witnesses have had no personal observation of petitioner for most, if not all, of the 10 years that have elapsed between the time petitioner resigned with disciplinary charges pending in 1990 and the hearings below. Thus, while the negative testimony of each of these witnesses is relevant on the issues of the seriousness and the nature and extent of petitioner's prior misconduct, it has little relevance on the issues of petitioner's present character and of whether petitioner has maintained a sustained period of unblemished and exemplary conduct.

In the case of Brown's testimony, we agree with the hearing judge's analysis discounting it in view of much more evidence that petitioner did cooperate sufficiently with the State Bar and law enforcement and accepted adequate responsibility for his Alliance misconduct. We also note that Brown's contacts with petitioner ended in 1991, thus depriving Brown of any significant opportunity to evaluate petitioner's rehabilitation.

C. The Evidence Surrounding Petitioner's Income Tax Liabilities.

[8a] Petitioner disclosed in his reinstatement petition that he owed nearly $458,000 in federal income taxes, penalties, and interest. About two-thirds to three-quarters of this amount is interest and penalties. This delinquency started in 1983 when petitioner's late payment of taxes led to a later interest and penalty assessment of $40,000. Petitioner paid his 1984 and 1985 taxes timely, but erred in estimating his quarterly tax payments and had a $7,000 underpayment. In 1987 when petitioner suffered investment reversals and had to incur considerable expenses for his criminal defense arising out of the Alliance matter, he was unable to pay his taxes, estimated at $40,000. In 1988, he underpaid his taxes by about $4,000, but paid in full his taxes for 1989 and 1990.

[8b] Because of heavy expenses, petitioner was unable to pay his 1991 and 1992 taxes and did not recall whether he paid his taxes in 1993 or 1994. Between 1995 and 1998, petitioner complied with an Internal Revenue Service (IRS) payment plan requiring him to pay increasing monthly payments, starting at $25 monthly and increasing to $558 monthly.

[8c] For 1997 through 1999, petitioner paid his taxes in full. Petitioner also owed the California Franchise Tax Board about $15,000 or $20,000, which he paid in full by 1996 or 1997. In 1998, petitioner consulted tax counsel who recommended he propose to the IRS an offer in compromise, pursuant to 26 Code of Federal Regulations part 301.7122-1.[7] Petitioner's counsel advised him to offer $50,000 to settle his delinquencies. The offer was pending at the time of the hearing below.

7. At the time petitioner submitted his offer to the IRS, there were two grounds for compromising a tax liability under 26 Code of Federal Regulations part 301.7122-1(b)(1) and (2): a dispute as to the tax liability, or a doubt as to collectibility where the tax liability exceeds the taxpayer's assets and income. The record does not disclose the basis of petitioner's offer in compromise. Subsequently, the IRS added a third ground for an offer in compromise in 26 Code of Federal Regulations part 301.7122-1(b)(3): promoting effective tax administration.

The hearing judge found that the circumstances surrounding petitioner's delinquencies did not show adverse moral character. The State Bar contends that petitioner's unresolved tax delinquencies in view of his income of over $150,000 per year shows a lack of requisite rehabilitation. We agree with the hearing judge's assessment.

[8d] This is not a case where petitioner has concealed assets or his delinquencies. Nor is this a case where petitioner has failed to file tax returns. His large salary earned in the years just before and during this reinstatement proceeding accompanied his full payment of taxes for those years. He should not be deprived of the ability to take advantage of the offer in compromise procedures open to any citizen seeking to resolve a large delinquency, particularly consisting sizeably of penalties and interest. (Cf. *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1069-1070, 1072-1074 [moral character admissions case–debt of applicant discharged in bankruptcy].) Ultimately, the State Bar's concerns seem to revolve around its claim that petitioner did not corroborate his testimony with additional documentary evidence. While that is true, petitioner's evidence on this subject remains unrebutted.

D. The Evidence Surrounding Petitioner's Recall of His Partnership with Stites

Petitioner testified that he did not recall forming a partnership with Stites in 1986. Petitioner was shown a law corporation application which he signed in 1986 for the formation of the Stites & Bodell Law Corporation. Petitioner did not recall that the corporation was active, and it was suspended several years later for failing to pay taxes. The State Bar did not show that the corporation was active or that a separate practice emerged from this relationship. The hearing judge did not make any findings on this issue, but the State Bar argues that it indicates petitioner's lack of credibility. We disagree with the State Bar. We would be more concerned had petitioner failed to recall a material event, particularly following his resignation. Since petitioner committed his misconduct while practicing with Stites, we do not see how his failure to recall forming this law corporation 14 years earlier affects his rehabilitative showing.

E. Overall Discussion of the Evidence Concerning Rehabilitation

Ultimately, we must decide whether petitioner has shown proof of sustained exemplary conduct since his resignation. (Cf. *In re Menna*, *supra*, 11 Cal.4th at p. 989.) We regard petitioner's proof analogous to that shown in the recent reinstatement case of *In the Matter of Salant*, *supra*, 4 Cal. State Bar Ct. Rptr., at pages 4 and 5. Although the misconduct in that case was considerably more isolated than the present case and occurred under mitigating circumstances, Salant offered impressive testimony from government attorneys and others who observed her and who gave specific reasons for testifying favorably for her, including her openness about her offense, her insight into its cause, and her positive behavior under stress. Notwithstanding this favorable testimony, there were some doubts that we held not to be inconsistent with the very high requisite showing. We recommended Salant's reinstatement, and the Supreme Court ordered it.

Here 10 years elapsed between petitioner's resignation and the hearings below. Abundant, critical witnesses established petitioner's success in overcoming the weaknesses that led to his earlier dishonest behavior and showed his success in establishing himself as a successful law clerk, making important contributions to his church and being highly sensitive to ethical behavior.

The hearing judge who presided over the twelve-day trial in this proceeding concluded that petitioner had made the very high showing which reinstatement demands. We agree.

V. RECOMMENDATION

For the foregoing reasons, we recommend that Gregory Scott Bodell's petition for reinstatement be granted and that he be reinstated as an active member of the State Bar of California upon his paying the required fees (Bus. & Prof. Code, § 6063) and other sums (e.g., Bus. & Prof. Code, §§ 6140.5, subd. (c), 6140.7) and upon his taking the oath of an attorney at law (Bus. & Prof. Code, § 6067).

We concur:
WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MITCHELL HOWARD KREITENBERG

A Member of the State Bar

No. 99-C-11604

Filed November 22, 2002

SUMMARY

In this felony conviction referral matter, the hearing judge found that, over a six-year period, respondent was involved in a capping scheme, fee splitting arrangement, and conspiracy to defraud the Internal Revenue Service in violation of title 18 United States Code section 371, which misconduct constituted acts of moral turpitude. The hearing judge recommended that respondent be suspended from the practice of law for six years, that the six-year suspension be stayed, and that he be actually suspended for four years and until he complied with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, Rules of Procedure of the State Bar, title IV. (Hon. Robert M. Talcott, Hearing Judge.)

The State Bar sought review, asserting that respondent should be disbarred. On review, respondent did not dispute the determination of culpability but argued that two to three years of actual suspension was the appropriate discipline. The review department determined that, given the magnitude, scope, and duration of respondent's crime, as well as the lack of compellling mitigating evidence, respondent should be disbarred.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Arthur Lewis Margolis

HEADNOTES

[1] **1512 Conviction Matters–Nature of Conviction–Theft Crimes**
1516 Conviction Matters–Nature of Conviction–Tax Laws
1523 Conviction Matters–Moral Turpitude–Facts and Circumstances
The facts and circumstances surrounding respondent's scheme to defraud the government presented clear and convincing evidence of moral turpitude where respondent misappropriated his clients' identities, authorized the forgery of clients' signatures, and conspired to use his trust account

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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.

as a subterfuge to avoid paying income taxes due on legal fees and to fund a massive capping and fee splitting scheme for the principal purpose of enriching himself, his cousin, and his nonattorney office manager. However else moral turpitude may be defined, it most certainly includes these deceitful acts by respondent for his personal gain.

[2] **691 Aggravation–Other–Found**
It was a factor in aggravation that respondent personally gained from his misconduct.

[3] **582.10 Aggravation–Harm to Client–Found**
Respondent's misconduct harmed his clients. Respondent breached his clients' trust by misappropriating their identities for his own personal gain and by allowing his clients to be misled into signing phony checks or permitting their signatures to be forged. Such actions were a clear betrayal of his clients' best interests in favor of respondent's own selfish desires and exposed his clients to possible tax audits and their unwitting involvement in his conspiracy to defraud the Internal Revenue Service.

[4] **691 Aggravation–Other–Found**
Where respondent misappropriated his clients' identities, authorized the forgery of clients' signatures, and conspired to use his trust account as a subterfuge to avoid paying income taxes due on legal fees and to fund a massive capping and fee splitting scheme, respondent's misconduct was directly related to his obligations as an attorney. This direct relation between the misconduct and attorney obligations constituted a factor in aggravation.

[5a, b] **191 Effect/Relationship of Other Proceedings**
740.31 Mitigation–Good Character–Found bnt Discounted–Insuffient References
740.32 Mitigation–Good Character–Found but Discounted–References Unfamiliar
740.39 Mitigation–Good Character–Found but Discounted–Other
Where respondent's character evidence was not from a sufficiently wide range of references, did not demonstrate that each witness was aware of the full extent of respondent's misconduct, and did not address the State Bar's disciplinary concerns or discuss respondent's fitness for practice, the evidence was entitled to only limited weight in mitigation.

[6] **795 Mitigation–Other–Declined to Find**
No mitigating weight was given to the fact that respondent was not a leader in the conspiracy to defraud the Internal Revenue Service where respondent knew virtually from the outset that what he was doing was wrong, participated as an equal in the conspiracy, decided with the others in the conspiracy on various modifications to the scheme to assure its ongoing success, drew an equal amount of the fees, and misappropriated the names of his own clients in furtherance of the conspiracy.

[7] **1610 Conviction Matters–Discipline–Disbarment**
Disbarment was the appropriate discipline for respondent's involvement in a capping scheme, fee splitting arrangement and conspiracy to defraud the Internal Revenue Service due to (1) the extremely serious nature of respondent's misconduct over an extended period of years; (2) the insufficient passage of time since the misconduct to give the necessary assurance that respondent was once again fit to practice law; (3) the fact that the misconduct occurred within three or four years after respondent began practicing law; (4) the fact that respondent was motivated to continue the misconduct for six years by a desire to enhance his standard of living; (5) respondent's decision to offer only limited cooperation to the government for three and one-half years after the

commencement of an investigation by the Internal Revenue Service; and (6) respondent's disregard, on virtually hundreds of occasions, of the trust his clients placed in him.

ADDITIONAL ANALYSIS

Aggravation
Found
521 Multiple Acts
531 Pattern
541 Bad Faith–Dishonesty
584.10 Harm to Public
Mitigation
Found but Discounted
730.30 Candor–Victim
735.30 Candor–Bar
745.32 Remorse–Restitution
Declined to Find
710.53 No Prior Record
Discipline
1552.10 Conviction Matters–Standards–Moral Turpitude–Disbarment

OPINION

EPSTEIN, J.:

This felony conviction referral matter involves serious misconduct by respondent, Mitchell H. Kreitenberg, which occurred over a six-year period. The State Bar Court hearing judge found respondent's involvement in a capping scheme, fee splitting arrangement and conspiracy to defraud the Internal Revenue Service in violation of title 18 United States Code section 371, constituted acts of moral turpitude. Respondent does not challenge this finding, and, therefore, culpability is not at issue. However, the State Bar is appealing the recommendation of the hearing judge that respondent be actually suspended for four years and, instead, is seeking disbarment; respondent maintains that two to three years of actual suspension is the appropriate discipline. In order to decide this issue, we must determine whether the evidence presented in mitigation is compelling enough to outweigh conduct that otherwise would result in a disbarment recommendation.

Given the magnitude, scope and duration of respondent's crime, we conclude that he should be disbarred. We cannot agree with the hearing judge that the mitigation evidence is so compelling as to warrant a discipline less than disbarment. Despite the progress towards rehabilitation that respondent has made to date, our paramount duty to protect the public, courts and profession dictates that reinstatement proceedings are the appropriate means by which respondent should demonstrate his fitness to practice law. The lesser showing that would be required of respondent in proceedings under Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) is insufficient to maintain the integrity of the profession, in light of the seriousness of his misconduct.[1]

I. PROCEDURAL AND FACTUAL BACKGROUND

Respondent was admitted to practice in June 1983, and has no prior record of discipline. He began his legal career in 1984, at an in-house law firm for an insurance company, where his annual salary was about $34,000. Three years later, in 1987, respondent was recruited by his cousin and mentor, Manny Kreitenberg, to join him in a personal injury practice. The law firm was denominated "The Law Offices of Mitchell Kreitenberg," and respondent was responsible for managing the office, although his cousin was involved in most aspects of the practice. (Manny Kreitenberg also operated a separate law office that respondent was no part of.)

Shortly after respondent began practicing personal injury law with his cousin, he became aware that some, if not all, of his cases were referred by cappers, who were paid for their referrals. Respondent also was aware that the legal fees from the cases referred by the cappers were split among his cousin, his non-attorney office manager, Elvira Topor, and himself. Respondent knew that these activities were illegal, and on several occasions he expressed his concern to Manny Kreitenberg, but his cousin told him "this is the way it works and if you don't like it you can leave. . . ." Respondent now wishes he had had the strength to leave; but he remained in the practice with his cousin. Indeed, in 1991, the seriousness of respondent's misconduct escalated beyond mere capping and fee splitting when he, his cousin and his office manager devised a plan to use respondent's client trust account for the purposes of paying for the illegal referrals and for shielding his income from the Internal Revenue Service (IRS).

In accordance with the illegal plan, respondent deposited settlement awards into his client trust account, and the appropriate disbursements were made to the client, medical doctors and others. However, the portion of the settlement award allocated to legal fees was not disbursed as such to

1. All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct, and all further references to rules are to these Rules of Procedure of the State Bar, unless otherwise indicated.

respondent. Instead, respondent wrote a second, fraudulent check, drawn against the trust account, using the name of his client as a fictitious payee and in an amount similar to the previous amount paid to the client. To further disguise the withdrawals of his fees from the IRS and the State Bar, respondent and his cousin agreed that the checks should be in a non-sequential order from the initial checks to the clients. Early in the scheme, the duplicate, phony checks were signed by the clients, who were inveigled to do so under false pretenses by the office manager. When this became cumbersome, due to the resistance of some clients, the plan was modified so that the office manager forged the signatures of the clients who were named on the checks.

In this manner, over 680 phony checks were written by respondent during a three-year period, and about $1,640,000 in legal fees was withdrawn from the trust account. None of this money was reported as income to the IRS. Instead, respondent's office manager used the money to pay cappers, who, in turn, referred still more lawsuits, generating additional legal fees, which were split equally among respondent, his cousin and the office manager. As a result of this conspiracy, respondent was able to earn an income of approximately $250,000 to $300,000 a year during the years 1990, 1991 and 1992. There is no evidence that the check-writing scheme would have stopped, but for the intervention of the IRS, which commenced an audit of respondent's tax returns in April 1993. At that point, respondent ceased writing the fraudulent checks and paying cappers.

Initially, respondent and his civil attorney cooperated on a limited basis with the IRS, providing various documents and records, as requested. Three years later, in September 1996, respondent learned that he was the subject of a criminal investigation by the United States Department of Justice arising out of the check-writing scheme. After he retained a criminal defense attorney, respondent met with the Assistant United States Attorney, whereupon he fully confessed to his criminal activities. On April 24, 1997, an information was filed in United States District Court for the Central District of California (District Court), charging respondent with one count of conspiracy to defraud the IRS under title 18 United States Code section 371, and in May 1997, pursuant to a plea agreement, respondent pled guilty to this count. As part of the plea agreement, respondent was required to meet with an IRS agent to determine the amount of taxes owed and to pay all back taxes, interest and penalties. There is no evidence in the record that respondent has fully repaid his back taxes.

Sentencing was delayed for the next one and one-half years to encourage respondent to provide detailed information and assistance to the government in aid of the investigation of the check-writing and capping conspiracy. As a consequence of his cooperation, the government successfully prosecuted respondent's cousin for his participation in the conspiracy.[2] Respondent also provided information and files to the government on numerous occasions concerning other targets of the government's investigation. In January 1999, he was given credit for his cooperation and sentenced by the District Court to five years' probation, including three months in a correctional center and three months' home detention.

We placed respondent on interim suspension in 1999, and the matter was referred to the hearing department. Respondent stipulated to the facts underlying the conspiracy, but he did not stipulate to a finding of moral turpitude. Based on the evidence presented by the State Bar, the hearing judge found respondent culpable of moral turpitude, citing *In re Hallinan* (1954) 43 Cal.2d 243, 247. The majority of the hearing focused on respondent's evidence in mitigation, which included three witnesses who testified to his good character, and approximately twenty-five letters from relatives, friends, classmates and professional colleagues attesting to respondent's strong relationship with his extended family, his participation in his religious community and his contributions to his community in general. The letters had been submitted previously to the District Court in

2. Manny Kreitenberg resigned as a member of the State Bar with charges pending in 1994.

preparation for respondent's sentencing hearing and, therefore, were not directed to the State Bar Court. Nevertheless, as part of the stipulated record, the letters were entered into evidence by respondent "for all purposes" without objection from the State Bar. The stipulated record also included a few other good character letters that previously were lodged with the Workers' Compensation Appeals Board on behalf of respondent, but, with one exception, were duplicative, since they were written by the same authors as those who had submitted letters to the District Court.

Based on this evidence of good character, which the hearing judge found was "extraordinary," he recommended that respondent be suspended from the practice of law for six years, stayed, and that he be actually suspended for four years and until he complied with standard 1.4(c)(ii). His decision, filed on July 19, 2001, was modified on August 23, 2001, to clarify that respondent should be given credit for his interim suspension, which began on October, 27, 1999. Accordingly, if respondent timely complies with standard 1.4(c)(ii), he could be eligible to practice law in October of 2003, prior to the completion of his federal sentence, which should end in 2004, provided all of the terms of respondent's probation in the criminal case are satisfied.

On appeal, the State Bar contends that disbarment is warranted under the facts and circumstances presented by this record.[3] Respondent does not challenge the hearing judge's finding of moral turpitude, but asserts that two to three years' actual suspension is the appropriate discipline.

II. DISCUSSION

A. Acts of Moral Turpitude

[1] Respondent stipulated to the facts and circumstances surrounding his crime, although not to a finding of moral turpitude. He pled guilty to only one felony count of conspiring to defraud the government (18 U.S.C. § 371); nevertheless, the underlying acts of misconduct were far ranging and of extended duration. Respondent, his cousin and his office manager devised a purposeful plan to use respondent's trust account as a subterfuge to avoid paying income taxes due on respondent's legal fees. As part of the conspiracy, which lasted three years, respondent personally drafted hundreds of phony checks by misappropriating his clients' names as fictitious payees and authorizing the checks to be forged in their names. In this manner, nearly 1.6 million dollars in legal fees were illegally diverted from the trust account. The fees that were withdrawn from the trust account were used by respondent specifically to fund a massive capping and fee splitting scheme, for the principal purpose of further enriching himself, his cousin and his non-attorney office manager.[4] In exercising our independent review of the record (Cal. Rules of Court, rule 951.5; rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we find that the facts and circumstances surrounding respondent's scheme to defraud the government (18 U.S.C. § 371) present clear and convincing evidence of moral turpitude, and, accordingly, we adopt the hearing judge's finding of culpability. Respondent's misconduct in misappropriating his clients' identities and authorizing the forgery of their signatures, as well as conspiring to use his trust account for illegal purposes was dishonest. However else moral turpitude may be defined, it most certainly includes these deceitful acts by re-

3. Although the State Bar did not file a Motion for Summary Disbarment below, it raises the issue on appeal that this is an appropriate case for summary disbarment. A violation of title 18 United States Code section 371 requires a determination by the hearing department of whether the crime involves moral turpitude under the facts and circumstances of the case. The crime is not *per se* moral turpitude, and therefore is ineligible for summary disbarment under Business and Professions Code section 6102, subdivision (c). (*In re Chernik* (1989) 49 Cal.3d 467, 469-470; *In re Severo* (1986) 41 Cal.3d 493, 496; *In re Chira* (1986) 42 Cal.3d 904, 906-907.) We may not reject this precedent.

4. There is no evidence that any of the law suits referred by the cappers were fraudulent.

spondent for his personal gain. (See *In re Schwartz* (1982) 31 Cal.3d 395,400; *In re Chira*, *supra*, 42 Cal.3d 904, 909.)

B. Aggravating Circumstances

We agree with the hearing judge's finding as aggravation that there was a pattern of misconduct. (Std. 1.2(b)(ii).) Indeed, the pattern involved multiple acts of wrongdoing. But, our calculation of the duration of the misconduct is significantly longer than that of the hearing judge, who found the relevant time period to be three years from the inception of the conspiracy until its abrupt termination with the delivery of the audit letter by the IRS. We find the appropriate time period to be six years, which is the length of time that respondent knew about and agreed to the use of cappers and fee splitting with a non-attorney, and includes the three-year period of the check-writing conspiracy.

[2] We also agree with the hearing judge's finding that respondent personally gained from his misconduct and that this is an aggravating factor. The record confirms that respondent, his cousin and his office manager *each* received between $250,000 and $300,000 per year in fees as a result of the conspiracy. Indeed, respondent testified that his primary motivation in participating in the scheme was "the chance to make more money."

The hearing judge further found that there was harm to the public because of respondent's failure to pay income taxes, and we agree. (Std. 1.2(b)(iv).) **[3]** However, we cannot agree with the hearing judge's finding that there was no harm to respondent's clients. To be sure, there is no evidence that respondent failed to timely disburse the settlement amounts due to his clients. Nonetheless, the harm occurred each time respondent breached his client's trust by misappropriating the client's identity for respondent's own personal gain. He further abdicated his fiduciary responsibilities to his clients by allowing them to be misled into signing the phony checks or permitting their signatures to be forged. Such actions were a clear betrayal of his clients' best interests in favor of his own selfish desires. It has long been a fundamental premise of the practice of law that "the relationship between an attorney and client is of the highest order of fiduciary relation.[citation.]" (*In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757.) Moreover, respondent's actions exposed his clients to possible tax audits and their unwitting involvement in his conspiracy to defraud the IRS. (See, e.g., *In re Distefano* (1975) 13 Cal.3d 476, 481-482.) "It is precisely because the attorney-client relationship is one of utmost confidence that the commission of a felony in betrayal of that confidence receives the harshest sanction the disciplinary system imposes." (*In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 479.)

We find additional factors in aggravation that were not identified by the hearing judge. Respondent pled guilty to intentionally hiding his fees so as to escape detection by the IRS. However, the check writing scheme also was intended to conceal respondent's misuse of his client trust account from the State Bar, which we find to be an aggravating factor. (Std. 1.2(b)(iii).) **[4]** In addition, we find that respondent's check writing scheme was directly related to his obligations as an attorney; indeed, the conspiracy lay at the very heart of his practice. Standard 2.3 provides guidance in this instance: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward . . . a client or another person or of concealment of a material fact to . . . a client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the *degree to which it relates to the member's acts within the practice of law*." (Italics added.) Respondent's misconduct touched on virtually every aspect of his law practice: he repeatedly misused his client trust account for his own purposes; he purchased lawsuits from cappers to generate legal fees; and, he split those fees with his cousin and his non-attorney office manager. Most importantly, but for his relationship with his clients as their attorney, respondent would not have had the opportunity to appropriate their names, nor would he have been privy to the information about their settlement awards, which he utilized in drafting each fraudulent check. There is a clear nexus between the felony committed here and respondent's responsibilities as an attorney. Accordingly, we find this to be an aggravating factor.

C. MITIGATING CIRCUMSTANCES

The hearing judge found that respondent made an "extraordinary demonstration" of good character, based on three character witnesses and approximately twenty-five good character letters. We give great deference to the hearing judge's findings of credibility of respondent's character witnesses (rule 305(a); *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 262), and we concur that their testimony placed respondent in a very favorable light.

The first witness, Steven Fabiano, has known respondent for almost twenty years and employed him as a part-time paralegal. They met when they worked for the in-house firm for the insurance company. They saw each other sporadically, but when Mr. Fabiano read in the newspaper about respondent's conviction, he contacted him. They discussed respondent's misconduct on "numerous" occasions, and during those discussions respondent never once denied his complicity or tried to shift the blame. Mr. Fabiano was of the opinion that respondent was remorseful and would not commit any further misconduct, largely because of his close relationship to his family, which respondent would not want to jeopardize.

The second character witness, who the hearing judge found to be "very credible," was Thomas Phillips, a law school classmate and co-worker with respondent at the in-house law firm for the insurance company. Mr. Phillips was aware of many of the particulars of respondent's crime and the surrounding circumstances and believed that Manny Kreitenberg led respondent into the conspiracy as the result of their close, mentoring relationship. He also testified that respondent did not blame his cousin and took full responsibility for his misdeeds. Mr. Phillips testified he remained a good friend of respondent and would be willing to hire him as a partner in his firm if he were allowed to practice law. Mr. Phillips firmly believed that respondent had been rehabilitated and should be given a second chance.

The third witness, Ronald Nessim, was a former Assistant United States Attorney and is in private criminal defense practice. According to the hearing judge, he was "a very impressive character witness." Mr. Nessim was fully aware of all of the particulars of respondent's involvement in the conspiracy, because he represented the cousin, Manny Kreitenberg, in the District Court proceedings. His personal relationship with respondent extended back to childhood, when they lived in the same neighborhood, and they continued their friendship on a social basis. Mr. Nessim felt that his client, Manny Kreitenberg, was the true leader of the check-writing operation and that respondent was less culpable of the crime. He believed that his client was able to influence respondent to participate in the conspiracy due to their close family relationship. He further testified that he had "no doubts" that respondent would never commit another crime of any kind and believed respondent fully accepted responsibility for his participation in the conspiracy.

[5a] Although each of these three witnesses testified persuasively as to respondent's good character and his rehabilitation, such testimony was not offered from a sufficiently "wide range" of references. (Std.1.2 (e)(vi); *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594-595.) Moreover, strong character evidence alone, no matter how positive, is not determinative of rehabilitation. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1095.) The numerous character letters from family, friends and colleagues submitted by respondent do little to fill the evidentiary gap needed in mitigation of respondent's serious misconduct. To be sure, all of the letter writers attested to respondent's attributes as a good family man and a religious person, as well as his extensive community involvement. The hearing judge found that each of the writers was "fully aware of the serious misconduct committed by respondent." We respectfully disagree. The vast majority of the letters stated the writers were aware that respondent either had serious problems with the law, or had made a terrible mistake. A few writers were aware of the specific charge or of the nature of his conviction. But, a close reading of these letters shows that, apart from the testimonials written by the three individuals who testified in the proceedings in the State Bar Court, one can reasonably infer from only three of the other letters that the authors were fully aware of the specific facts and circumstances surrounding respondent's conviction for conspiracy

to defraud the government. As such, we find that, with few exceptions, the letters do not demonstrate that the writers were aware of the full extent of respondent's misconduct. (Std. 1.2(e)(vi); *In re Ford* (1988) 44 Cal.3d 810, 818; see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.)

[5b] Equally problematic is the relevance of the character letters, since they were directed to the sentencing judge in the District Court in support of leniency. The purpose of criminal proceedings differs from that of disciplinary hearings. The Supreme Court discussed this difference in *In re Distefano*, *supra*, 13 Cal. 3d at page 481: "The trial court was dealing with him as a citizen, whereas we are dealing with him as a lawyer. . . . The responsibilities of a lawyer differ from those of a layman; 'Correspondingly, our duty to the public and to the lawyers of the state in this respect differs from that of the trial judge in administering criminal law.' [Citation.]" Indeed, the letters movingly described respondent's sincere and deep remorse, but they did not address the disciplinary concerns of the State Bar or discuss respondent's fitness for practice. "Remorse does not demonstrate rehabilitation." (*In re Conflenti* (1981) 29 Cal. 3d 120, 124.) A close reading of these letters compels the conclusion that they are entitled to only limited weight as mitigation evidence.

We do find the character letter from respondent's psychologist, Dr. Neil Einbund, which was also directed to the District Court, to be relevant. He wrote eloquently of respondent's voluntary psychotherapy to gain insight into the conduct that led him into criminal activity. He further opined that respondent had shown a rare strength of character and that he would not pose a danger to the public, the courts or his clients. We therefore give significant mitigation credit to the letter submitted by Dr. Einbund, as well as to respondent's voluntary therapy, which demonstrates a substantial effort by respondent to rectify his misconduct. (Std. 1.2(e)(vii); *In the Matter of Kueker*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 591.)

We also give weight to the testimony of respondent, who was forthright about his involvement in the conspiracy and his financial motivation. He fully and without reservation accepted responsibility, and his remorse appeared to be genuine. His strong ties to his family and the community also were evident from his testimony and would no doubt act as strong motivation and assurance of no further misconduct. Respondent's testimony demonstrated that he has fully acknowledged his wrongdoing and has taken steps to prevent its recurrence, which we find is a factor in mitigation. (Std. 1.2(e)(vii).)

In exercising our independent review of the record, we conclude that respondent's other mitigation evidence, discussed below, is not as persuasive or as compelling as the hearing judge found. For example, respondent points to the absence of prior misconduct as mitigation. (Std. 1.2(e)(i)). The hearing judge assigned "little weight" in mitigation, having found that respondent's misconduct started in 1990 -- seven years after he was admitted to the bar. But, respondent testified that he participated in fee splitting and the use of cappers shortly after he joined his cousin to practice personal injury law in 1987. Thus, respondent practiced law for only three or four years before he knowingly engaged in misconduct. Such a short period of unblemished practice is insignificant for purposes of mitigation. (*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 Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 316 [eight years without discipline does not merit significant mitigation]; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 (eight years not significant mitigation].) Accordingly, we give no weight to this mitigating factor.

The hearing judge found as mitigation that respondent "displayed full candor and cooperation with the Internal Revenue Service and the United States Department of Justice, as well as the State Bar." (Std. 1.2(e)(v).) The hearing judge also found in mitigation that respondent promptly took objective steps that demonstrated his recognition of his wrongdoing. (Std. 1.2(e)(vii).) Again, we respectfully disagree with these findings. As troubled as respondent claimed to be about his ongoing transgressions, he did nothing to stop the conspiracy during its three years, nor did he opt out. Indeed, the record shows that respondent's recognition of his wrongdoing occurred only *after* the IRS audit was commenced, and even then his remorse was not complete. It is true that

at that point respondent stopped the fraudulent check scheme and the payments to cappers, recognizing that with the intervention of the IRS, "there were bad things out there that were going to probably come to light and did. That was actually my bell ringing . . . to stop doing what I was doing."

But, respondent did not acknowledge the full extent of his participation in the conspiracy until he confessed to his crime in October 1996 -- over three years after he received the IRS audit letter, and then only after learning he was the subject of a criminal investigation.[5] Once he met with the Assistant United States Attorney, respondent acknowledged his role and accepted responsibility for his conduct. Respondent's cooperation with the United States Attorney continued over one and one-half years in order to gain a lighter sentence for himself. Also, Respondent did cooperate with the State Bar, entering into a Partial Stipulation of Undisputed Facts. Therefore, we give only slight weight in mitigation to respondent's delayed recognition of this wrongdoing and his subsequent cooperation with the United States government and the State Bar. (Cf. *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1070, 1072-1073; cf. *In the Matter of Kueker*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 591, 594.)

[6] The hearing judge gave some consideration to the fact that respondent was a follower and not a leader in the conspiracy. It is true that respondent and his cousin grew up together in a tightly-knit, immigrant family and that respondent trusted his cousin and looked up to him. But, respondent clearly knew virtually from the outset that what he was doing was wrong, even hiding the details of his law practice from friends and colleagues and dissuading his brother from joining him in his law office. Respondent appeared to take some measure of comfort in not knowing the identities of the cappers or in not paying them personally, but he otherwise participated as an equal in the conspiracy, deciding with his cousin and his office manager on various modifications to the scheme to assure its ongoing success, and drawing an equal amount of the fees. Finally, the clients whose names he misappropriated were the clients of The Law Offices of Mitchell Kreitenberg. We, therefore, give no mitigation weight to the fact that Manny Kreitenberg first involved respondent in the conspiracy.

D. DISCIPLINE

The record contains substantial evidence of respondent's rehabilitation and good character, but it is by no means overwhelming or determinative. Character evidence must be measured against the gravity of respondent's crimes. (Cf. *In re Menna* (1995) 11 Cal.4th 975, 988; See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 509-510, 514-515.) Moreover, in a conviction referral matter, the discipline must be imposed commensurate with the gravity of the crime and the circumstances surrounding the crime. We look to standard 3.2, which provides for disbarment of any attorney who has committed a crime of moral turpitude unless the most compelling mitigating circumstances clearly predominate. "'[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude . . . .' [Citation.]" (*In re Crooks* (1990) 51 Cal.3d 1090, 1101.) Respondent urges us to consider the cases of *In re Chira, supra,* 42 Cal.3d 904; *In re Chernik*, *supra*, 49 Cal.3d 467; and *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, as authority for suspension rather than disbarment. But, we find these cases to be distinguishable, since each involved "a few isolated incidents," whereas respondent's purposeful plan to defraud the government continued over several years and involved *hundreds* of falsely subscribed checks. (Cf. *Kaplan v. State Bar*, *supra*, 52 Cal.3d at p. 1071 [disbarment for 24 separate acts of misappropriation over several months from a law partnership fund].)

5. In his good character letter to the District Court Judge in support of respondent, Ronald Nessim acknowledged that respondent did not fully admit his culpability early in the investigation, and instead, under the advice of his tax attorney, respondent mischaracterized the capping payments to the IRS as marketing fees that should have been considered as valid tax deductions.

The instant matter must also be distinguished from the typical capping case where a hapless young attorney does not fully understand the implications of how business is ethically generated or only learns about the misconduct of others in his law office after the fact. (See, e.g., *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178.) Virtually from the outset, respondent was actively involved in the check-writing scheme, and he was fully aware of the impropriety of his actions, hiding them from the State Bar, the IRS, his colleagues and his family. Although respondent testified that his transgressions were due to his youth and inexperience, he also admitted it was the lure of making between $250,000 and $300,000 a year that was the primary motivator. He also said he felt trapped within the conspiracy and continued his conduct because his cousin, Manny Kreitenberg, was not only his co-conspirator, but his mentor as well. He believed he had no one else to turn to for counsel.

Similar claims were rejected as mitigation by the Supreme Court in *In re Severo, supra,* 41 Cal. 3d at page 501: "[P]etitioner's 'youth and inexperience' [do not] provide a basis here for concluding that his conduct should be viewed leniently and that he is presently able to practice law. He did not act negligently or by mistake, but participated knowingly in illegal acts. [citations.]" Respondent's misconduct was neither an inadvertent nor a short-lived venture into the realm of the unethical. Indeed, there is no indication in the record that, absent the action of the IRS, respondent would have discontinued the fraudulent plan. A similar concern was voiced by the Supreme Court in *In re Basinger* (1998) 45 Cal.3d 1348, 1360. (See also *Kaplan v. State Bar, supra,* 52 Cal.3d at p. 1072.)

We consider as persuasive authority the conviction-based case of *In re Distefano, supra,* 13 Cal.3d 476, which involved a tax offense resulting in disbarment. Attorney Distefano filed thirteen false income tax returns over a two-year period, claiming refunds totaling over $16,000. Attorney Distefano claimed he was lured into the plan to defraud the United States by a close friend, who exercised substantial influence over him, much like respondent's cousin. Also, similar to the instant matter, the illegal plan in *Distefano* contemplated using the names of living persons (one of whom was a client) without their knowledge or consent and the forgery of their signatures on tax returns. Pursuant to a plea bargain, Distefano was found guilty of three counts of violating title 18 United States Code section 287, resulting in five years' probation. Like respondent, Distefano had no prior record of discipline and practiced for only four years before he began committing the acts of misconduct. His last act of misconduct occurred three years prior to the Supreme Court order of disbarment, whereas respondent committed his last act of the check-writing conspiracy nine years ago. However, both respondent's and attorney Distefano's interim suspensions had been imposed for relatively short periods at the time of their disciplinary hearings. Six character witnesses testified on behalf of Distefano as to his honesty and his competence in the practice of law, including his brother, two attorneys who were colleagues and had the opportunity to observe Distefano in the practice of law (including an attorney at his former law firm), and his commanding officer in the Army Reserves. In addition, a favorable probation report and a letter from his psychiatrist stating Distefano had indicated repentance were admitted into evidence.

The Supreme Court was not persuaded that the evidence in mitigation was sufficient, given that "the misconduct was of an aggravated nature involving successive deliberate fraudulent acts, including forgery, extending over a substantial [two-year] period . . . ." *In re Distefano, supra,* 13 Cal.3d at p. 481. And perhaps most relevant to the instant matter was the Supreme Court's expressed unwillingness to accept the level of discipline imposed in the case of *In re Hallinan* (1957) 48 Cal.2d 52, a case relied upon by respondent and the hearing judge in this matter. In rejecting the *Hallinan* recommendation of suspension, the Court noted that Distefano's tax fraud scheme involved the use of the names of thirteen living individuals without their knowledge or consent, which "could well have subjected innocent third parties to investigation by the Internal Revenue Service . . . ." (*Id.* at pp. 481-482.) We share the same concern for the hundreds of clients of respondent, who without their knowledge or consent, had checks made out to them and "negotiated" on their behalf. On this basis, we find *Hallinan* is distinguishable.

We also find the decision of *In re Basinger, supra,* 45 Cal.3d 1348, to be instructive. *Basinger* is a conviction referral case, although it does not involve a tax offense. Instead, Basinger pled guilty to one count of grand theft in connection with the conversion of over $260,000 over a period of time from both his client trust account and the operating accounts of his law partners. The attorney stipulated to his culpability and presented substantial evidence in mitigation, including his voluntary treatment by a psychiatrist, his successful completion of probation, his unblemished record prior to the crime, and testimony about his good character and remorse by several friends, attorneys, former clients and one superior court judge, as well as his treating psychiatrist who said the attorney was suffering from situational stress and that his misconduct was unlikely to recur. (*Id.* at pp. 1354-1355.) The hearing referee found that the case involved " 'one of the most severe and clear cut breaches of professional responsibility that ha[d] been encountered,' " but he also found the evidence in mitigation to be compelling enough that the attorney deserved a second chance. (*Id.* at p. 1356.) The review department declined to adopt the recommendation of a five-year suspension and, instead, recommended disbarment.

The attorney sought review by the Supreme Court of the disbarment recommendation. The Court acknowledged that "the record contains much evidence attesting to petitioner's past effectiveness as an attorney, the psychological roots of his misconduct, low probability of the misconduct recurring, and his rehabilitation. In addition, we are cognizant of the absence of prior misconduct." (*In re Basinger, supra*, 45 Cal.3d at p. 1363.) Nevertheless, the Court stated that it "must still consider the enormity of the crime and its effect on the integrity, high professional standards, and public confidence in the legal profession.[citations.]" (*Id.* at p. 1360.) In so finding, the Court focused on many factors similar to those in the instant case, including the fact that Basinger worked with an accomplice (his office manager), he engaged in an ongoing operation of diverting trust and partnership funds to his own use, signatures were forged on checks by his office manager, he breached basic fiduciary obligations to his clients (and his partners) and "[a]n unusually large amount of money was involved." (*Ibid.*) Furthermore, the Court noted that one could "infer from the evidence that the scheme would have continued indefinitely since it only ceased when [the law partner] discovered petitioner's defalcations." (*Ibid.*) The Supreme Court adopted the review department's recommendation of disbarment, concluding that the more appropriate forum to hear the evidence of the attorney's rehabilitation would be in a proceeding for reinstatement. (*In re* Basinger, *supra*, 45 Cal.3d at p. 1362.)

We also look to *In the Matter of Rech, supra*, 3 Cal. State Bar Ct. Rptr. 310, which is a conviction referral case for violation of 18 United State Code section 371. In the Rech case we recommended, and the Supreme Court ordered, disbarment. (*Id.* at p. 317.) The hearing judge in the instant matter distinguished *Rech*, finding the mitigating factors were not as compelling, while respondent asserts that the misconduct in the instant matter is far less serious than that of Attorney Rech. However, we find *Rech* to be apt. Rech's conviction was the result of a four-year conspiracy, which involved disguising his client's drug proceeds by investing them in two real estate ventures. The attorney later became involved in his client's illegal drug business by loaning the client $30,000.

This court found that by participating in the laundering scheme, the attorney committed acts of moral turpitude involving concealment and intentional misrepresentations that could have endangered the lives of his business colleague and his family. (*In the Matter of Rech, supra*, 3 Cal State Bar Ct. Rptr. at p. 315.) Like Rech, respondent was found to have engaged in multiple acts of misconduct involving moral turpitude. (*Ibid.*) We are unable to discern if respondent's misdeeds are worse than those of Rech. However, we find the similarity in the mitigating circumstances to be instructive as to our determination of the appropriate discipline in this matter. Both Rech and respondent were found to have demonstrated candor and cooperation with the State Bar. (*Ibid.*) Both also presented favorable character testimony. (*Ibid.*) Both expressed remorse (although neither did so promptly). (*Id.* at p. 316, fn.4.) Also, like respondent, Rech had no prior record of discipline. (Rech was given some additional mitigation for the eight years of unblemished practice prior to his misconduct, which, as we discussed, *ante*, we

do not consider in mitigation in the instant case due to respondent's brief three-year career before he engaged in illegal conduct.) (*Ibid.*) Rech and respondent each presented psychological evidence, which was found to corroborate other favorable character testimony showing his remorse. (*Ibid.*) Although this court viewed the mitigation evidence in *Rech* to be "substantial," we determined, in accordance with standard 3.2, "it [is] not compelling [enough] in light of his extremely serious misconduct over a several-year period." (*Id.* at p. 317.)

Finally, the case of *In re Schwartz*, *supra*, 31 Cal.3d 395, which is another conviction referral matter, involved a complex fraud scheme, albeit, one based on mail fraud under title 18 United States Code section 1342, rather than tax fraud. The circumstances surrounding the crime consisted of a fraudulent enterprise to obtain merchandise by creation of false credit information, fictitious entities and a fictitious drivers license, as well as forgery of a fictitious name to open a bank account. The criminal acts began only two years after Attorney Schwartz was admitted to practice and resulted in four years' probation imposed by the superior court. Similar mitigation evidence was presented in the hearing department by the attorney in *Schwartz* as was offered by respondent in the instant matter, including the absence of a prior record of discipline, cooperation with the prosecuting authorities, and other post-conviction behavior that demonstrated remorse and rehabilitation. (*Id.* at pp. 400-401.) At the time the Supreme Court ordered his disbarment, Schwartz had been on interim suspension for three years. The Court acknowledged "that petitioner regrets his past criminal conduct and the consequences thereof [and the Court had no] reason to dispute the character testimony to that effect." (*Id.* at p. 401.) But in ordering disbarment, the Court did not agree that evidence of remorse was sufficient to establish rehabilitation. " 'In our view, a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice law . . . . Petitioner will have an additional opportunity hereafter to demonstrate his fitness in reinstatement proceedings before [the State Bar].' [Citation.]" (*Ibid.*)

[7] In light of the extremely serious nature of respondent's actions over an extended period of years, we recommend disbarment, rather than suspension, as the most appropriate enforcement response to ensure the protection of the public, the courts and the profession. While we commend respondent for the rehabilitation he has shown to date, we do not believe there has been sufficient passage of time to give us the assurance needed that he is once again fit to practice law. (See *In the Matter of Rech*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 316-317.) Even though his last act of the conspiracy occurred in 1993, at all times since then respondent has been either under investigation or under supervision. Furthermore, we are troubled that his misconduct occurred within three or four years after he began practicing law, and his decision to continue his misconduct for six years was primarily motivated by a desire to enhance his standard of living. Equally troubling is respondent's decision to offer only limited cooperation to the government for three and one-half years after the commencement of the investigation by the IRS, albeit with the misguided advice of his tax counsel. We simply are unpersuaded by the record before us that his misconduct would have ceased in the absence of governmental intervention and supervision. Our recommendation of disbarment also is based on respondent's disregard, on virtually hundreds of occasions, of the trust his clients placed in him, with the resulting adverse impact on the integrity of the legal profession, as well as public confidence in the profession. (*In re Basinger*, *supra*, 45 Cal.3d 1348, 1360.)

III. RECOMMENDATION

Respondent best captured the issue presented by this appeal when he testified that "the amounts and the crime and the situations done were terrible . . . [but] I think everybody deserves a second chance in life." We agree, but leave his second chance to another time and place than that here urged by respondent. Accordingly, we recommend that evidence of respondent's rehabilitation and fitness to practice law should be presented at a reinstatement proceeding following disbarment. (*In re Schwartz*, *supra*, 31 Cal.3d at p. 401.) This court has drawn a distinction

between the showing of rehabilitation required for an attorney seeking reinstatement and that necessary to satisfy the more modest standard 1.4(c)(ii) proceedings. (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 298.) We believe the stronger showing of rehabilitation required in a reinstatement proceeding is necessary here in light of the length and severity of respondent's misconduct and its direct relationship to the practice of law.

Respondent may seek reinstatement five years from the initial date of his suspension. (Rule 662(b).) At that time respondent will have completed his federal sentence of five years' probation, and a thorough re-appraisal, investigation and review of respondent's fitness to practice law can be made. In this manner, the public can be assured, to the greatest extent possible, of respondent's rehabilitation.

Accordingly, we recommend that respondent be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded 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.

We concur:
STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM BENSON PEAVEY, JR.,

A Member of the State Bar

Nos. 98-O-02234; 00-O-14818

Filed December 13, 2002

SUMMARY

The hearing judge found respondent culpable of seven counts of misconduct including failure to report a civil judgment for fraud to the State Bar, failure to avoid interests adverse to a client, breach of a fiduciary duty, and committing acts of moral turpitude and dishonesty. The hearing judge recommended that respondent receive three years' stayed suspension and three years' probation on conditions including that he be actually suspended for two years and until he makes restitution. (Hon. JoAnn M. Remke, Hearing Judge.)

Respondent requested review, contending that the decision was not supported by the weight of the evidence and that the appropriate discipline was three months' actual suspension with restitution. The review department adopted the hearing judge's conclusions of culpability and discipline recommendation.

COUNSEL FOR PARTIES

For State Bar: Robin B. Haffner

For Respondent: William Benson Peavey, Jr., in pro. per.

HEADNOTES

[1a-c] 273.00 Rule 3-300 [former 5-101]
In a prosecution for a violation of Rules of Professional Conduct, rule 3-300, where respondent borrowed $25,000 from clients in 1994, an attorney-client relationship existed at the time of the loan where the clients had an ongoing relationship with respondent since the 1970's and sought and received legal advice from respondent intermittently from that time through 1996.

[2a-f] 221.00 State Bar Act–Section 6106
Respondent committed acts involving moral turpitude where, in borrowing money from clients, he repeatedly misrepresented to the clients his business situation, his financial situation, and his ability

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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.

to repay the loans. Notwithstanding respondent's argument on review that his inability to repay the loans to his clients did not constitute any ethical violation, the review department found respondent culpable of violating Business and Professions Code section 6106 based on respondent's misrepresentations.

[3a-c] **106.90 Procedure–Pleadings–Other Issues**
159 Evidence–Miscellaneous
561 Aggravation–Uncharged Violation–Found
Absent an appropriate objection to the introduction of evidence of misconduct other than that charged in the notice of disciplinary charges, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters.

ADDITIONAL ANALYSIS

Culpability
Found
214.51 Section 6068(o)
221.11 Section 6106–Deliberate Dishonesty/Fraud
273.01 Rule 3-300 [former 5-101]
430.01 Breach of Fiduciary Duty
Not Found
213.15 Section 6068(a)
Aggravation
Found
521 Multiple Acts
582.10 Harm to Client
591 Indifference
Mitigation
Found
710.10 No Prior Record
765.10 Pro Bono Work
Found but Discounted
740.33 Good Character
Standards
833.90 Moral Turpitude–Suspension
Discipline
1013.09 Stayed Suspension–3 Years
1015.08 Actual Suspension–2 Years
Probation Conditions
1017.09 Probation–3 Years
1021 Resitution
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)
Other
106.30 Procedure–Pleadings–Duplicative Charges
191 Effect/Relationship of Other Proceedings

OPINION

WATAI, J.:

Respondent, WILLIAM B. PEAVEY, JR., was found culpable of seven counts of misconduct including failure to report a civil judgment for fraud to the State Bar, failure to avoid interests adverse to a client, violating his fiduciary duty and committing acts of moral turpitude and dishonesty. The hearing judge recommended that respondent receive three years' suspension, execution stayed, and three years' probation on conditions including that respondent be actually suspended for two years and until he makes restitution.

Respondent requested review, contending that the decision is not supported by the weight of the evidence and that the appropriate discipline is three months' actual suspension with restitution.

Based on our independent review of the record, we generally adopt the hearing judge's findings and conclusions. We also believe that the recommended suspension is clearly warranted and we so recommend to the Supreme Court.

PROCEDURAL SUMMARY

The Office of Chief Trial Counsel (OCTC) filed a Notice of Disciplinary Charges (NDC) in case no. 98-O-02234 on August 2, 2000. Respondent timely filed his response to the NDC. On February 27, 2001, OCTC filed an NDC in case no. 00-O-14818. Respondent timely filed his response. The two matters were consolidated on March 12, 2001.

On April 3, 2001, the parties filed a partial stipulation as to undisputed facts.

HEARING JUDGE'S FINDINGS OF FACT

Respondent was admitted to the practice of law in the State of California on December 19, 1973. He has no prior discipline.

In about September of 1995, respondent paid a vanity press about $76,000 to print 5,000 copies of his book Dignity of the Soul, The Story of Filipino Bravery in World War II. The copies were priced at $17.95 each, but at the time of the hearing below, the majority of copies were in storage, unsold.

98-O-02234 - The Henson Matter

The hearing judge found that respondent had represented the Hensons in several matters in the course of 20 years since the late 1970's. Respondent represented Myrtle Henson in the late 1970's in an employment matter. In 1981, the Hensons and some other parents retained respondent to represent their children in a curriculum dispute with their school. In 1988, George Henson and his two daughters were represented by respondent in their personal injury claim. The Hensons were satisfied and pleased with the representations and the results.

The parties stipulated that on May 30, 1994, respondent borrowed $25,000 at 10 percent interest per annum from the Hensons, payable in full on November 1, 1994. The money was to be used to produce respondent's book. The Hensons were given the option to convert this loan into a partnership interest to share in the proceeds of the sale of the book. The Hensons borrowed $24,000 from their credit union at 12 percent interest ($1,000 of their money was put in the loan) to make the $25,000 loan based on respondent's assurance that the book sales would make enough money, that Mr. Henson would not have to work anymore and that they would be paid in full in six months. The Hensons were given a simple promissory note which included the option to convert the note to a limited partnership interest. Said option rights were to remain in full force and effect until November 1, 1994.

Respondent stipulated that he did not advise the Hensons, in writing or orally, that they should seek the advice of an independent attorney. Respondent never secured a written agreement to the terms of the loan signed by the Hensons. The debt was not secured.

To their many requests for payment on the note after November 1994, the Hensons were told that payment was getting close and were assured that they would get paid.

On June 1, 1998, the Hensons brought suit against respondent in the Superior Court of San Joaquin County for failure to pay on the note, failure to account, fraud and breach of fiduciary duty. They obtained a default judgment on November 13, 1998, against respondent in the sum of $124,188.33. This amount included $25,000 plus interest, the amount of the cost of the loan plus interest, and $50,000 in punitive damages and costs. The default judgment was filed on November 24, 1998. Notice of entry of the judgment was filed and served on May 5, 1999.

On October 26, 1999, respondent filed a Motion to Set Aside Default and Default Judgment. The record does not show that a ruling has been made on the motion.

Respondent stipulated that, at all times mentioned, he was aware of the default judgment and that he did not report this judgment to the State Bar. No payment has been made to the Hensons.

CONCLUSIONS OF LAW

Based on the above, the hearing judge found respondent culpable of a violation of section 6068, subdivision (o)(2) of the Business and Professions Code,[1] for failure to report to the State Bar the entry of judgment in a civil action for fraud, misrepresentation and breach of a fiduciary duty in a professional capacity.

The hearing judge rejected respondent's argument that there was no attorney-client relationship between himself and the Hensons and found that a fiduciary relationship existed between them. Respondent was found culpable of a violation of Rules of Professional Conduct, rule 3-300,[2] failure to advise a client regarding an adverse interest. The hearing judge found that the loan was unsecured and therefore not fair and reasonable and that respondent failed to advise the Hensons to seek advice of independent counsel.

The hearing judge found respondent culpable of conduct involving moral turpitude (section 6106) when, at the time he obtained the loan from the Hensons, he knew or should have known that he would be unable to repay the loan in five months. He knew that even if all 5,000 books from the first printing were sold, the publishing costs would still surpass the amount of the sale. He would not realize any profits from the sale.

Respondent was charged in the NDC with a violation of section 6068, subdivision (a), the duty of an attorney to support the Constitution and laws of this state. The hearing judge found this charge to be cumulative to the rule 3-300 violation and declined to give it additional weight in determining the proper discipline.

00-O-14818 - The Chamberlain Matter

The parties stipulated to the following:

Respondent and Kevin Chamberlain (Chamberlain) had an attorney-client relationship since March 8, 1993, when respondent undertook representation of Chamberlain in a personal injury matter. This lawsuit settled, and on October 31, 1994, Chamberlain received a check for $132,050. On November 15, 1995, Chamberlain received another check for $13,532.57.

In August 1995, Chamberlain again hired respondent to represent him in a personal injury matter due to a bicycle accident. This lawsuit settled on November 17, 1997, for the sum of $7,500, and Chamberlain received a check for $2,500 as his portion of the settlement proceeds.

On July 1, 1996, respondent sought a loan of $25,000 from Chamberlain to be used for a second printing of Dignity of the Soul. In return, respondent promised to pay $30,000 at 10 percent interest per annum, due and payable on January 1, 1997. Cham-

1. All further references to section(s) are to the provisions of the Business and Professions Code.

2. All further references to rule(s) are to the provisions of the Rules of Professional Conduct.

berlain withdrew the money from his savings account to loan to respondent, and respondent gave him a promissory note.

Respondent did not advise Chamberlain, in writing or orally, that he may seek the advice of an independent attorney. Respondent did not secure Chamberlain's written consent to the terms of the agreement. The debt was not secured.

The parties stipulated that Chamberlain was induced to loan respondent the money based on the trust and confidence that Chamberlain held for respondent as his attorney.[3]

At the time of entering into the stipulation, respondent had made no payments on the loan to Chamberlain. To his many requests for payment, respondent assured Chamberlain that payment was forthcoming.

On March 9, 2001, summary judgment was granted and entered by the Superior Court of San Francisco in case no. 314414 in the sum of $43,794.89 in favor of Kevin Chamberlain against respondent. As of the date of this trial, payment had not been made on the judgment by respondent.

CONCLUSIONS OF LAW

Based on the above, the hearing judge found respondent culpable of a violation of rule 3-300 by entering into an unfair business transaction that was not secured and by failing to advise Chamberlain to seek the advice of an independent attorney.

Respondent was charged with a violation of section 6068, subdivision (a), failure to obey and follow the laws of California. The hearing judge found this charge to be cumulative to the charge of violating rule 3-300 and declined to give it additional weight in determining the proper discipline.

Respondent was found culpable of violating section 6106, committing conduct involving moral turpitude and dishonesty, based on respondent's failure to reveal the true status of the book. Respondent misrepresented to Chamberlain that the borrowed money was to be used for the second printing, when in fact, books from the first printing were still in storage.

HEARING JUDGE'S DISCIPLINE ANALYSIS

MITIGATING CIRCUMSTANCES

The hearing judge found the following mitigating circumstances:

a. Respondent does not have any prior record of discipline in over 21 years of practice. (Std. 1.2(e)(i).)[4]

b. Respondent has performed substantial legal and community pro bono work, which was given significant weight. (Std. 1.2(e)(vi).)

c. Respondent's character witnesses (six), including attorneys, former clients, a business partner and a community leader, were deserving of some weight in mitigation. (Std. 1.2(e)(vi).)

AGGRAVATING CIRCUMSTANCES

The hearing judge found many aggravating factors:

a. Respondent committed multiple acts of wrongdoing in abusing his position of trust for personal gain and enticing his unsophisticated clients into believing that the loan was safe and that the return on the investment would be ludicrously high. (Std. 1.2(b)(ii).)

b. Respondent's misconduct harmed the Hensons and Chamberlain. The elderly Hensons are burdened with loan payments to Mr. Henson's credit

3. Chamberlain was a carpenter who was severely injured. He required nine surgeries and was unable to work. Before asking for the loan, respondent inquired of Chamberlain whether he still had the settlement funds.

4. This reference and all further references to standard(s) are to the provisions of the Standards for Attorney Sanctions for Professional Misconduct found in title IV of the Rules of Procedure of the State Bar.

union, and Mr. Henson is unable to retire as planned at age 65. He is still working at age 71. The Chamberlains (recently married) are unable to purchase a home. (Std. 1.2(b)(iv).)

c. During this period of 1994 and 1995, respondent borrowed $37,500 from a friend and former client, Donald Herger, for the publication of Dignity of the Soul. In January 1998, Mr. Herger obtained a default judgment against respondent for the amount of $49,422 in the Superior Court of San Francisco, case no. 989696. The failure of respondent to repay the loan is uncharged misconduct as further aggravation. (Std. 1.2(b)(iii).)

d. Respondent is indifferent toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) The Hensons and Chamberlain had not been paid at the time of trial.

e. Respondent's repeated lies to the Hensons and Chamberlain that the money was forthcoming when he knew that he was unable to pay the loans demonstrate respondent's lack of candor and cooperation with his clients. (Std. 1.2(b)(vi).)

Respondent contends that the weight of the evidence does not support the recommended discipline and that the appropriate discipline is three months' actual suspension with restitution. He maintains that culpability should be found only for count one in the Chamberlain matter and all other counts should be reversed.

DISCUSSION - THE HENSON MATTER

Regarding case no. 98-O-02234 (The Henson Matter), the violation of section 6068, subdivision (o)(2),[5] failure to report judgment to the State Bar, respondent contends that he had no duty to report the judgment because (1) the transcript of the default hearing was not offered into evidence; and (2) the default judgment was for money loaned and therefore not reportable. He argues that the default judgment filed on November 13, 1998, does not recite any of the grounds listed in section 6068, subdivision (o)(2), i.e., civil action for fraud, misrepresentation, breach of fiduciary duty or gross negligence committed in a professional capacity.

Respondent's arguments are not well taken. First of all, we assume that respondent's reference to "transcript of the default hearing" refers to findings and conclusions of law issued by the court. Code of Civil Procedure section 632 provides in essence that written findings of fact and conclusions of law are not required upon trial by the court and that upon request of any party appearing at the trial, the court shall issue a statement of decision explaining the factual and legal basis for its decision. Respondent allowed this matter to proceed by way of default and therefore is not entitled to findings and conclusions of law. He has not offered any supporting legal authority for his position. He was aware of the complaint at all material times.

On the other hand, if respondent is referring to the reporter's transcript, it would have been his responsibility to obtain the transcript if there had been a reporter in attendance at the default hearing.

As to respondent's argument that the judgment is not reportable because the judgment was for money loaned, we review the Complaint For Damages filed by the Hensons in the matter of *George Henson and Myrtle Henson vs. William B. Peavey, Jr.*, case no. CV 005180. We find the causes of action pleaded to be: Breach of Promissory Note, Failure to Provide Accounting in a Limited Partnership, Fraud and Breach of Fiduciary Duty based on an attorney-client relationship and a limited partnership. The prayer in the complaint included punitive damages. In *Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 131-132, the court held: "By permitting his default to be entered he confessed the truth of all the material allegations in the complaint [citations] . . . .

5. Section 6068, subdivision (o)(2) provides in pertinent part that it is the duty of an attorney "[t]o report to the agency charged with attorney discipline, in writing . . . [¶] The entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity."

[Citation.] A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. [Citations.]" Respondent argues that the court had no authority to include punitive damages in the judgment. However, he was on notice that punitive damages were sought in the prayer of the complaint. After the judgment was awarded to the Hensons, respondent filed a motion to set aside the default and default judgment, in which he argued that default punitive damages may not be awarded without prior notice of the amount sought.[6] Instead of pursuing the motion, respondent then (according to respondent) requested the court to withhold a ruling pending payment. Payment has not been made, a ruling on the motion has not been made, and therefore, we find the judgment still stands. We do not rule on the validity of the judgment. The hearing judge properly found a violation of section 6068, subdivision (o)(2).

[1a] Respondent claims that the Hensons were not clients and therefore there was no attorney-client relationship. He points to the fact that he had not represented the Hensons after Mr. Henson's personal injury matter in 1988 and that was the last matter for which he had been compensated. The Hensons testified to an ongoing relationship with respondent since the 1970's, when respondent represented Myrtle Henson in an employment matter. They sought his assistance and advice in 1981, 1988, 1994, 1995 and 1996. In the 1994 matter, Mr. Henson sought the advice of respondent regarding his pickup truck. Respondent assisted Mr. Henson with some small claims papers. Mr. Henson testified that he had only a seventh grade education and his reading and writing skills are poor. In 1996, Mr. Henson had a real property problem, but after seeking the advice of respondent, Mr. Henson decided not to pursue the real property matter any further. " 'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*.' [Citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812.) During this period, the Hensons, who had the highest regard for respondent as their attorney, referred their friends and family to respondent for legal work.

[1b] In the case of *Colstad v. Levine* (1954) 243 Minn. 279, 287-288 [67 N.W. 2d 648, 654-655], on the issue of cessation of fiduciary duty between the attorney and the client, the Supreme Court of Minnesota stated: "Since the duty of fidelity and good faith arising out of the confidential relation of attorney and client is founded, not on the professional relation per se, but on the influence which the relation creates, such duty does not always cease immediately upon the termination of the relation but continues as long as the influence therefrom exists." It was during this period of influence in 1994 that respondent borrowed $25,000 at 10 percent per annum interest from the Hensons for the publication of his book. Based on the promise of full repayment in six months and the promise that Mr. Henson would never have to work again, the Hensons borrowed the funds to loan to respondent from Mr. Henson's credit union at 12 percent per annum interest.

[1c] Under these circumstances, we find, as did the hearing judge, that an attorney-client relationship existed between respondent and the Hensons at the time of the loan and that the loan was unsecured, indicating that the loan was not fair and reasonable. 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.) Respondent failed to meet his burden. The hearing judge also properly found, and we also find, that respondent failed to advise the Hensons in writing to seek the advice of independent counsel and the Hensons did not consent in writing to the transaction, in violation of rule 3-300. "All business dealings between an attorney and client in which the attorney benefits are closely scrutinized for unfairness on the attorney's part [citations] and attorneys have been disciplined for inducing clients to invest in enterprises

6. Respondent argues in his brief that OCTC has not produced any authority supporting the court's award of punitive damages. He mistakenly places the burden on OCTC when it was incumbent on respondent to litigate this matter in the San Joachin Superior Court.

without fully apprising them of the risks. [Citations.]" (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 445, fn. 4.) "The relation between an attorney and his client is a fiduciary one of the highest trust and confidence and, *as long as the relationship or the influence thereof exists*, requires the attorney to observe the utmost good faith and candor and not to allow his private interest to conflict with those of his client." (*Colstad v. Levine*, *supra*, 67 N.W.2d at p. 654, fns. omitted.) It is clear that respondent took advantage of the Hensons' trust and confidence in him in persuading them to loan him $25,000.

[2a] During this period, the record shows that respondent made many misrepresentations and broke many promises to the Hensons in reference to repayment on the note: e.g., when he sold the books, he would give them their money back; if they wanted to, they could "go partners"; "You don't have to worry because you're getting your money back either way"; "It's getting close. It'll be any day"; "It's getting close. I'll have it on Friday"; "I'll have it in two weeks. I'll call you when I get it"; "The money, the check is in Los Angeles." (Respondent allegedly sent someone to Los Angeles to pick up the check.); "The guy went to Vegas with the check. I'll call you Monday." Mr. Henson testified that it was at this point that his trust of respondent broke down. These placating assurances continued through the years. At one point in time, a Reverend Jefferson called the Hensons on behalf of respondent and told them that respondent was involved in another project for which about a million dollars was in the Bank of America, that it was respondent's intention that the Hensons be paid first from this fund when he received it and that respondent had signed the authorization to pay the Hensons first. No payment was made.

[2b] In 1996, respondent wrote to the Hensons from the Philippines that "this trip is a culmination of my project. I have tied up the printing endorsements, marketing and distribution of the book here. And the response has been very positive." At the hearing of this matter, respondent admitted that he had basically agreed in principle with Adams Publishing (in the Philippines) that they would consider distributing his first book, if he wrote a second book. He acknowledged that there was no written contract, only a conversation.

[2c] On November 24, 1997, in response to a letter from the Hensons' attorney, respondent wrote to the Hensons that he considered the Hensons as partners in the book venture and laid out a payment plan including the repayment of the $25,000, interest on the $25,000, repayment of costs for raising the $25,000 and profit from the venture anticipated to be another $25,000. Respondent anticipated full payment by the end of the year. No payment was made. We note that the option to convert was kept open until November 1, 1994, and the Hensons had not exercised their option. Respondent also stated that "I am in the process of completing the financing for release of the book in the Philippines." In reference to this statement, respondent testified that he had decided to finance the printing of the book in the Philippines himself because he hadn't finished his second book. (At this time, he still owed the vanity press approximately $30,000 for the first printing, and at least half of the books were held in storage. The final payment was not made until April 20, 1999, after a lawsuit, at which time the books were released to respondent by the vanity press.)

[2d] On August 5, 1999, respondent wrote to the Hensons (the default judgment had been obtained by the Hensons on November 13, 1998, and respondent has stipulated that he was aware, at all times, of the default judgment) stating, "I want to thank you for staying in touch with me as I move our business venture closer to realizing a profit. As [sic] this time we should finalize our agreement for the payment of your interest in the project." Respondent refers to his letter of November 24, 1997, and implies that he has been waiting for input from the Hensons to his payment proposal and to the amount they would accept.

[2e] From 1994 to the present, it is abundantly clear that respondent was well aware of his financial status,[7] that he could not or did not have the means to

7. The record reveals outstanding tax liens, both federal and state, during the period of 1992 to 2000.

repay the Hensons. Yet, he continued to assure them that payment was forthcoming, when it wasn't, and that the book venture was a success, when it wasn't. He failed to inform them of the true status of the book venture, but instead told them glowingly of the coming printing in the Philippines. The attorney-client relationship is a fiduciary relation of the very highest character imposing on the attorney a duty to communicate to the client whatever information he has or may acquire in relation to the subject matter of the transaction. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189-190.) Although the Hensons did not opt for partnership, and there was no partnership agreement, respondent testified that he treated the Hensons as partners because he wanted them to make money. Yet, in his sworn declaration filed in the *Henson v. Peavey* matter, he declared: "Plaintiffs never elected to become limited partners." Respondent totally ignored the fact that the Hensons elected to collect on their loan by bringing a lawsuit. The Hensons obtained a judgment for a sum certain, and yet respondent insisted that he was waiting for a sum certain that the Hensons would accept. He places the burden on the Hensons to clarify the terms of the loan, when the terms of the loan should have been clearly set out by respondent in writing in 1994.

[2f] As the hearing judge noted, a profit was not going to be realized from the first printing of the book because even if respondent had sold all 5,000 copies of his book at $17.95, the cost of publishing would not be met. Respondent argues that inability to pay does not constitute "acts of baseness, vileness or depravity." Respondent may be correct, except that continued misrepresentations since 1994 to the Hensons of the status of the book venture, of imminent payments which never materialized, of the contracts and funds that never materialized, and of referring to the Hensons as partners when no partnership agreement existed do rise to "acts of dishonesty in wilful violation of section 6106." As held in *Coppock v. State Bar* (1988) 44 Cal.3d 665, 679, "an act by an attorney for the purpose of concealment or other deception is dishonest and involves moral turpitude under section 6106." This was a situation of "now you see it and now you don't."

We also agree with the hearing judge that count four, charging a violation of the laws of this state under section 6068, subdivision (a), due to a violation of a fiduciary duty, is duplicative of the rule 3-300 charge and therefore will not be given any weight or further consideration.

DISCUSSION - THE CHAMBERLAIN MATTER

Respondent has stipulated that there was an ongoing attorney-client relationship and that based on the trust and confidence Chamberlain held for respondent, Chamberlain was induced to loan respondent $25,000 on July 1, 1996, payable in the sum of $30,000 plus interest on January 1, 1997. This loan was unsecured, and Chamberlain was not advised to seek the advice of an independent attorney in reference to this transaction, nor did Chamberlain consent to the transaction in writing. Respondent admitted that he was in violation of rule 3-300, failure to advise a client regarding an adverse interest. The hearing judge so found and we agree.

We also agree with respondent and the hearing judge that the charge of a violation of section 6068, subdivision (a) in count two is duplicative of the rule 3-300 charge, and therefore no weight will be given to this charge in consideration of discipline.

Respondent argues that his conduct in this matter falls far short of moral turpitude. He describes the loan as a long overdue obligation for which he takes full responsibility and which he is committed to paying.

Chamberlain's testimony is that respondent had given him a copy of Dignity of the Soul about a year before the loan. Then respondent requested the loan for a second printing of the book, explaining that he could have gotten the funds from the bank, but instead, borrowed the money from Chamberlain to help them (Chamberlain and his wife). Chamberlain assumed that the first printing must have been a success. In 1999, when payment had not been made, and Chamberlain continued to request payment, respondent told him that payment was forthcoming, that respondent had money due from various sources and that it was a matter of days, or that it was just at the

end of the week or the next week. Each time Chamberlain contacted respondent, payment was just around the corner, or a personal injury case was just about to be settled. In March of 2000, Chamberlain wanted to purchase a car and was told by respondent to "[g]o ahead and make plans on it." Based on this, Chamberlain ordered a new vehicle. Payment still was not forthcoming, and Chamberlain had to borrow the funds from his family. Respondent argues that this was not misrepresentation because he consistently agreed to repay the subject loan with no strings attached.

Respondent's conduct demonstrates the ease with which respondent continued to mislead Chamberlain that payment was imminent when he knew that he still owed Waller Press $30,000, and he knew that he could not meet his obligation to Chamberlain. This conduct has continued since January 1997. This was not an isolated incident. We concur with the hearing judge that this conduct rises to conduct involving moral turpitude and dishonesty. (*Hallinan v. State Bar* (1948) 33 Cal.2d 246.) At the time of trial, respondent had not paid the judgment of $43,794.89.[8]

DISCUSSION - THE HERGER MATTER

[3a] OCTC presented the testimony of Donald Herger (Herger) who had played softball with respondent for about 20 to 25 years. Respondent had also represented Herger on two occasions.

[3b] In May 1994, Herger loaned respondent $25,000, and in July 1995 gave respondent another loan in the sum of $12,500, for research and publication of Dignity of the Soul. Respondent gave Herger a promissory note in return for the $25,000. The record is unclear whether another promissory note was provided for the $12,500. The debt was not secured. Subsequently, after many broken promises, Herger obtained a judgment against respondent for the amount owed plus interest.[9]

[3c] However, since this matter is an uncharged act of misconduct, we cannot consider this as an independent basis of discipline but may consider it when it is otherwise relevant to an issue in the proceeding. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) When the evidence at the hearing discloses misconduct not charged in the original NDC, OCTC may move to amend the NDC to conform to the proof, but if OCTC fails to do so, the attorney may be disciplined only for the misconduct alleged in the original NDC. (*Id.* at p. 35.) Here, respondent did not object to the testimony of Herger. Respondent testified that the loan from Herger was simply a loan, no strings attached. "We conclude that absent an appropriate objection to the introduction of evidence of misconduct other than that charged, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters. (*In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 40-41.) The hearing judge properly considered failure to repay Herger as a circumstance in aggravation.

DEGREE OF DISCIPLINE

In mitigation, the hearing judge gave significant weight to respondent's record of 21 years of practice without prior discipline and to his extensive pro bono work. His pro bono work consists of work in the Filipino community; work with the government of the Philippines; work as general counsel of the National Association of Letter Carriers, Branch 214; work as a coach of Little League since 1985; and work as president of South San Francisco Sister City Commission from 1996 to the present. As to the character witnesses, the hearing judge found they lacked understanding or knowledge of the charges against respondent and gave their testimony only some weight.

8. Respondent states in his rebuttal brief that he has fully paid the Chamberlain obligation since the filing of his Opening Brief. However, he has failed to attach any evidence to support his allegation. In any event, the pattern of misrepresentation to Chamberlain, which occurred over a 12-month period, constitutes moral turpitude even if repayment has now been made.

9. Respondent states in his rebuttal brief that he has paid Herger $18,000 to date. However, he has failed to attach any evidence to support his allegation.

We summarize their testimony as follows:

Denny Roja, a lawyer and venture capitalist, testified that he holds respondent in high esteem. He is aware of respondent's involvement in the Filipino community and of his expertise in personal injury matters. As to Roja's knowledge of the charges in these proceedings, he was aware that respondent had business dealings with an alleged client, a partnership dealing in an investment type of a project. He understood that this was a violation of the rules of professional responsibility. His opinion did not change after reading the stipulation.

Herbert Mitchell is a client and a letter carrier for the Postal Service. Respondent is the legal advisor for the National Association of Letter Carriers and serves pro bono. Mitchell's opinion of respondent is that he is very truthful and up-front with "us union members." Mitchell understands that this proceeding could affect respondent's standing as an attorney. However, he knows nothing about respondent borrowing money from clients or any misrepresentation.

Charles Bridges, a business partner of respondent, is in the insurance business and is a financial consultant with Financial Link in Oakland. He is working with respondent on several projects. These are humanitarian projects with the Elder Jefferson's group covering the last four or five years. He stated that within the next 30 to 60 days, they should see funding start to flow on a project geared to helping people in underdeveloped and needy places. They have evaluated approximately 50 projects. He confirmed that respondent is committed to repaying his creditors.

Michael Comfort is an attorney. He has known respondent for about seven years and attests that respondent's reputation is very high as to honesty and truthfulness. He has never heard a negative comment about respondent. Respondent informed him that the present proceeding involved a "lack of following proper procedures under the State Bar rules in engaging in business with clients" and that respondent was involved in a business relationship with three individuals who were impatient about receiving some money from the business ventures. As a result, the clients submitted a complaint to the State Bar. Comfort's opinion would not change after reading the stipulation.

Horatio Candia, a client, specializes in loan mortgages. He is licensed with the National Association of Securities Dealers and is licensed by the Department of Insurance (life and disability). Respondent has served his family and friends in a good faith capacity in every single aspect. Candia has no specific knowledge of charges against respondent, only that respondent conducted some type of business outside of his attorney-client relationship.

Maria Bell Goldstein is a client. Respondent represented her, pro bono, after she shot and killed her abusive step-father. She was placed in the Youth Guidance Center, where respondent assisted her in reuniting with her mother. She is still in contact with respondent, as are her mother and her brother.

We concur with the hearing judge that some weight should be given the character witnesses' testimony.

The aggravating factors were multiple acts of wrongdoing by repeatedly misrepresenting to the Hensons and Chamberlain that payment was imminent and by failing to disclose the true status of the book venture. (Std. 1.2(b)(ii)). There is harm to the Hensons who took a loan at 12 percent interest per annum, based on respondent's promise to repay in six months, in order to make the loan to respondent at 10 percent interest per annum. Respondent also promised to pay the Hensons the cost of their 12-percent-interest loan, which has not been paid. The Hensons were forced to seek legal counsel before the statute of limitations ran out. George Henson could not retire at age 65 as planned, because he is still paying on the loan, at age 71. The Chamberlains have not been able to purchase a home, and they had to borrow funds to buy a vehicle. They were forced to seek legal counsel to preserve their claim. Herger testified that the money he loaned to respondent was his retirement money and he is now retired without his funds. (Std. 1.2(b)(iv)). Respondent has shown indifference toward rectification of or atonement for the consequences of his misconduct by continuing to profess no wrongdoing and continuing to promise payment soon, despite numerous failures to

follow through. (Std. 1.2(b)(v)). We agree with the hearing judge's findings as to these aggravating factors.

The hearing judge found, and we also find, that respondent breached his fiduciary duties to the Hensons and Chamberlain and abused their trust in him as their attorney. Respondent continued to exploit their trust for years by promising payment as soon as the funds came in from one project or another.

Respondent's position is that because he has always acknowledged his obligation, has always intended to repay the loans and has always acted in good faith, he did not violate any rules of professional conduct except that charged in count one in the Kevin Chamberlain matter. His conduct belies his professed intent to pay.

Acknowledgment of obligations or repeated promises to repay does not exonerate respondent from his misconduct. This is not a simple collection case as respondent suggests, but the overreaching by respondent in taking advantage of the clients' trust in him as their attorney and capitalizing on their confidence and trust to obtain an interest adverse to them. He promised full payment in five to six months knowing that he was not in a position to honor that promise. He then promised payment "any time now," which never happened. He failed to disclose that the books were in storage, and instead spoke of books being sold throughout the United States. He failed to disclose that he owed money to the vanity press (Waller Press) for the first printing, and instead spoke of the second printing in the Philippines. He failed to disclose that he needed funds to finance his other ventures, consulting or otherwise, and instead spoke of imminent funding for his other ventures from which he would repay the loan. He continued to present his ventures in the most favorable light to induce the clients to wait for payment. Respondent's conduct was wilful, dishonest and deliberate. In *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147, the Supreme Court in discussing acts of dishonesty violating the high ethical standards that members of the bar are expected to maintain stated that acts of dishonesty "manifest an 'abiding disregard of' '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.' " [Citation.]' [Citations.]"

It is troubling that respondent glibly rationalized that the Hensons were neither unsophisticated (in spite of Mr. Henson's seventh grade education) nor harmed because they were property holders and they testified that the money would be used to remodel their rentals so that they could rent them. Respondent concluded that the nonpayment was only delaying the Hensons' investment plan. As to Chamberlain, respondent argued that he was not harmed because *when* he is paid by respondent, the housing market might be favorable and he'll have his home.

Respondent has shown no remorse, nor has he accepted responsibility for the harm caused by his misconduct. Instead, he accused the Hensons of going to the State Bar to collect a debt for them. His attitude shows a serious lack of insight into the wrongfulness of his conduct as found by the hearing judge, and we also so find.

Respondent directs our attention to *Rose v. State Bar* (1989) 49 Cal.3d 646 in support of his contention that two years' actual suspension is excessive. Rose was found culpable of, among other things, failure to return client's file upon termination, improper solicitation, improper transaction of business with a client and failure to account. The Supreme Court imposed two years' actual suspension upon a finding that although the acts of misconduct were numerous, there was substantial mitigation and upon an important finding of no moral turpitude in the misconduct unlike in this matter.

The following case law was appropriately relied on by the hearing judge to determine discipline:

In *Krieger v. State Bar* (1954) 43 Cal.2d 604, the Supreme Court found that the attorney affirmatively misrepresented and concealed the true condition of a partnership in order to induce a client to invest $10,000 in the partnership. Upon the client's request for a return of funds, the attorney promised to repay at various times, but failed to do so. The Supreme Court suspended the attorney for two years.

In *Beery v. State Bar* (1987) 43 Cal.3d 802, the attorney solicited and obtained a loan from his client for a venture in which attorney was involved. The attorney did not fully disclose his involvement with the venture, nor did he disclose that the venture had almost no capital and that funds were unobtainable from commercial lenders. He further failed to disclose that although he had guaranteed the note, he had no funds to make good on the guarantee. The Supreme Court found this was not an arm's length business deal and found misconduct involving moral turpitude and dishonesty. The Court also held that increased discipline is warranted by an attorney's " 'apparent lack of insight into the wrongfulness of his actions' . . . ." and imposed two years' actual suspension. (*Id.* at p. 816, citation omitted.)

In *Rodgers v. State Bar* (1989) 48 Cal.3d 300, the attorney persuaded his client, a conservator, to loan money from the estate to an ex-client and former business partner, who owed him legal fees. The attorney failed to disclose his professional relationship with his ex-client and then deceived opposing counsel (for the conservatee) and deceived the probate court. The attorney was found to have wilfully violated court orders in several instances and was found to have commingled client funds with his own. The Supreme Court imposed two years' actual suspension.

We also consider *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, in which the attorney was found culpable of, inter alia, breaching her fiduciary duty to a client and entering into an improper business transaction with a client by borrowing the bulk of settlement funds from a vulnerable relative whom she represented in a personal injury action. The unsecured loan of approximately $20,000 was found to be unfair and unreasonable to the client. The review department found that the conduct involved moral turpitude and recommended that the attorney be placed on actual suspension for two years and until she provided proof of completed restitution.

Standard 2.3 provides in pertinent part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty . . . or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled . . . ."

We have independently reviewed and considered the evidence, balanced the mitigating factors against the aggravating factors and considered the standards for attorney sanctions for professional misconduct applicable to this matter. Bearing in mind 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* (1990) 50 Cal.3d 1047, 1055), we believe that the recommendation of the hearing judge of two years' actual suspension with restitution is appropriate.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent William Benson Peavey, Jr., be suspended from the practice of law in California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years, with the following conditions:

1. Respondent shall be actually suspended from the practice of law for the first two years of probation and until he pays restitution to George and Myrtle Henson (or the Client Security Fund, if it has already paid) in the amount of $124,188.33, pursuant to the judgment in *Henson v. Peavey*, San Joaquin County Superior Court, case no. CV005180, plus 10 percent simple interest per annum from the date of the judgment until paid, and provides satisfactory proof thereof to the Probation Unit unless, on motion of respondent, he submits satisfactory proof to the State Bar Court that the judgment has been modified; and until he pays restitution to Kevin Chamberlain (or the Client Security Fund, if it has already paid) in the amount of $43,794.89, pursuant to the judgment in *Chamberlain v. Peavey*, San Francisco County Superior Court, case no. 314414, plus 10 percent simple interest per annum from the date of the judgment until paid, and provides satisfactory proof thereof to the Probation Unit; and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to

standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. During the three years of probation, respondent shall comply with the State Bar Act and the Rules of Professional Conduct.

3. Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly and truthfully, any inquiries of the Probation Unit of the Office of the Chief Trial Counsel, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

5. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Probation Unit, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

6. Within one (1) year of the effective date of the discipline herein, respondent shall provide to the Probation Unit satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent shall not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar).

7. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for three years shall be satisfied and that suspension shall be terminated.

It is further recommended that respondent be ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein. Wilful failure to comply with the provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.[10]

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P. O. Box 4001, Iowa City, Iowa, 52243, (telephone (319) 337-1287) and provide proof of passage to the Probation Unit during the period of

10. Respondent is required to file a California Rules of Court, rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.

COSTS

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, to be paid in accordance with section 6140.7 of that Code.

We concur:

STOVITZ, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES ROBERT VALINOTI

A Member of the State Bar

No. 96-O-08095

Filed December 31, 2002

SUMMARY

The State Bar charged respondent with twenty-eight counts of misconduct in nine client matters in which respondent was the attorney of record for one or more aliens with cases in the United States Immigration Court in Los Angeles. The hearing judge found respondent culpable of misconduct in only seven of the client matters. Specifically, he found respondent culpable on a total of fourteen counts of charged misconduct and on eight counts of uncharged, but proved misconduct. The hearing judge found the eight counts of uncharged misconduct and six other factors to be aggravating circumstances warranting an increase in discipline. The hearing judge found three mitigating circumstances, but none of them was significant. The hearing judge recommended that respondent be placed on three years' stayed suspension and three years' probation with conditions, including two years' actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent appealed. And the review department consolidated his numerous arguments into five points of error: (1) that the hearing judge erred in refusing to evaluate respondent's conduct under the purported "practice standards" for immigration law; (2) that the hearing judge erred in refusing to evaluate respondent's conduct under the purported limited scope of respondent's representation; (3) that almost all the hearing judge's misconduct findings were erroneous as they were based on unintentional acts and omissions that resulted from respondent's simple negligence or honest mistakes; (4) that the hearing judge's findings that respondent made misleading statements to an immigration court judge were not supported by the record; and (5) that the hearing judge's recommended two-year period of actual suspension was excessive. The State Bar argued that all of respondent's arguments were meritless and urged the review department to adopt the hearing judge's findings, conclusions, and discipline recommendation.

The review department rejected all of respondent's points of error, primarily on the basis of controlling federal law not addressed by the parties. With various modifications, the review department adopted many of the hearing judge's findings and conclusions, but while the hearing judge found respondent culpable of misconduct in only seven client matters, the review department found him culpable in all nine. And, while the hearing judge found respondent culpable on only 14 counts of charged misconduct, the review department found him culpable on 18. Moreover, after notifying the parties and considering their supplemental briefing, the review

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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.

department independently found respondent culpable on five counts of uncharged misconduct not found by the hearing judge. The review department considered these five additional counts of uncharged misconduct to be additional aggravating circumstances. Based on the seriousness of the misconduct and aggravating circumstances, which included the intentional and reckless failure to competently perform legal services in all nine client matters, multiple client abandonments, multiple acts of moral turpitude, the repeated aiding and abetting of nonattorney immigration services providers (commonly referred to as visa consultants, *notarios*, or *notarios publicos*) to represent aliens in immigration cases in violation of federal law and to engage in the unauthorized practice of law, and recklessly practice law, the review department increased the recommended discipline to five years' stayed suspension and five years' probation with conditions, including three years' actual suspension that will continue until respondent establishes his rehabilitation, fitness to practice law, and learning in the law. (Obrien, J., filed a concurring and dissenting opinion.)

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: R. Gerald Markle, Ellen A. Pansky

HEADNOTES

[1] **130 Procedure–Procedure on Review**
135.70 Procedure–Revised Rules of Procedure–Review/Delegated Powers
136.30 Procedure–Rules of Practice–Division III, Review Department
When a party supports a statement in its brief with a reference to a finding or conclusion in the hearing judge's decision, party must also provide references to where the evidence supporting the hearing judge's finding or conclusion may be found in the record in order to comply with rules of procedure and rule of practice mandating that statements in briefs be supported with proper references to the record. (Rules Proc. of State Bar, rules 302(a), 303(a); State Bar Ct. Rules of Prac., rule 1320.)

[2] **169 Standard of Proof or Review–Miscellaneous**
199 General Issues–Miscellaneous
204.90 Culpability–General Substantive Issues
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct
Standards governing an attorney's ethical duties do not vary according to the many areas of practice, even in specialized areas such as immigration law. Nor do those standards vary according to whether the attorney practices alone or in a partnership, small law firm, large law firm, or corporate law department.

[3] **159 Evidence–Miscellaneous**
169 Standard of Proof or Review–Miscellaneous
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous
204.90 Culpability–General Substantive Issues
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct
In attorney discipline, ethical standards for attorneys are primarily established by State Bar Rules of Professional Conduct and State Bar Act. But, when an attorney practices in a specific area or

jurisdiction, those standards may be measured by reference to other relevant state and federal statutes, rules of court, regulations, and administrative rules.

[4 a-c] **106.90 Procedure–Pleadings–Other Issues**
139 Procedure–Miscellaneous
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous
Respondent's testimony and arguments regarding his customary practices (1) to limit the scope of his representation of clients referred to him by nonattorney immigration services providers to that of an "appearance attorney," which respondent asserts is an attorney who appears in his clients' immigration cases only for the limited purpose of making court appearances, and (2) to rely on or permit referring nonattorney immigration services providers to prepare and file immigration applications, pleadings, and other documents for his clients placed respondent's practices in issue so that any uncharged improprieties in them may appropriately be considered as aggravation warranting increased discipline.

[5 a-h] **191 Effect/Relationship of Other Proceedings**
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous
401 Common Law/Other Violations in General
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
Under controlling federal regulation and Board of Immigration Appeals precedent, respondent could not properly limit the scope of his representation of clients referred to him by nonattorney immigration services providers to that of an "appearance attorney," which respondent asserts is an attorney who appears in his clients' immigration cases only for the limited purpose of making court appearances, and when respondent did so, he effectively provided those clients with no legal representation or services.

[6 a-j] **106.90 Procedure–Pleadings–Other Issues**
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
166 Independent Review of Record
192 Due Process/Procedural Rights
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous
221.19 Section 6106–Gross Negligence
252.01 Rule 1-300(A) [former 3-101(A)]
401 Common Law/Other Violations in General
521 Aggravation–Multiple Acts–Found
561 Aggravation–Uncharged Violations–Found
Although not charged, record established that respondent repeatedly aided and abetted nonattorney immigration services providers to represent aliens in violation of federal law and to engage in the unauthorized practice of law by relying on or permitting nonattorney providers who referred clients to him to, inter alia, prepare and file immigration applications, pleadings, and other documents for his clients. Respondent's aiding and abetting nonattorneys' violation of federal law involved moral turpitude, while his aiding and abetting nonattorneys' unauthorized practice of law violated rule of professional conduct prohibiting such conduct and violation rose to a level involving moral turpitude. Since much of this misconduct was established by respondent's testimony and evidence, he had no

grounds to challenge review department's independent consideration of it as uncharged misconduct aggravation warranting increased discipline.

[7] **169 Standard of Proof or Review–Miscellaneous**
199 General Issues–Miscellaneous
204.90 Culpability–General Substantive Issues
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct

Facts clients referred to respondent by nonattorney immigration services providers might have had a cultural bias in favor the referring nonattorney immigration services providers or that those clients might have viewed immigration attorneys, like respondent, as less important to their immigration cases than the referring nonattorney immigration services providers did not reduce or limit nature and scope of respondent's professional duties to his immigration clients.

[8] **130 Procedure–Procedure on Review**
139 Procedure–Miscellaneous
141 Evidence–Relevance
146 Evidence–Judicial Note
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
199 General Issues–Miscellaneous

Because parties failed to address relevant immigration court and Board of Immigration Appeals rules and procedures that are set forth in the Code of Federal Regulation and have the force and effect of law, hearing judge and review department were required to take and did take judicial notice of those rules and procedures sua sponte. (Rules Proc. of State Bar, rule 214; Evid. Code, §§ 451, subd. (b), 459, subd. (a).)

[9a, b] **106.90 Procedure–Pleadings–Other Issues**
139 Procedure–Miscellaneous
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous

Respondent's arguments and testimony that almost all hearing judge's findings of misconduct are erroneous because they are based on unintentional acts and omissions that resulted from respondent's simple negligence or honest mistakes respondent made in good faith as a product of trying to do too much, not too little, for his clients placed respondent's methods of practicing law in issue so that any uncharged impropriety in them may appropriately be considered as aggravation warranting increased discipline.

[10 a-c] **106.90 Procedure–Pleadings–Other Issues**
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
162.20 Proof–Respondent's Burden
163 Proof of Wilfulness
164 Proof of Intent
166 Independent Review of Record
169 Standard of Proof or Review–Miscellaneous
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous
204.10 Culpability–Wilfulness Requirement

204.20 Culpability–Intent Requirement
204.90 Culpability–General Substantive Issues
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct
521 Aggravation–Multiple Acts–Found
561 Aggravation–Uncharged Violations–Found
715.50 Mitigation–Good Faith–Declined to Find

Individually and collectively, (1) hearing judge's finding that respondent repeatedly and deliberately abdicated his ethical duties to properly represent his immigration clients and to competently perform the legal services that he had a legal duty to perform, repeatedly accepted more immigration cases than he could properly handle, routinely placed his interests above those of his clients by permitting nonattorneys to prepare and file applications, pleadings, and other documents in his clients' immigration court cases, and consistently demonstrated a profound lack of understanding of his duty of fidelity to his clients and (2) review department's independent finding of uncharged misconduct aggravation that respondent engaged in a course of practicing law that was reckless and involved gross carelessness not only negated respondent's claims that almost all the hearing judge's findings of misconduct were improperly based on unintentional acts and omissions that resulted from respondent's simple negligence or honest mistakes respondent made in good faith as a product of trying to do too much, not too little, for his clients, but they also precluded a finding of good faith mitigation.

[11 a-d] **106.90 Procedure–Pleadings–Other Issues**
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
162.90 Quantum of Proof–Miscellaneous
166 Independent Review of Record
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous
221.00 State Bar Act–Section 6106
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct
521 Aggravation–Multiple Acts–Found
561 Aggravation–Uncharged Violations–Found

Although not charged, record established that respondent engaged in a course of practicing law that was reckless and involved gross carelessness and thereby engaged in acts of moral turpitude. Since much of respondent's recklessness and carelessness in his practice of law was established by respondent's testimony and evidence, he had no grounds to challenge review department's independent consideration of his recklessness and carelessness as uncharged misconduct aggravation warranting increased discipline.

[12] **147 Evidence–Presumptions**
159 Evidence–Miscellaneous
199 General Issues–Miscellaneous
401 Common Law/Other Violations in General
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct

Keeping proper non-financial client files and records is necessary for attorneys to be able to prove their honesty and fair dealings when their actions are called into question such that justice will not permit an attorneys to escape responsibility for his misconduct by simple act of not keeping adequate

non-financial client files and records from which his conduct may be reviewed and any misconduct proved. Thus, an attorney's failure to keep such adequate files and records is itself a suspicious circumstance.

[13] **401 Common Law/Other Violations in General**
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
Attorney's fiduciary duties to his clients require that he keep adequate non-financial client files and records. At a minimum, attorney must keep, for each client, an individual file that contains the client's name, address, and telephone number and all other items reasonably necessary to competently represent the client, such as written fee agreement, correspondence, pleadings, deposition transcripts, exhibits, physical evidence, and expert reports.

[14] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
401 Common Law/Other Violations in General
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
Attorney's fiduciary duties to his clients require that he develop and maintain adequate management and accounting procedures for the proper operation of his law office. At a minimum, attorney must develop and maintain procedures for proper maintenance and protection of client files; calendaring court hearings and filing deadlines; tracking court hearing dates and filing deadlines; tracking correspondence and client communications; proper handling and accurate accounting of client trust funds and other property. Attorney must also train his staff on those procedures and supervise staff to ensure that procedures are followed.

[15] **199 General Issues–Miscellaneous**
213.50 State Bar Act–Section 6068(e)
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)
280.00 Rule 4-100(A) [former 8-101(A)]
401 Common Law/Other Violations in General
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
Attorney's fiduciary duty to develop and maintain adequate management and accounting procedures for proper operation of his law office is fundamental to fulfillment of multiple duties, including duties to competently perform legal services, adequately communicate with clients, protect client confidential information, and properly handle and account for client funds and other property.

[16] **142 Evidence–Hearsay**
159 Evidence–Miscellaneous
Because hearing judge admitted a paralegal's business card, which also had name of respondent's law offices and insignia of a nonattorney immigration services provider partnership printed on it, into evidence without limitation and without any hearsay objection from respondent, review department properly considered business card for the truth of the matter stated by relying on it as evidence that respondent employed the paralegal.

[17a, b] **106.90 Procedure–Pleadings–Other Issues**
130 Procedure–Procedure on Review
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
169 Standard of Proof or Review–Miscellaneous
192 Due Process/Procedural Rights
199 General Issues–Miscellaneous
220.40 State Bar Act–Section 6105
252.00 Rule 1-300(A) [former 3-101(A)]
253.10 Rule 1-400(D) [former 2-101(A)]
525 Aggravation–Multiple Acts–Declined to Find
565 Aggravation–Uncharged Violations–Declined to Find
Even though respondent's uncharged acts of misconduct (1) in permitting name of his law offices to be printed on a paralegal's business card that also had insignia of a nonattorney immigration services provider partnership printed on it and (2) in later posting name of his law offices and name of a nonattorney immigration services provider on the front door of small office space respondent shared with that nonattorney appear to have violated statute that prohibits attorneys from lending their names and titles for use by nonattorneys and might have violated Rule of Professional Conduct prohibiting attorney communications, including business cards, from containing any matter or presenting or arranging any matter in a manner or format that is false or deceptive or tends to confuse or mislead, review department did not consider these acts as uncharged misconduct aggravation warranting increased discipline because acts supported review department's conclusion that respondent aided and abetted nonattorney immigration services providers to engage in the unauthorized practice of law.

[18] **142 Evidence–Hearsay**
159 Evidence–Miscellaneous
Because transcript of immigration court hearing was admitted into evidence for all purposes and without any hearsay objection, review department properly considered it for the truth of the matter stated by relying on immigration judge's statements in it to support one of State Bar's witness's testimony and to contradict respondent's testimony in State Bar Court.

[19a, b] **211.00 State Bar Act–Section 6002.1**
214.00 State Bar Act–Section 6068(j)
By maintaining a post office box as his State Bar address of record, respondent violated statute requiring attorneys to maintain, on the State Bar's official membership records, their current office addresses and telephone numbers. It is only when an attorney does not have offices that he is permitted to maintain some other address and telephone number as his official State Bar address.

[20] **211.00 State Bar Act–Section 6002.1**
214.00 State Bar Act–Section 6068(j)
In addition to multiple State Bar administrative and investigative purposes, purpose of statute and State Bar rules and regulations requiring attorneys to maintain their current office addresses and telephone numbers on State Bar's official membership records is to establish a bar-wide database of every attorney's office address and telephone number from which clients may locate their attorneys should they lose contact with them.

[21] **142 Evidence–Hearsay**
147 Evidence–Presumptions
148 Evidence–Witnesses
159 Evidence–Miscellaneous
Because transcript of immigration court hearing was admitted into evidence for all purposes and without any hearsay objection, review department properly considered it for the truth of the matter stated by relying on the unsworn statements of two attorneys contained in it to establish multiple relevant facts. Review department considered attorneys' unsworn statements to be highly credible because they, like all attorneys, have a duty under State Bar Act and Rules of Professional Conduct to employ means only as are consistent with truth.

[22] **106.30 Procedure–Pleadings–Duplicative Charges**
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
165 Adequacy of Hearing Decision
214.30 State Bar Act–Section 6068(m)
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Because review department relied on respondent's repeated and reckless failure to communicate with client to establish his culpability for violating rule of professional conduct prohibiting attorneys from abandoning clients and withdrawing from employment without taking adequate steps to protect their clients' interests, review department did not adopt hearing judge's finding that respondent violated statute requiring attorneys to adequately communicate with their clients, but dismissed charge with prejudice as being duplicative.

[23 a–d] **161 Duty to Present Evidence**
162.20 Proof–Respondent's Burden
163 Proof of Wilfulness
164 Proof of Intent
169 Standard of Proof or Review–Miscellaneous
204.10 Culpability–Wilfulness Requirement
204.90 Culpability–General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
490.00 Miscellaneous Misconduct
Even if an attorney of record did not have actual knowledge of a trial setting, if a notice of trial setting was properly served on him, his failure to appear at trial will not be excused for State Bar disciplinary purposes unless he establishes that he had office procedures in place that, at a minimum, required his staff (1) to promptly inform him each time a notice of court or administrative trial or hearing is delivered to office, (2) to promptly record date of the trial or hearing in attorney's court calendaring system and in client's file, and (3) to promptly give client actual notice of date, time, and location of the trial or hearing. Respondent did not have any such proper office procedures in place. Thus, where record established that a notice of a hearing was properly served on him in an immigration court case in which he was attorney of record for the alien, respondent's failures to inform client of hearing, to prepare himself for the hearing, and to counsel and prepare client for the hearing could not be excused even if respondent did not learn of the hearing until the day of the hearing.

[24] **162.20 Proof–Respondent's Burden**
163 Proof of Wilfulness
164 Proof of Intent
169 Standard of Proof or Review–Miscellaneous

204.10 Culpability–Wilfulness Requirement
204.20 Culpability–Intent Requirement
204.90 Culpability–General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
490.00 Miscellaneous Misconduct

Principle that, in the normal course of operation of a law office, an attorney should not be at risk of discipline for failure to have knowledge of every item of information that comes in his office is based on presumptions that the attorney has adequate office procedures in place for the proper operation of his office, trains his staff on those procedures; employs safeguards to insure that procedures are followed, and supervises staff to insure they perform their jobs.

[25] **139 Procedure–Miscellaneous**
162.90 Quantum of Proof–Miscellaneous
163 Proof of Wilfulness
164 Proof of Intent
169 Standard of Proof or Review–Miscellaneous
204.10 Culpability–Wilfulness Requirement
204.20 Culpability–Intent Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Even if respondent failed to appear at an immigration court hearing because he simply forgot to record the date of the hearing in his calendar, his failure to appear must be viewed in light of the record as a whole because, even if an attorney does not act intentionally or recklessly, he violates the rule of professional conduct regarding attorneys' duty to competently perform legal services if he repeatedly fails to competently perform. Respondent's failure to appear at the hearing could not be excused for disciplinary purposes because, under record as a whole, his failure to appear was not isolated, but one of many such failures.

[26 a-c] **113 Procedure–Discovery**
213.90 State Bar Act–Section 6068(i)
221.00 State Bar Act–Section 6106
610 Aggravation–Lack of candor/cooperatin with Bar (1.2(b)(vi))

Misrepresentations in an attorney's verified answers to interrogatories propounded to him by the State Bar, is a serious aggravation warranting increased discipline and might well constitute a greater offense than underlying misconduct. It is no defense that attorney's answers were prepared for him by his counsel. While it might be improper to penalize a lay client for not correcting mistakes that his counsel made in a pleading that the client verified, such reasoning carries little weight when the client is an attorney.

[27] **113 Procedure–Discovery**
135.40 Procedure–Rules of Procedure–Division IV, Subpoenas and Discovery
139 Procedure–Miscellaneous
199 General Issues–Miscellaneous
213.90 State Bar Act–Section 6068(i)

Under State Bar Act and disciplinary case law, respondent had affirmative duty to insure that his answers to interrogatories propounded to him by the State Bar were true and correct even if he had to refresh his recollection of the facts by going to the immigration court and reviewing the court file and listening to the tapes of all relevant court hearings in each client matter that was a subject of the interrogatories.

[28] **113 Procedure–Discovery**
135.40 Procedure–Rules of Procedure–Division IV, Subpoenas and Discovery
139 Procedure–Miscellaneous
194 Statutes Outside State Bar Act
Under Civil Discovery Act, respondent had affirmative duty to answer each of the State Bar's interrogatories as complete and straightforward as the information reasonably available to him permitted.

[29 a-c] **120 Procedure–Conduct of Trial**
130 Procedure–Procedure on Review
139 Procedure–Miscellaneous
159 Evidence–Miscellaneous
161 Duty to Present Evidence
199 General Issues–Miscellaneous
An offer of proof is a summary of proffered evidence excluded by a trial judge, which is presented (1) to the trial judge to insure that he knows what evidence he has excluded and to provide him with an opportunity to reconsider his denial and permit the introduction of the evidence before the end of trial and (2) to an appellate court so that it may effectively review the trial judge's exclusion of the evidence. Thus, where respondent subpoenaed three immigration court judges to testify on his behalf in State Bar Court disciplinary proceeding, but U.S. Department of Justice greatly restricted the scope of the testimony one immigration court judge could give and refused to permit the other two judges to testify at all, the declaration regarding the immigration judges' testimonies that was executed by respondent's counsel and filed in hearing department was not an offer of proof because hearing judge did not restrict or excluded immigration court judges' testimonies, Department of Justice did, and State Bar Court lacked jurisdiction to review Department's actions. Accordingly, review department struck all statements in respondent's brief based on the declaration of respondent's attorney.

[30] **199 General Issues–Miscellaneous**
715.50 Mitigation–Good Faith–Declined to Find
795 Mitigation–Other–Declined to Find
An attorney's lack of experience is not a mitigating circumstance. It is when an attorney is newly licensed or begins to practice in a new area of law that he should take proper steps necessary to learn governing law, rules, and regulations.

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
221.19 Section 6106–Other Factual Basis
252.01 Rule 1-300(A) [former 3-101(A)]
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)]
277.51 Rule 3-700(D) [former 2-111(A)(2)]

Not Found
214.35 Section 6068(m)
277.25 Rule 3-700(A)(2) [former 2-111 (A)(2)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation
Found
582.10 Harm to Client
611 Lack of Candor–Bar
621 Lack of Remorse
Declined to Find
535.90 Pattern

Mitigation
Found but Discounted
740.33 Good Character
Declined to Find
720.50 Lack of Harm
750.52 Rehabilitation
750.59 Other Reason

Standards
802.30 Purposes of Sanctions
833.90 Moral Turpitude–Suspension

Discipline
1013.11 Stayed Suspension–5 Years
1015.09 Actual Suspension–3 Years
1017.11 Probation–5 Years
Probation Conditions
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management
1029 Other Probation Conditions
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, P. J.:

Respondent James Robert Valinoti[1] seeks our review of a hearing judge recommendation that he be placed on three years' stayed suspension and on three years' probation with conditions, including two years' actual suspension continuing until respondent establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[2]

In this proceeding the State Bar charged respondent with a combined total of twenty-eight counts of professional misconduct in nine separate client matters. In each of the nine client matters, respondent was attorney of record for one or more aliens[3] with cases pending in the United States Immigration Court in Los Angeles (hereafter immigration court).

The hearing judge did not find respondent culpable of any misconduct in two of the nine client matters. However, in the remaining seven client matters, the hearing judge found respondent culpable of fourteen counts of charged misconduct and on eight counts of *uncharged*, but proved misconduct. The hearing judge did not consider the eight counts of uncharged misconduct to be independent grounds for discipline, but correctly considered them only for purposes of aggravation.[4] (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [uncharged misconduct may not be used as an independent ground of discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

In addition to the aggravation based on the eight counts of uncharged misconduct, the hearing judge found six additional factors in aggravation. In contrast to this extensive misconduct and aggravation, the hearing judge found only three mitigating factors, none of which is significant.

We consolidate respondent's numerous, lengthy arguments on review into the following five points of error: (1) that the hearing judge erroneously refused to evaluate respondent's conduct under what respondent asserts are in effect the "practice standards" for immigration law; (2) that, in almost all the client matters in this proceeding, the hearing judge erroneously refused to evaluate respondent's conduct under what respondent asserts was the limited scope of his representation; (3) that almost all the hearing judge's findings of misconduct are erroneous because they are based on unintentional acts and omissions that resulted from respondent's simple negligence or honest mistakes he made in good faith; (4) that the hearing judge's findings that respondent made misleading statements to an immigration court judge are not supported by the record; and (5) that the hearing judge's recommended two-year period of actual suspension is excessive and should be eliminated or, at least, substantially reduced to no more than a "modest" period. The State Bar argues that all of respondent's arguments are meritless. It urges us to adopt the hearing judge's findings, conclusions, and discipline recommendation.[5] **[1 - see fn. 5]**

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1. Respondent was admitted to the practice of law in the State of California on March 12, 1993, and has been a member of the State Bar since that time. He has no prior record of discipline.

2. The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

3. We use the term "alien" to describe "any person [who is] not a citizen or national of the United States." (8 U.S.C. § 1101(a)(3).)

4. "Aggravation" or "aggravating circumstances" are circumstances or acts surrounding an attorney's misconduct which demonstrate that a greater degree of discipline than would otherwise have been appropriate is necessary to adequately protect the public, the courts, and the legal profession. (Std. 1.2(b).)

5. [1] Both parties have properly supported many of the statements in their briefs on review with references to the record as expressly required by rules 302(a) and 303(a) of the Rules of Procedure of the State Bar and rule 1320 of the Rules of Practice of the State Bar Court. However, a number of respondent's statements (1) are not supported by the required references to the record or (2) are "supported" by record references that are inapposite or refer only to respondent's evidence and version of the events, which is often times contrary to the hearing judge's express findings. Moreover, a number of respondent's statements find no support in the record. In addition, the State Bar supports many of its statements with references to the hearing judge's findings and conclusions set forth in his decision without providing the required references to where the evidence supporting those findings and conclusions may be found in the record. Although

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we reject all of respondent's points of error. After making various modifications, we adopt many of the hearing judge's findings of fact and conclusions of law.[6] However, while the hearing judge found respondent culpable of misconduct in only seven of the nine client matters, we conclude that respondent is culpable of misconduct in all nine. Moreover, while the hearing judge found respondent culpable of 14 of the 28 counts of charged misconduct, we conclude that he is culpable of 18. In addition, we independently conclude that respondent is culpable of five counts of serious *uncharged*, but proved misconduct, which were not found by the hearing judge.[7] Because these five counts were not charged, we consider them only for purposes of aggravation. (*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 35-36.) Respondent committed all the found misconduct, charged and uncharged, over the two and one-half year period from mid-1995 to late 1997.

Because the record establishes substantially more misconduct and aggravation than found by the hearing judge, we increase the recommended discipline to five years' stayed suspension and five years' probation with conditions, including three years' actual suspension, which will continue until respondent makes an appropriate showing of rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii).

I. NATURE OF RESPONDENT'S PRACTICE OF LAW.

When respondent began his legal career in 1993, he practiced primarily in the areas of construction defect and insurance defense matters. In mid-1995, he opened his own law office and began practicing immigration law by representing aliens with cases in the immigration court. Immigration courts are administrative trial courts that are part of the United States Department of Justice's Executive Office of Immigration Review (hereafter EOIR). Immigration court judges (hereafter IJs) are administrative judges appointed by the United States Attorney General. (8 U.S.C. § 1101(b)(4); 8 C.F.R. §§ 1.1(l), 3.10 (2002).) Almost all IJ rulings may be appealed to the Board of Immigration Appeals (hereafter BIA). (8 C.F.R. § 3.1(b) (2002).) The BIA, like the immigration courts, is part of the EOIR.[8] Published BIA decisions are binding precedent on all immigration courts and the United States Immigration and Naturalization Service (hereafter INS) unless the BIA, the Attorney General or a federal court modifies or overrules them. (8 C.F.R. § 3.1(g) (2002).)

By early 1997, respondent's practice consisted almost entirely of immigration court matters. From mid-1995 through late 1997, respondent and his law office handled more than 2,720 immigration cases.

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the State Bar has properly identified a few instances when a hearing judge finding conflicts with the undisputed evidence in the record, it has failed to do so in other instances in which it repeats the erroneous facts in its briefs as though they were true.

6. On a posttrial motion of the State Bar, the hearing judge dismissed counts 6 and 7. We adopt those dismissals, but clarify that they are with prejudice (Rules Proc. of State Bar, rule 261(a)). (See, e.g., *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [the dismissal of a charge after a trial on the merits is with prejudice].)

7. These additional acts of uncharged misconduct were not raised by the hearing judge or the parties. Thus, we notified the parties, in an order filed May 6, 2002, that we were addressing these additional acts sua sponte and permitted the parties to file supplemental briefs addressing these acts. (Rules Proc. of State Bar, rule 305(b).) Each party filed a supplemental brief, which we have considered.

8. Congress has constitutionally delegated much of its authority over immigration to the Attorney General of the United States, to whom it also granted the authority to establish such regulations as are appropriate for carrying out that delegated authority. (8 U.S.C. § 1103(a)(3).) In turn, the Attorney General has lawfully delegated, to the immigration courts and the BIA, much of the authority to determine the immigration status of aliens as well as the discretion to grant or deny immigration relief to aliens (e.g., naturalization, lawful permanent residency in the United States) under the Immigration and Nationality Act of June 27, 1952, as amended (8 U.S.C. § 1101 et seq.) (hereafter INA).

II. RESPONDENT'S FIRST POINT OF ERROR.

In his first point of error, respondent contends that the hearing judge erroneously refused to evaluate respondent's conduct under what respondent asserts are the "practice standards" for immigration law and asserts that he may be disciplined only if his conduct violated those purported practice standards. Respondent then argues that, except in a few isolated instances, none of his conduct in this proceeding violated those standards. Therefore, respondent contends that, except in those few instances in which his conduct violated those standards, the hearing judge's findings of misconduct are erroneous and must be reversed. We disagree.

[2] Admittedly, immigration law is a specialized area of practice. However, the standards governing an attorney's ethical duties do not vary according to the many areas of practice. Nor do they vary according to whether an attorney practices alone or in a partnership, small law firm, large law firm, or corporate law department. (See, e.g., *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1059-1060.) [3] Furthermore, with respect to attorney discipline, the ethical standards for attorneys are primarily established by the State Bar Rules of Professional Conduct (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917) and the State Bar Act (Bus. & Prof. Code, § 6000 et seq.).[9] However, when an attorney practices in a specific area or jurisdiction, those ethical standards may be measured by reference to other relevant state and federal statutes, rules of court, regulations, and administrative rules. None of the purported immigration law practice standards identified by respondent fall within one of these categories. Therefore, we reject respondent's first point of error.

III. RESPONDENT'S SECOND POINT OF ERROR.

[4a] [5a] In his second point of error, respondent contends that, in seven of the nine client matters in this proceeding, the hearing judge erroneously refused to evaluate respondent's conduct under what respondent asserts was the limited scope of his representation and that this error caused the hearing judge to improperly find respondent culpable of failing to fulfill duties that he did not have and of failing to perform legal services that he never agreed to perform and for which he was never paid. Specifically, respondent contends that, as to those seven client matters, his representation was limited to that of what respondent refers to as an "appearance attorney." According to respondent, an "appearance attorney" appears in his clients' immigration cases only for the limited purpose of making court appearances; an "appearance attorney" does not, inter alia, prepare and file his clients' immigration applications, pleadings, or other documents. Instead, respondent asserts, those items are properly prepared and filed by nonattorney immigration services providers. As respondent and his witnesses testified in the hearing department, these nonattorney immigration services providers (1) advise aliens on United States immigration law and procedures; (2) prepare and file immigration applications, pleadings, and other documents with the INS, the immigration court, and the BIA on behalf of their alien clients; and (3) refer their alien clients to immigration attorneys, such as respondent, when the aliens must appear in immigration court.

These nonattorney immigration services providers are commonly referred to as immigration consultants, visa consultants, and, in some Hispanic communities, *notarios* or *notarios publicos*. We, however, refer to them either as nonattorney immigration services providers, immigration services providers, nonattorney providers, or providers. We do not use the term immigration consultant because, as discussed *post*, it is a statutorily defined term in this state and is inapplicable to the nonattorney providers

9. Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

involved in this disciplinary proceeding. We do not use the terms visa consultants, *notarios*, and *notarios publicos* because they are deceptive, inappropriate terms.

[4b] [5b] Of the more than 2,720 immigration cases that respondent and his law office handled between mid-1995 and late 1997, all but about 170 of them were referred to him by nonattorney immigration services providers, of which respondent estimates there are between 50 to 100 in Southern California. Since mid-1995, when representing clients referred to him by these nonattorney providers, it has been respondent's customary practice (1) to rely on or permit the referring immigration services providers to, inter alia, prepare and file the clients' immigration applications, pleadings, and other documents and (2) to represent the clients only as an "appearance attorney," often without telling the clients. Respondent testified in the hearing department and has repeatedly argued in the hearing department and on review, that these customary practices of his were and are legal, appropriate, and in the interest of his clients.[10] **[4c - see fn.10]** Thus, respondent contends that each culpability finding by the hearing judge which is based on a failure to fulfill a duty or to perform a service that respondent asserts should have been fulfilled or performed by the referring nonattorney provider is erroneous and must be reversed. We disagree and reject respondent's second point of error.

[6a] First, under controlling federal law not addressed by the parties, nonattorney immigration services providers may not legally or appropriately prepare immigration applications, pleadings, or other documents for respondent's immigration clients. Nor may they legally advise aliens on immigration law and procedures or otherwise represent aliens in immigration cases. In fact, the first count of uncharged misconduct on which we independently conclude that respondent is culpable is that respondent repeatedly aided and abetted nonattorney immigration services providers to represent aliens in violation of federal law and to engage in the unauthorized practice of law by relying on or permitting the providers to, inter alia, prepare and file immigration applications, pleadings, and other documents for his clients. **[5c]** Second, under controlling federal law not addressed by the parties, the scope of respondent's representation was not limited to that of an "appearance attorney" in any client matter in which he or another attorney from his law office appeared in the client's immigration case as an attorney of record.

Before we discuss the controlling federal law, we first summarize how, from at least mid-1995 through late 1997, aliens often initially retained nonattorney immigration services providers to handle their immigration cases to obtain work permits, visas, or lawful immigration status for them and how those nonattorney providers ordinarily represented aliens and referred thousands of them to respondent. We then summarize how respondent customarily represented the clients the nonattorney providers referred to him. Not only do these summaries set forth the factual basis for our rejection of respondent's contention that he properly limited the scope of his representation in seven of the nine client matters in this proceeding to that of an "appearance" attorney, they also set forth the facts establishing respondent's culpability for aiding and abetting nonattorney providers to represent aliens in violation of federal law and to engage in the unauthorized practice of law. Much of this summary is based on respondent's evidence and on his statements and admissions in his pleadings in the hearing department and briefs on review.[11]

A. How aliens hired nonattorney immigration services providers and how those providers represented them and referred many of them to respondent.

Based on the record before us, it appears that instead of retaining attorneys, many aliens, including the clients in at least eight of the matters in this

10. **[4c]** Respondent's testimony and arguments place his customary practices in issue so that any uncharged improprieties in them may appropriately be considered as aggravation in this proceeding. (See *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 35-36.)

11. Because this summary is based on the record in this proceeding, it may not accurately reflect the practices of all nonattorney immigration services providers or other attorneys who practice immigration law in Southern California.

proceeding, initially hire nonattorney immigration services providers to handle their immigration cases. This may be explained in part because these nonattorney providers routinely (1) hold themselves out as immigration law experts; (2) engage in "in-person" solicitation (either personally or through representatives) of aliens at INS offices and the immigration court; and (3) advertise their services to non-English speaking aliens in local newspapers, telephone books, and other publications that cater to various non-English speaking communities. (See, e.g., Cisneros, *H.B. 2659: Notorious Notaries – How Arizona is Curbing Notario Fraud in the Immigrant Community* (Spring 2000) 32 Ariz. St. L.J. 287, 299-308 (hereafter *Notorious Notaries*).) It may also be explained in part by the common misconception among aliens that the providers are specialized attorneys. This misconception frequently arises because many immigration services providers deceptively advertise or refer to themselves as notary publics, *notario publicos*, or *notarios*. (See, e.g., Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, (1991) 5 Geo. J. Legal Ethics 237, 253 [hereafter Ashbrook].) Even though the terms "*notario publicos*" and "*notarios*" are the Spanish translations for the English phrase "notary publics, " they are also titles of a selected class of "elite" attorneys in civil law countries such as Mexico and others in Central and South America. Accordingly, we refer to *notario publicos* and *notarios* as Latin notaries to distinguish them from American notaries.[12]

There is no equivalent to the Latin notary in the United States. (*Notorious Notaries*, *supra*, 32 Ariz. St. L.J. at pp. 294-299.) In the United States, as in almost all Anglo based legal systems, the notary occupies a purely clerical position in which the notary is authorized to witness the signing of documents or administer a limited number of oaths. However, "[I]n contemporary Latin America, a lawyer fortunate enough to become a *notario publico* is a private legal professional of immense prestige who holds his or her office for life, as long he or she remains in good standing." (*Notorious Notaries* at p. 295.) Indeed, the Latin notary may be regarded somewhat akin to a judge who vouches for the validity of the entire transaction. (*Notorious Notaries* at p. 297.)

[7] The foregoing facts lend support to respondent's contentions that many of his alien clients (1) have "a cultural bias in favor of" the immigration services providers that they hire to handle their immigration matters, particularly when the providers are of the same culture as the aliens (Ashbrook, *supra*, 5 Geo. J. Legal Ethics at p. 266), and (2) view immigration attorneys, like respondent, as less important than the immigration services providers they hire. Nonetheless, these factors do not, as respondent argues, reduce or limit the nature and scope of his professional duties towards his clients in any of the seven client matters in this proceeding in which he claims to have limited his represented to that of an "appearance" attorney. Nor would they reduce or limit the nature and scope of his duties towards any of his other immigration clients.

When an alien retains a nonattorney immigration services provider to handle his immigration matter, he typically does so (1) in response to the provider's solicitations or advertisements or (2) on the referral from a friend, family member, or prior client of the provider. (*Notorious Notaries*, *supra*, 32 Ariz. St. L.J. at pp. 301-302.) Most often, the immigration services provider tells the alien that he can obtain for the alien a work permit or a "green card" (i.e., an identification card issued only to aliens with lawful permanent resident status). The nonattorney provider usually charges aliens a flat fee ranging from $2,000 to $4,000 for handling their cases and preparing all the necessary "paperwork."[13]

12. In fact, because many individuals from civil law countries believe that American notaries are equivalent to Latin notaries, California all but prohibits notaries from using the terms *notario publico* and *notario*. (Gov. Code, § 8219.5, subd. (c).) Moreover, if a notary in California elects to hold himself out as an immigration service provider, he is expressly prohibited from advertising in any manner whatsoever that he is a notary. (Gov. Code, § 8223, subd. (a).)

13. The record suggests that this fee might be higher than an immigration attorney's fee would be for the same or similar services.

At least from mid-1995 through late 1997, immigration services providers customarily began representing alien clients by seeking political asylum for them. More specifically, when an alien retained an immigration services provider, the provider prepared, for the alien, an Application for Asylum and for Withholding of Deportation – INS Form I-589 (Rev. 11-16-94) (hereafter asylum application) (now an Application for Asylum and for Withholding of Removal – INS Form I-589 [Rev. 05-01-98]), which was written in English, had to be completed in English, and had to be signed by the alien under penalty of perjury to certify that it and the supporting documentary evidence accompanying it were all true and correct. After the provider completed the application and had the alien sign it under penalty of perjury, the provider ordinarily filed it with the INS.

Subject to multiple exceptions not relevant here, to qualify for asylum, an alien must prove (1) that he has been persecuted in the country of his nationality or last habitual residence on account of his race, religion, nationality, membership in a particular social group, or political opinion or (2) that he has a well-founded fear of being persecuted in the future on one of the foregoing grounds if he is deported to the country of his nationality or last habitual residence. (8 U.S.C. §§ 1101(a)(42), 1157, 1158.) However, the grant of asylum is discretionary, not mandatory. (8 U.S.C. § 1158(b)(1).) When an alien is granted asylum, he is permitted to stay in the United States and, one year later, may apply to have his immigration status adjusted to that of a lawful permanent resident. (8 U.S.C. § 1159(b).)

Respondent testified that it is extremely difficult for aliens from Mexico and many Central and South American countries to qualify for asylum because they cannot prove the requisite past persecution or well-founded fear of future persecution. Respondent further testified that virtually every asylum application prepared and filed by an immigration services provider was fraudulent because: (1) the alien clearly did not qualify for asylum; (2) many of the facts the provider put in the application and its supporting documentary evidence were false; and (3) the provider knew (when he prepared the application, had the alien sign it under penalty of perjury, and filed it with the INS) that the alien did not qualify for asylum and that many of the facts he put in the application and its supporting evidence were false. As respondent explains, one principal reason immigration services providers routinely began representing aliens by preparing and filing fraudulent asylum applications was because the INS processed those applications much faster than most other types of immigration applications and because the aliens often received temporary work permits while their applications were pending. (Accord Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2520 [an act to amend Bus. & Prof. Code, § 22445 relating to immigration consultants] (1993-1994 Reg. Sess.) [dated Mar. 13, 1994] for Com. Hearing of Apr. 5, 1994.)

Respondent asserts that many of his clients were willing participants in the immigration services providers' scheme of filing fraudulent asylum applications because they purportedly knew that they did not qualify for asylum and that there were false facts in their applications and supporting evidence. In addition, respondent asserts that many of his clients engaged in further fraudulent conduct because they (1) falsely declared, under oath to INS officials, that the facts in their asylum applications and supporting evidence were true and correct and (2) signed, under penalty of perjury, declarations in support of motions filed in their immigration cases when they knew the declarations contained false statements. Relying on these alleged fraudulent actions, respondent attacks the credibility of a number of his clients who testified against him in this disciplinary proceeding. We, like the hearing judge, conclude that the record does not support respondent's assertions that his clients engaged in such fraudulent conduct as to impeach their credibility as witnesses in this proceeding.

First, as we noted *ante*, the asylum application was written in English and had to be completed in English. Several of respondent's clients credibly testified in the hearing department that they did not read English at the time they signed their completed applications, that the immigration services providers never read the completed applications to them in their native language before the providers instructed them to sign the completed applications, and either that the providers told them that their applications were "in order" or that they trusted the providers to prepare their applications properly. The clients' testimonies

are supported by the fact that *none* of the immigration services providers who prepared the asylum applications in this proceeding complied with the federal law mandating that *anyone* other than a member of an applicant's immediate family who prepares or assists in preparing an asylum application for an alien must sign the preparer's declaration at the end of the application (1) to disclose the fact that he prepared or assisted in the preparation of the application and (2) to certify, under penalty of perjury, that he read the completed application to the alien in the alien's native language for purposes of verification before the alien signed the application.[14] (Former 8 C.F.R. § 208.3(c)(4) (eff. Jan. 4, 1995 [59 Fed.Reg. 62284, 62298, Dec. 5, 1994] to Mar. 31, 1997); former 8 C.F.R. § 208.3(c)(2) (eff. Apr. 1, 1997 [62 Fed.Reg. 10312, 10338, Mar. 6, 1997] to Jan. 4, 2001); now 8 C.F.R. § 208.3(c)(2) (eff. Jan. 5, 2001 [65 Fed.Reg. 76121, 76131, Dec. 6, 2000]).)

Second, the hearing judge, who saw and heard the clients testify, found them to be credible witnesses notwithstanding respondent's allegations that they engaged in fraudulent conduct. We must give great weight to these credibility determinations. (See, e.g., Rules Proc. of State Bar, rule 305(a).) Finally, because respondent routinely accepted referrals from immigration services providers in cases in which respondent knew that the providers had prepared and filed fraudulent asylum applications without signing the preparer's declarations, respondent's attacks on the credibility of his own clients are disingenuous.

After the immigration services provider filed the alien's completed asylum application, the INS interviewed the alien on his asylum claim. The alien ordinarily went to the interview alone or with a family member. At or shortly after the interview, the INS almost always summarily denied the application because it was patently meritless. Thereafter, the INS initiated a deportation proceeding against the alien by filing in the immigration court and serving on the alien an order to show cause (hereafter OSC or deportation OSC) ordering him to appear before an IJ in Los Angeles and show why he should not be deported for, most often, having previously entered the United States without inspection by an immigration officer.[15] Once the deportation proceeding was initiated, the immigration court obtained jurisdiction over both the issue of alien's deportability and the merits of his asylum application. Accordingly, when it initiated the deportation proceeding, the INS forwarded the alien's asylum application to the immigration court, where the alien could have it considered "de novo" by the IJ if he so desired.

Understandably, the alien did not want to appear in immigration court alone. Accordingly, the nonattorney provider then "referred" the alien to respondent, or another immigration attorney. The nonattorney providers usually referred their alien clients to immigration attorneys with whom they had a relationship; who the providers knew would "represent" the alien clients only by appearing with them in court; and who the providers knew would not steal their clients by taking over the clients' cases and preparing and filing the clients' immigration applications, pleadings, and documents. In fact, as the hearing judge correctly found, respondent did not interfere with the nonattorney providers' relationships with their clients or ordinarily assume responsibility for preparing and filing the applications, pleadings, and documents for the clients the providers referred to him because, had he done so, it would have reduced the number of referrals he would have received from the providers in the future.

Often, immigration services providers waited until the day of the initial hearing in their alien clients' cases before they referred their clients to respondent, or another immigration attorney. In such a case, the immigration services provider walked the hallways

14. A preparer's willful failure to disclose his assistance by not signing the preparer's declaration may result in an adverse ruling on the alien's asylum application. In addition, a preparer's willful failure to sign an application with knowledge or in reckless disregard of the fact that the application (1) contains a false, fictitious, fraudulent statement, or material misrepresentation, (2) has no basis in law or fact, or (3) fails to state a material fact is a crime punishable by fine, imprisonment for not more than five years, or both. (8 U.S.C. § 1324c(e) & (f).)

15. Deportation for entry without inspection (former 8 U.S.C. § 1251(a)(1)(B)) has been replaced with removal for being present in the United States in violation of the INA or any other federal law (8 U.S.C. § 1227(a)(1)(B)).

outside the immigration court courtrooms with the alien the day of the hearing looking for respondent. When the provider found respondent, he introduced the client to respondent, arranged for respondent to appear with the client in court, and usually paid respondent a cash appearance fee. Regardless of whether the provider referred the client to respondent shortly before or well in advance of the initial hearing, respondent did not ordinarily meet with the client to review the client's case or otherwise obtain the facts necessary to properly represent the client at the initial hearing.

B. How respondent's represented clients referred to him by immigration services providers.

Respondent testified that the immigration services provider, not he, set the fee that the provider or the client paid respondent for each court appearance respondent made. Respondent testified that he was paid as little as $50 per appearance and as much as $350 per appearance, but that he averaged $150 per appearance. By conservative extrapolation, based on the evidence, respondent earned more than $250,000 in 1996 and again in 1997.

[5d] Before the initial hearing, respondent and the client executed a Notice of Entry of Appearance as Attorney or Representative – Form EOIR-28 (Jan. 89) (hereafter Form EOIR-28) (now Notice of Entry of Appearance as Attorney or Representative – Form EOIR-28 [August 99]), which respondent then filed with the immigration court and served on the INS. Under 8 Code of Federal Regulations parts 3.17(a) and 292.4(a), neither attorneys nor other federally authorized representatives may represent aliens in immigration court until they execute, file, and serve Forms EOIR-28,[16] **[8 - see fn. 16]** and once they do so, they may not withdraw from representation or effectuate substitutions of attorney except on motions to the IJ to whom their clients' cases are assigned. (8 C.F.R. §§ 3.17(b), 292.4(a); accord Immig. Ct. L.A., San Pedro, and Lancaster, Local Operating Procedures, Proc. 4 (all future references to local operating procedures are to this source); cf. Rules Prof. Conduct, rule 3-700(A)(1) ["If permission for termination of employment is required by the rules of a tribunal, [an attorney] shall not withdraw from employment in a proceeding before that tribunal without its permission."].)[17]

When respondent first met the client, he typically told the client that, at the hearing, he would (1) withdraw the client's asylum application; (2) request suspension of deportation relief for the client;[18] and (3) alternatively request that the client be permitted to voluntarily depart from the United States in lieu of being deported should the client not be granted suspension of deportation and the client be found to be deportable.[19] At the hearing, respondent also ordinarily admitted the factual basis to the issue of deportability charged against the client in the deportation OSC, or otherwise admitted to his client's deportability, and then designated the client's country of origin as the country of deportation. It is unclear whether respondent told his client of this practice

16. **[8]** Because neither respondent nor the State Bar addressed 8 Code of Federal Regulations parts 3.17 and 292.4, the hearing judge sua sponte took judicial notice of them. The rules and procedures for the immigration courts and the BIA established by the Attorney General and set forth in the Code of Federal Regulations have the force and effect of law. (*United States ex rel. Accardi v. Shaughnessy* (1954) 347 U.S. 260, 265; *In re Sun Cha Tom* (1968) 294 F.Supp. 791, 793.) Accordingly, the hearing judge correctly took judicial notice of parts 3.17 and 292.4. (Rules Proc. of State Bar, rule 214; Evid. Code, § 451, subd. (b); 44 U.S.C. §§ 1507, 1510; *Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 171, fn. 4.) Like the hearing judge, we are required to sua sponte take judicial notice of parts 3.17 and 292.4 as well as all other relevant parts of the Code of Federal Regulations. (*Ibid.*; Evid. Code, § 459, subd. (a).)

17. All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

18. Respondent did not always request suspension of deportation relief; at times he sought other relief for the client.

19. If an alien's application for suspension of deportation (or application for some form of primary relief) was denied, it was very important that the alien be allowed to depart the United States voluntarily and not be ordered deported because, if an alien was deported, he was ineligible to reenter the United States and seek most forms of immigration relief for five years unless the United States Attorney General consented otherwise.

during their first meeting or whether he ever explained the implications of such an admission of deportability to the client.

If respondent's client was granted suspension of deportation, he gained legal immigration status and, subject to a limited number of exceptions not relevant here, was permitted to remain in the United States permanently. However, to qualify for suspension of deportation relief, an alien had to prove several requirements, including (1) that he was of good moral character and (2) that his deportation would result in "extreme hardship" to himself or an immediate family member who is a United States citizen or legal alien. (Former 8 U.S.C. § 1254(a) [former INA § 244(a)(1) (suspension of deportation)], repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208 (Sept. 30, 1996) 110 Stat. 3009) (hereafter IIRA) § 308(b)(7), replaced by 8 U.S.C. § 1229b [INA § 240A (cancellation of removal)].)

Obviously, the filing of a frivolous or fraudulent asylum application could make establishing the requisite good moral character extremely difficult. In addition, establishing the extreme hardship requirement could be very difficult. Moreover, even if the client carried his burden of proof and established each of the requirements, the granting of suspension of deportation relief was wholly within the discretion of the IJ. (*INS. v. Rios-Pineda* (1985) 471 U.S. 444, 446 [105 S.Ct. 2098, 85 L.Ed.2d 452]; see also *Achacoso-Sanchez v. INS* (7th Cir. 1985) 779 F.2d 1260, 1264.) Thus, the timely and proper presentation of the client's case in the immigration court was of the utmost importance to the client. Likewise, if the IJ denied the client's application, it made the client's timely and proper appeal to the BIA of the utmost importance to the client. (See, e.g., *INS v. Jong Ha Wang* (1981) 450 U.S. 139, 145 [101 S.Ct. 1027, 67 L.Ed. 2d 123] [standard of judicial review of BIA's denial of suspension of deportation relief is abuse of discretion].)

After respondent admitted his client's deportability, designated a country of deportation, withdrew the client's asylum application, and requested suspension of deportation or voluntary departure in the alternative, the IJ set a deadline for filing the Application for Suspension of Deportation – Form EOIR-40 (Nov. 94) (now Application for Suspension of Deportation – Form EOIR-40 [Expires 08/31/01])[20] and set the case for hearing, which was often the merits hearing (i.e., the trial) on the client's application. The IJ also admonished the client of his absolute duty to timely file his application and to appear at the next hearing ready to proceed with his attorney[21] or be subject to having his requests for relief deemed abandoned and being ordered deported in absentia, the order of which cannot be appealed, but only rescinded on a motion to reopen, which may be granted only under *exceptional circumstances*.[22]

Respondent testified that, after the initial hearing, he almost always spoke with the client in the hallway outside the courtroom, gave the client his

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20. Notwithstanding the notation "Expires 08/31/01" on current Form EOIR-40, it "continues to be the one and only valid version of the form." Presumably, Form EOIR-40 will be "retired" because, under the IIRA, suspension of deportation proceedings have been replaced with cancellation of removal proceedings (8 U.S.C. § 1229b).

21. Every notice of hearing sent out by the immigration court states that, if the alien is represented, his attorney must appear with him at the noticed hearing "*prepared to proceed.*" (Italics added.)

22. "Exceptional circumstances" to support a motion to reopen are narrowly limited to those circumstances (such as serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances) that are beyond the control of the alien. (8 U.S.C. § 1229a(e)(1).) Ineffective assistance of counsel is an "exceptional circumstance" provided the alien strictly complies with the procedural requirements. (*Matter of Lozada* (BIA 1988) 19 I. & N. Dec. 637, 639-640; but see *Castillo-Perez v. INS* (9th Cir. 2000) 212 F.3d 518, 526 [procedural requirements not strictly enforced when their purpose is served by other means].) However, bad advice, an error committed, or ineffective assistance by an immigration consultant rarely qualifies as an exceptional circumstance (*Singh-Bhathal v. INS* (9th Cir.1999) 170 F.3d 943, 946; but see *Rodriguez-Lariz v. INS* (9th Cir. 2002) 282 F.3d 1218, 1224) unless the consultant defrauded the alien into believing that he or she was an attorney (*Lopez v. INS* (9th Cir.1999) 184 F.3d 1097, 1100).

business card, and gave the client the option of having either respondent or the referring immigration services provider prepare the client's application for suspension of deportation and its supporting documentary evidence and any other necessary pleadings or documents. According to respondent, the client ordinarily insisted on returning to the referring immigration services provider and having the provider draft the "paperwork" because the client had already paid the provider to do so. Even though respondent's testimony was partially corroborated by secretary Lopez's testimony, the hearing judge not only rejected it, but he also expressly found, in a number of the client matters in this proceeding, that respondent did not meet with the client or give the client his business card after the initial hearing. Furthermore, in at least two client matters, the hearing judge found that respondent (1) told his client that the referring immigration services provider was going to prepare the client's paperwork and (2) instructed the client return to the provider and to give the provider whatever information and documentation the provider needed to prepare the client's paperwork. We adopt the hearing judge's rejection of respondent's testimony and his findings on respondent's conduct after the initial hearings.

C. Respondent aided and abetted nonattorney providers to represent aliens in violation of federal law and to engage in the unauthorized practice of law when he relied on or permitted those providers to prepare and file client documents.

[6b] In his opening brief on review respondent supports his testimony and arguments that his customary practice of relying on or permitting nonattorney immigration services providers to prepare and file applications, pleadings, and documents for his clients is legal, appropriate, and in his clients' interest by stating that "immigration consultants or notarios are licensed by the State of California to prepare petitions and applications for aliens . . ." and that "[t]he papers at issue in the instant [disciplinary] proceeding, e.g., applications for suspension of deportation, are routinely prepared and filed by non-attorney consultants or notarios, who lawfully offer such services to aliens. . . ." Respondent, however, does not cite to any legal authority to support his unequivocal statement that the State of California licenses "immigration consultants or notarios."[23] To the contrary, respondent's statement is inaccurate because California has never *licensed* "immigration consultants or notarios." It has, however, since 1983, regulated and placed restrictions on nonattorneys, other than those nonattorneys who are expressly authorized by federal law to represent aliens before the INS, the immigration courts, and the BIA, who provide *nonlegal* assistance and advice on immigration matters to others for compensation. (§ 22440 et seq. [hereafter California act regarding immigration consultants].) Such nonattorneys who provide nonlegal assistance and advice are referred to as immigration consultants. (§ 22441, subd. (a).) California's regulation of immigration consultants attempts to create "a class of consultants to help [immigration] applicants fill out *basic* forms at *minimal* cost."[24] (*Unlawful practice hits vulnerable immigrants*, Cal. St. B.J. (Nov. 2001) pp. 1, 7, italics added.) Furthermore, respondent does not cite any authority for his representation that "non-attorney consultants or notarios" may lawfully prepare and file applications and petitions for aliens as they did in this proceeding. In fact, respondent's statement that they may is patently incorrect.

[6c] Next, in his reply brief on review, respondent supports his testimony and arguments by stating that, "[a]s is their prerogative, aliens frequently utilize the services of immigration consultants for preparation of paperwork, and *federal law permits non-lawyer consultants to provide such services*."

23. Respondent does, however, provide a reference to the record; but the evidence located at the record reference is inapposite, having nothing to do with the licensing of "immigration consultants or notarios."

24. For example, California law allows a notary public to complete government immigration forms if the client provides the data to be entered and if the notary charges no more than $10 per person for each set of forms completed. (Govt. Code, § 8223, subd. (b).)

(Italics added.) Again, respondent cites no authority to support these unequivocal statements, which are additional misrepresentations of law to this court.

[6d] Finally, in his September 9, 2002, supplemental brief on review, which he filed in response to our May 6, 2002, order notifying the parties of our intent to address sua sponte the issue of whether the record contained clear and convincing evidence that respondent aided and abetted nonattorney immigration services providers to represent aliens in violation of federal law or to engage in the unauthorized practice of law, respondent states that "[a]s nonattorneys, notarios are specifically permitted to represent aliens in immigration proceeding pursuant to federal statute.[25] (8 C.F.R. § 292.1 et seq.) [Footnote omitted.] This is recognized by California Business and Professions Code, sections 22440-22448." These are incorrect statements of law to this court. The supporting authorities cited by respondent are simply inapposite. Under 8 Code of Federal Regulations part 292.1, an authority cited by respondent, there are only six categories of nonattorneys who may represent aliens in immigration cases without violating federal law. (8 C.F.R. § 292.1(e); Opn. Gen. Counsel INS (June 9, 1992) 1992 WL 1369368 (INS) Legal Opinion on the Role of Visa Consultants in the Practice of Immigration Law [hereafter 1992 Opn. Gen. Counsel INS];[26] Ashbrook, *supra*, 5 Geo. J. Legal Ethics at p. 278.) Neither immigration consultants, notarios, nor immigration services providers fall within one of these six categories of federally authorized nonattorney representatives.

[6e] Furthermore, based on the interplay of the regulatory definitions of case, representation, practice, and preparation as set forth in 8 Code of Federal Regulations part 1.1(g), (m), (i), (k), respectively, "the scope of the term 'representation' is a *very* broad one. It includes activities which range from *incidentally* preparing papers for a person, to giving a person advice about his or her case, to appearing before the Service on behalf of a person." (1992 Opn. Gen. Counsel INS; Opn. Gen. Counsel INS (Apr. 20, 1993) 1993 WL 1503972 (INS) [hearafter 1993 Opn. Gen. Counsel INS], affirming 1992 Opn. Gen. Counsel INS.) Therefore, any person who is not an attorney or one of the six federally authorized nonattorney representatives under 8 Code of Federal Regulations part 292.1 may not engage in any activity falling within this *very* broad definition of representation without violating federal law. (1992 Opn. Gen. Counsel INS; 1993 Opn. Gen. Counsel INS; Ashbrook, *supra*, 5 Geo. J. Legal Ethics at p. 242 [there is a very "narrow domain, where non-lawyer work in immigration matters would not constitute the practice of immigration law"].) Concomitantly, a person who merely assists another in completing preprinted government immigration forms will not violate federal law *so long as* he does not receive more than nominal consideration for such assistance *and* does not hold himself out as qualified in legal matters or in the area of immigration and naturalization law and procedures. (*Ibid.*)

[6f] In this state, " 'to practice as an attorney at law' means to do the work as a business which is commonly and usually done by lawyers in this country." (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535, quoting *People v. Alfani* (1919) 227 N.Y. 334, 339, 125 N.E. 671.) Thus, "the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it [also] includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." (*People v. Merchants Protective Corp., supra*, 189 Cal. at p. 535, quoting *Eley v. Miller* (1893) 7 Ind. App. 529, 535, 34 N.E. 836, 837-838; *Baron v. City of Los*

25. The intended reference is to federal regulation, not federal statute.

26. See *United States v. Larionoff* (1977) 431 U.S. 864, 872-873 (federal agency's interpretation of its own regulations entitled to great deference); *Diaz v. INS* (E.D.Cal. 1986) 648 F.Supp. 638, 645, citing *Miller v. Youakim* (1979) 440 U.S. 125, 145, fn. 25 (formal interpretation dispensed by agency's general counsel that is intended to apply nationally constitutes an agency interpretation); see also *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal.App.4th 1190, 1195 (agency's interpretation of its regulations entitled to considerable judicial deference and generally controls unless clearly erroneous).

Angeles (1970) 2 Cal.3d 535, 542-543.) And, under the law of this state "'[w]hether a person give advice as to [local] law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice. . . .' [Citation.]" (*Bluestein v. State Bar* (1974) 13 Cal.3d 162, 173-174.)

[6g] We hold that the preparation and filing of immigration applications, pleadings, and documents by the nonattorney immigration services providers in this proceeding was the representation of aliens under federal law, that those nonattorney providers were not within one of the six categories of nonattorneys authorized under federal law to represent aliens in immigration cases, and that those nonattorney providers, therefore, represented aliens in violation of federal law. We further hold that the preparation and filing of immigration applications, pleadings, and documents by the nonattorney providers in this proceeding fall within California's definition of the unauthorized practice of law (accord *Unauthorized Practice Committee, State Bar of Texas v. Cortez* (Tex. 1985) 692 S.W.2d 47, 50; *Oregon State Bar v. Ortiz* (Or.Ct.App. 1986) 713 P.2d 1068, 1070) and that those nonattorney providers, therefore, engaged in the unauthorized practice of law. Finally, we hold that, by relying on or permitting those nonattorney providers to prepare and file immigration applications, pleadings, and other documents for his clients from at least mid-1995 through late 1997, respondent deliberately aided and abetted the providers to represent aliens in violation of federal law. In doing so, respondent engaged in acts of moral turpitude in willful violation of section 6106. Moreover, in willful violation of rule 1-300(A), respondent deliberately aided and abetted the providers to engage in the unauthorized practice of law. Respondent's violation of rule 1-300(A) rose to a level involving moral turpitude in violation of section 6106.

D. Respondent's representation was not limited to that of an "appearance attorney."

[5e] To support his testimony and argument that his customary practice of limiting the scope of his representation of the clients referred to him by immigration services providers to that of an "appearance attorney" are legal, appropriate, and in his clients' interests, respondent cites and discusses two local bar association ethics opinions and a law review article.[27] To support its contrary position, the State Bar cites to a number of cases setting forth an attorney's duties when representing a client in a judicial proceeding. Whether the scope of respondent's representation of his alien clients was or could have been properly limited to that of an "appearance attorney" is unquestionably resolved against respondent by controlling federal law, which was not addressed by the parties. Therefore, we need not and do not address the parties' cited authorities and arguments on this issue.

[5f] As noted *ante*, an attorney, or federally authorized nonattorney representative, may not represent an alien in an immigration case until he executes and files a Form EOIR-28, and once he does so, he becomes the client's attorney of record and may not withdraw or substitute out of the case without the permission of the IJ. Since June 1972, 8 Code of Federal Regulations part 292.5(a) has definitively mandated that, whenever a party in an immigration case is required to give notice; serve any document, other than arrest warrants and subpoenas; make a motion; file or submit an application, pleading, or other document; or perform or waive the performance of any act and the party is represented by an attorney, it is the duty of the party's attorney to give such notice, serve the document, make the motion, file or submit the application, pleading, or other document, and

27. Los Angeles County Bar Association Professional Responsibility and Ethics Committee Formal Opinion 483 (Mar. 1995) Limited Representation of in Pro Per Litigants; Los Angeles County Bar Association Professional Responsibility and Ethics Committee Formal Opinion 502 (Nov. 1999) Lawyers' Duties when Preparing Pleadings or Negotiating Settlement for in Pro Per Litigant; Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?* (1998) 11 Geo. J. Legal Ethics 915; Limited Representation Committee of the California Commission on Access to Justice Report on Limited Scope Legal Assistance With Initial Recommendations (Oct. 2001 [initial recommendations approved State Bar, Bd. of Gov., on Jul. 28, 2001]).

perform or waive the performance of the act. Accordingly, when respondent filed a Form EOIR-28 in a client's immigration case, he had the duty to fully and competently represent the client before the immigration court and to properly prepare each and every application, pleading, and document necessary for the proper representation of that client. (8 C.F.R. § 292.5(a); *Matter of Velasquez* (BIA 1986) 19 I. & N. Dec. 377, 384 ["there is no 'limited' appearance of counsel in immigration proceedings"]; *Matter of N-K* (BIA 1997) 21 I. & N. Dec. 879, 882, fn. 2, 880 [it is a "well-settled principle" that "there is no 'limited' appearance of counsel in immigration proceedings"].) Moreover, this duty to fully and competently represent an alien client may not be modified by an agreement between a client and his attorney even if the parties expressly note the limited scope of the attorney's representation on the Form EOIR-28 filed with the immigration court. (*Matter of N-K*, *supra*, 21 I. & N. Dec. at pp. 879, 882, fn. 1.) In fact, since it was last revised in August 1999, Form EOIR-28 has plainly stated: "**Appearances** – . . . Please note that appearances for limited purposes are not permitted." Accordingly, respondent's testimony and repeated argument that he could legally and appropriately limit the scope of his representation to that of an "appearance attorney" are disingenuous.

Moreover, respondent's unsupported assertion that his alien clients had the "prerogative" of returning to the referring immigration services providers for the preparation and filing of their applications, pleadings, or other documents is meritless and frivolous in light of the duties imposed on an attorney once he or she appears before the immigration court by filing a Form EOIR-28. (8 C.F.R. § 292.5(a); *Matter of Velasquez*, *supra*, 19 I. & N. Dec. at p. 384; *Matter of N-K*, *supra*, 21 I. & N. Dec. at pp. 879, 882, fn. 2.)

IV. RESPONDENT'S THIRD POINT OF ERROR.

[9a] [10a] In his third point of error, respondent contends that almost all the hearing judge's findings of misconduct are erroneous because they are based on unintentional acts and omissions that resulted from simple negligence or honest mistakes that respondent made in good faith as a "product of trying to do too much, not too little," for his clients.[28] **[9b - see fn. 28]** We disagree and reject this point.

[10b] First, the hearing judge correctly found that, from at least mid-1995 through late 1997, respondent: (1) repeatedly and deliberately abdicated his ethical duties to properly represent his alien clients and to competently perform the legal services that he had a legal duty to perform; (2) repeatedly accepted more immigration cases than he and his law office could properly handle; (3) routinely "placed his interests above those of his clients" by permitting nonattorneys to prepare and file his clients' immigration applications, pleadings, and other documents with the immigration court and BIA; and (4) consistently "demonstrated a profound lack of understanding of his duty of fidelity to his clients." **[11a]** Second, as the second count of uncharged misconduct on which we independently conclude that respondent is culpable and consider as aggravation, we find that, from at least mid-1995 through late 1997, respondent engaged in a course of practicing law that was reckless and involved gross carelessness. **[10c]** The hearing judge's and our independent findings, individually and collectively, not only negate respondent's claims of unintentional acts and omissions, simple negligence, honest mistakes, and good faith, but also preclude a finding of good faith mitigation under standard 1.2(e)(ii).

[12] As the Supreme Court explained more than 40 years ago with respect to the duty of attorneys to keep adequate records of client funds, " '[t]he purpose of keeping proper books of account, vouchers, receipts, and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called into question, whether in litigation with their clients or in disciplinary proceedings and it is a part of their duty which accompanies the relation of attorney and client. The failure to keep proper

28. **[9b]** These arguments place respondent's methods of practicing law in issue so that any impropriety in them may appropriately be considered as aggravation. (See *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 35-36.)

books . . . is in itself a suspicious circumstance.' [Citations.]" (*Clark v. State Bar* (1952) 39 Cal.2d 161, 174.) And, as the Supreme Court explained more than 60 years ago with respect to keeping adequate financial records, it would be a distortion of justice to permit an attorney handling client funds to escape responsibility for his misconduct by the simple act of not keeping any record or data from which an accounting might be made and the misconduct proved. (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 672.) By analogy, these principles are equally applicable with respect to the duty of an attorney to keep adequate non-financial client files and records so that an attorney's failure to keep such adequate files and records is in itself a suspicious circumstance and that justice will not permit an attorney to escape responsibility for his misconduct by the simple act of not keeping adequate non-financial client files and records from which his conduct may be reviewed and any misconduct proved. (Accord *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 715 [applying principles regarding an attorney's duty to keep adequate financial records to an attorney's failure to use written fee agreements].)

[13] In light of the foregoing Supreme Court authorities, respondent's fiduciary duties to his clients unquestionably required that he keep adequate non-financial client files and records. (Cf. *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713.) At a minimum, respondent was required to keep, for each client, an individual file that not only contained the client's name, address, and telephone number, but also all other items reasonably necessary to competently represent the client, such as a written fee agreement, correspondence, pleadings, deposition transcripts, exhibits, physical evidence, and expert reports. (Cf. rule 3-700(D)(1).) As discussed *post*, respondent failed to keep non-financial client files and records that complied with these minimum requirements.

[14] Without question, respondent's fiduciary duties to his clients also required that he develop and maintain adequate management and accounting procedures for the proper operation of a law office.[29] **[15 - see fn. 29]** (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726-727.) At a minimum, respondent was required to develop and maintain procedures for: the proper maintenance and protection of client files; calendaring court hearings and filing deadlines; tracking court hearing dates and filing deadlines to insure they are not missed; tracking correspondence and client communications; secure handling and accurate accounting of client trust funds and other property. (See State Bar Ct. Std. Conditions of Probation, condition 19;[30] see also State Bar Trust Acct. Record Keeping Stds. (adopted by Bd. of Governors, eff. Jan. 1, 1993, pursuant to rule 4-100(C)).) In addition, respondent was required to train his staff with respect to these procedures and to employ adequate safeguards to insure that his staff actually followed the procedures. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858.) In short, respondent was required to "accept responsibility to supervise the work of his staff." (*Ibid.*) As noted *post*, respondent failed to fulfill any of these requirements.

[11b] In short, the facts in this proceeding "disclose an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends." (*Waterman v. State Bar* (1936) 8 Cal.2d 17, 21.) Such recklessness and gross carelessness, even if not deliberate or

29. **[15]** Of course, respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3-110(A)), to adequately communicate with his clients (rule 3-500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4-100).

30. When used, standard condition 19 requires a disciplined attorney to develop an approved law office management plan which, at a minimum, "must include procedures to send periodic reports to clients, the documentation of telephone messages sent and received, file maintenance, the meeting of deadlines, the establishment of procedures to withdraw as attorney, whether of record or not, when clients cannot be contacted or located, and for the training and supervision of support personnel."

dishonest, violate "the oath of an attorney to discharge faithfully the duties of an attorney to the best of his knowledge and ability and involve moral turpitude, in that they are a breach of the fiduciary relation which binds him to the most conscientious fidelity to his clients' interests. [Citations.]" (*Simmons v. State Bar* (1970) 2 Cal.3d 719, 729; accord *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978, and cases there cited.) Even repeated acts of mere negligence and omission involve moral turpitude and "prove as great a lack of fitness to practice law as affirmative violations of duty." (*Bruns v. State Bar*, *supra*, 18 Cal.2d at p. 672.)

1. Respondent's excessive case load & inadequate support staff.

a. 1995.

Respondent handled approximately 20 immigration cases in 1995. Respondent employed a secretary for one or possibly two months in 1995.

Even though respondent unequivocally testified that he did not employ a paralegal in 1995, the record establishes that he employed paralegal Victor M. Enriquez (hereafter paralegal Enriquez) in 1995. First, respondent's unequivocal testimony that he did not employ a paralegal in 1995 is impeached by his own later testimony.[31] Second, paralegal Enriquez's business card itself is documentary evidence that respondent employed a paralegal in 1995.[32] **[16 - see fn. 32]** As the hearing judge noted, paralegal Enriquez's business card has both the name "Law Offices of: James Robert Valinoti" *and* the insignia "JV & Associates" printed at the top. According to respondent, "JV & Associates" (hereafter JV) is a partnership between Javier Nunez and Vicente Enriquez,[33] who are both nonattorney immigration services providers who refer immigration clients to respondent.[34] **[17a - see fn. 34]** On paralegal Enriquez's business card there is only one address. As discussed *post*, that address is the address of the offices that respondent shared with JV in 1995.

b. 1996.

In 1996, respondent employed Veronica Lopez (hereafter Lopez or secretary Lopez) as a full-time secretary from April 1996 until late November 1996. For approximately two weeks thereafter, Lopez did a very small amount of work for respondent. Lopez

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31. While testifying in defense to misconduct charged in the Maya-Perez client matter, respondent testified that he had sufficient records to prove that the fee he charged and collected in that matter was reasonable. In describing the work that he and his law office performed to earn the fee, respondent unequivocally testified that, on November 8, 1995, when he and Maya-Perez met for the first time, they met at his law office for "[p]robably a little over an hour . . . , and then she spent more time with *my paralegal*." (Italics added.)

32. **[16]** The hearing judge correctly admitted this business card into evidence over respondent's sole objection that the State Bar did not produce it during formal discovery. Moreover, because the hearing judge admitted the business card without limitation and without any hearsay objection from respondent, we may and do consider it for the truth of the matter stated. (*People v Sangani* (1994) 22 Cal.App.4th 1120, 1142; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865; see also *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 649.)

33. Vicente Enriquez is the father of paralegal Enriquez. To distinguish between Vicente Enriquez and his son, paralegal Enriquez, we refer to Vicente Enriquez as Mr. Enriquez.

34. **[17a]** By permitting the name and title of "Law Offices of: James Robert Valinoti" to be printed on the same business card bearing the insignia of the nonattorney partnership of "JV & Associates," respondent appears to have violated section 6105, which proscribes an attorney from permitting his name and title as attorney to be used by a nonattorney. Moreover, even assuming arguendo that respondent's testimony that he had no business relationship with JV other than accepting immigration matter referrals from JV is true, then paralegal Enriquez's business card (which clearly represents that respondent and JV had a business relationship and that they jointly employed paralegal Enriquez), would violate rule 1-400(D)(2)'s proscription against attorney communications, including business cards (rule 1-400(A)(2)), containing any matter or presenting or arranging any matter in a manner or format which, inter alia, is false or deceptive or tends to confuse or mislead. Because respondent's misconduct in permitting his name and title to appear with JV's insignia on paralegal Enriquez's business card supports our conclusion that respondent aided and abetted nonattorneys to engage in the unauthorized practice of law, we do not separately consider it as additional uncharged misconduct aggravation.

spent each morning with respondent at the immigration court acting as his translator for his Spanish-speaking clients and spent each afternoon doing secretarial work in respondent's law office. The record does not establish whether anyone served as respondent's translator in the afternoons or in the mornings after Lopez quit in late November.

From approximately March 1996 to late November 1996, respondent employed, as a "kind of part time" secretary, someone respondent testified was named Roxanne, but whom Lopez testified was named Rosanna (hereafter Rosanna). Even though respondent employed Rosanna for approximately nine months and presumably paid her (withholding, reporting, and paying her state and federal employment taxes) throughout those nine months, he could not remember her last name.

In either November or December 1996, respondent hired Lupe Becerra as his full-time secretary. Becerra worked for respondent until June 1997. Respondent denied employing a paralegal in 1996.

Respondent testified (1) that, from approximately February through August 1996, he employed, as an associate attorney, an attorney who we refer to as attorney Kazarian and (2) that, for a few months "sometime" during 1996, he employed, either as an associate attorney or an independent contractor, a second attorney who we refer to as attorney Peak. Respondent's testimony, however, is impeached by Lopez's credible, disinterested, and unchallenged testimony that, while she worked for respondent in 1996, she and Rosanna were respondent's only employees. Lopez's testimony is consistent with the very limited office space respondent had for most of 1996.

Respondent's law office handled more than 1,000 immigration cases in 1996. Respondent estimates that he was the attorney of record in at least 400 or 500 of those cases. Presumably, other attorneys associated with respondent's office were the attorneys of record in the remaining cases.

According to respondent he made an average of four immigration court appearances each morning and four each afternoon in 1996. We accept respondent's testimony that he made an average of four appearances each afternoon in 1996, but reject his testimony that the made an average of four appearance each morning because it is impeached by Lopez's credible, disinterested, and unchallenged testimony that, when she worked for respondent, he made between five and seven appearances each morning.[35] **[18 - see fn. 35]** Lopez did not know how many appearances respondent made each afternoon because, as noted *ante*, she worked in respondent's law office in the afternoons and because she did not keep respondent's calendar. Respondent personally "kept" or "maintained" his own calendar. In conclusion, we find that respondent made between five and seven court appearances each morning and that he made an average of four appearances each afternoon in 1996. Moreover, the record suggests that respondent made at least this same number of appearances each day in 1997.

c. 1997.

Becerra was the only secretary respondent employed in 1997. And, as noted *ante*, she worked for respondent until June 1997. In 1997, respondent employed a paralegal named Ezekiel Bahena, who was still working for respondent at the time of trial in the hearing department.

In December 1997, respondent hired, as an independent contractor, an attorney we refer to as attorney Mehrpoo. When he hired her, attorney Mehrpoo had no immigration law experience; in fact,

35. [18] Lopez's testimony is supported by the disinterested and credible statement Immigration Judge Ronald N. Ohata made, during a November 1996 hearing in the Israil matter, that respondent was making between six and ten appearance each morning in 1996. Because the transcript of that hearing was admitted for all purposes without any hearsay objection, we may and do consider it for the truth of the matters stated. (See footnote 32, *ante*, page 26, and cases there cited.) We rely on Immigration Judge Ohata's statement to the extent that it supports Lopez's testimony and contradicts respondent's testimony.

she had *just* become a member of the State Bar. As the hearing judge aptly noted with justifiable concern, respondent permitted attorney Mehrpoo to make court appearances by herself in his immigration cases after giving her only three weeks of very informal training. She worked between 30 and 40 hours a week and made approximately four court appearances a day. She worked for respondent until March 1998.

Even though respondent failed to disclose these facts when testifying in response to the State Bar's detailed questioning regarding his office staff, the record establishes that he employed an attorney who we refer to as attorney Hovsepian in March 1997 and an attorney who we refer to as attorney Arias in summer 1997. By 1997, respondent's law office had more than 1,700 immigration cases. Respondent estimates that he was the attorney of record in 1,000 of those cases and that other attorneys associated with his law office were the attorneys of record in the remaining case.

2. Respondent's many law offices.

When respondent first opened his own law practice in 1995, he shared office space with JV at 9452 Garvey Avenue, Suite D, El Monte, California.[36] Initially, respondent unequivocally testified in the hearing department that he maintained his law office on Garvey Avenue until January 1996 when he moved it to 4605 Lankershim Boulevard, Suite 418, North Hollywood, California.[37] However, respondent later impeached that unequivocal testimony by testifying later in the hearing that, from "December of '95 through part of January '96," his law office was located at 1543 West Olympic Boulevard and that he did not move his office to Lankershim Boulevard until either the end of January or the beginning of February of 1996.[38] Yet, all of respondent's testimony and credibility as to when and where he moved his office after he moved out of his Garvey Avenue office are impeached by documentary evidence. First, respondent listed his office address as 1306 Wilshire Boulevard, Suite 104, Los Angeles, California in (1) an immigration court pleading that he signed and filed in the Maya-Perez matter on January 16, 1996, and (2) the Form EOIR-28 that he signed and filed in the Padilla matter on February 2, 1996. Second, respondent listed his office address as 124 West 2nd. Street, Los Angeles, California in an immigration court pleading that he signed and filed in the Calderon matter on January 22, 1996.

Whenever respondent truly moved his office to Lankershim Boulevard, he sublet from and shared office space with Hratch Baliozian, who is a nonattorney immigration services provider who re-

36. While testifying in the hearing department, respondent denied that he shared offices with JV. However, his denial was not clear nor unequivocal. Moreover, the hearing judge made inconsistent findings on whether respondent shared an office with JV. Our finding that respondent shared offices with JV is supported by at least the following three factors. First, respondent specifically admitted that the building on Garvey Avenue was a small office building and that, as soon as you walked in the front door, there was a "shared" area for the offices, which respondent describes as a combined reception and hallway area. Second, respondent testified that his law office was in suite D of the building on Garvey Avenue, and suite D is the same suite that is listed in the address on paralegal Enriquez's business card. Third, as we discuss in further detail *post*, while in the offices on Garvey Avenue, Mr. Enriquez "pointed" respondent out to Rodolfo Baza-Salgado and identified him as an attorney associated with JV who would represent the Rodolfo Baza-Salgado and his wife in immigration court.

37. Respondent admits that, for the more than 10 months that his office was on Lankershim Boulevard, his business cards incorrectly listed the office's address as being in Universal City instead of North Hollywood.

38. Respondent's repeated inability to testify consistently as to the locations of his law offices not only highlights the difficulty that his alien clients (who did not understand English) had keeping up with and locating him, but it reflects adversely on his credibility as a witness in general, particularly in light of the fact that he testified that, before trial, he "checked about" all of his old office addresses at the request of his counsel in the hearing department. It is clear from his findings and culpability conclusions that the hearing judge repeatedly rejected respondent's testimony and determined that respondent simply was not a credible witness. Because the record clearly supports these repeated adverse credibility determinations, we give them great weight. (See Rules Proc. of State Bar, rule 305(a).)

fers immigration clients to respondent.[39] Their office space consisted of a common reception area and two small offices. One of the offices was used by Baliozian and his staff, and the other one was used by respondent and his staff. Respondent testified that both the names "Law Offices of James R. Valinoti" and "Hratch Baliozian" were on the front door leading into respondent's and Baliozian's shared office space.[40] **[17b - see fn. 40]**

The only furniture in respondent's office was a desk, which respondent, Lopez, and the second secretary shared; a credenza; and a shelf-type cabinet. There was no filing cabinet. Respondent kept all of his client files, which according to Lopez's and respondent's testimonies totaled no more than 200, in one or two boxes on the floor next to his desk. There was no office equipment in respondent's office other than perhaps a telephone. However, in Baliozian's office, there was a computer and a printer, which respondent's secretaries were allowed to use for writing letters and drafting notices. Respondent might have owned the printer.

Respondent continued sharing office space with Baliozian on Lankershim Boulevard until he and Baliozian were evicted in mid-November 1996 because Baliozian did not pay the rent. Contrary to respondent's testimony that he and Baliozian were evicted in October 1996, Lopez's credible, unchallenged testimony and the documentary evidence establish that they were evicted in mid-November 1996. Respondent testified that, during November and December following his and Baliozian's eviction, he (i.e., respondent) "was moving" his office to 3540 Wilshire Boulevard, Suite 322, Los Angeles, California and that he maintained his office at that address on Wilshire Boulevard until July 1997. However, respondent's testimony and credibility are again impeached by the documentary evidence in the record in this proceeding. On December 16, 1996, the immigration court served a copy of an IJ's order in the Gonzalez matter on respondent at 1543 West Olympic Boulevard, Suite 231, Los Angeles, California, which was the office address that respondent then maintained with the immigration court.[41]

Respondent testified that, in July 1997, he moved his office from 3540 Wilshire Boulevard to 510 West Sixth Street, Suite 924, Los Angeles, California and that, in November 1997, he moved his office from suite 924 to suite 515 in the same building on West Sixth Street.

3. Respondent failed to properly maintain his official state bar address.

[19a] Like the hearing judge, we take judicial notice of respondent's official State Bar membership records. As the hearing judge found, those records establish that respondent repeatedly violated his duty, under section 6002.1, subdivision (a), and Rules and Regulations of the State Bar, article I, section 1, to maintain, on the official membership records of the State Bar, his current office address and telephone number (hereafter official State Bar address). Respondent never notified the State Bar of the addresses and telephone numbers of the offices he shared with JV on Garvey Avenue or of the offices he shared with Baliozian on Lankershim Boulevard. Nor did respondent ever notify the State Bar of the offices he had on 1306 Wilshire Boulevard, West 2nd Street, or West Olympic Boulevard. In fact, the first law office respondent ever notified the State Bar of was his office on 3540 Wilshire Boulevard and, even then, his notification was not timely. Furthermore, respondent never notified the State Bar of his office in suite 924 at 510 West Sixth Street. Finally, even though respondent notified the State Bar of his office in suite 515 at 510 West Sixth Street, he did not do so until after he had been there for one year.

39. Respondent testified that he obtained approximately 50 alien client referrals from Baliozian.

40. [17b] Respondent's posting of his law offices' name on the same door with Baliozian's name raises the same issues we discussed *ante* in footnote 34.

41. The copy of the notice is unclear; the street address may be 1542 instead of 1543.

[19b] Respondent also violated section 6002.1, subdivision (a), from July 1994 through March 1997 because, throughout that time period, respondent maintained post office boxes as his official State Bar addresses. This authority expressly mandates that attorneys maintain their current *office* addresses and telephone numbers as their official State Bar addresses; it is only when an attorney does not have an office that he is permitted to maintain some other address and telephone number as his official State Bar address. (Accord *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 246, fn. 19.) **[20]** In addition to the multiple State Bar administrative and investigative purposes, attorneys must maintain their current office addresses and telephone numbers as their official State Bar addresses to establish a bar-wide database of every attorney's office address and telephone number from which clients may locate their attorneys should they lose contact with them. The importance of such a listing is highlighted by the facts in this case, which show that a number of respondent's clients could not contact him about their cases because he repeatedly moved his law office without notifying them and his many other clients.

4. Respondent failed to notify his clients, the immigration court and postal service of his many changes of address.

a. Respondent's clients.

Respondent admits that he did not notify all of his clients each of the four times he moved his office between 1995 and 1997. He does, however, claim that he sent out "hundreds" of change of address notices to his clients with respect to one or maybe more of his moves, but he could not specify when the notices were mailed out or which move or moves they pertained to. We reject respondent's unsubstantiated claim.

In addition, respondent testified that he kept the addresses of his clients in the notebook-size, yearly calendars that he carried with him to court each day and, for a very brief time period, in a "hand-held computer organizer." Respondent further testified that his "office did the best [it] could to send out notices to everybody" whose address was listed in either his notebook-size calendars or his hand-held computer organizer. However, respondent also testified (1) that, in April 1996, someone broke into his car and stole his briefcase containing his 1996 calendar and (2) that, in June 1997, someone again broke into his car and stole his briefcase containing his 1997 calendar and his hand-held computer organizer. Even if we were able to accept as credible respondent's testimony that he kept his clients' names and addresses in his calendars and hand-held computer organizer, he could not have notified the clients listed in his stolen 1996 calendar when he moved his office in late 1996 or January 1997. Likewise, he could not have notified the clients listed in either his stolen 1996 calendar, his stolen 1997 calendar, or his stolen hand-held computer organizer when he moved his office in July 1997 or when he moved in November 1997.

Moreover, as discussed in detail *post*, we not only reject respondent's testimony that he kept his clients' addresses in his calendars and hand-held computer organizer, but also find that he failed to keep any client records in all but a limited number of his cases. Thus, respondent could not have and did not sent out "hundreds" of change of address notices as he testified.

b. The immigration court.

Almost all the notices (e.g., notices of hearing dates, orders, and decisions) that the immigration court sends out each year are generated and addressed by the court's central computer system. The court's central administrative office maintains a centralized computer data bank that contains, inter alia, the name and address of the attorney of record for the alien in each case. When the court's computer system generates a notice, it automatically addresses the notice using the name and address of the alien's attorney of record as contained in the centralized data bank. As a result, attorneys who move their offices are required to submit only a single change of address notice to the court's administration office, which promptly updates its centralized data bank.

Even though respondent testified that he promptly notified the immigration court's central administrative office each time he moved his office between mid-1995 and late 1997, he did not proffer a con-

formed copy of any change of address notice to corroborate his testimony. Moreover, respondent's testimony is incorrect, at least, with respect to when he moved his office from 3540 Wilshire Boulevard to 510 West Sixth Street, Suite 924, in July 1997. On October 8, 1997, the immigration court served a computer-generated notice in the Ramirez matter on respondent at his old address on 3540 Wilshire Boulevard. Had respondent promptly notified the immigration court of this July 1997 move as he testified, the court would have updated its centralized data bank and served the notice on respondent at his new address on West Sixth Street address. (Evid. Code, §§ 606, 664 [in the absence of proof establishing the contrary, official duties are presumed to have been regularly performed].)

It is clear that, sometime after October 8, 1997, respondent notified the immigration court of his July 1997 office move because, on December 23, 1997, the court served another computer-generated notice in the Ramirez matter on respondent at his office at 510 West Sixth Street, Suite 924. Yet, because the court served that December 1997 notice on respondent at his office in suite 924 in the building at 510 West Sixth Street, it is clear that he failed to promptly notify the court when he moved his office from suite 924 to suite 515 in that building in November 1997.

c. The postal service.

As far as he can recall, respondent thinks he notified and provided his new office address to the United State Postal Service each of the four times he moved his office between 1995 and 1997. However, the failure of the postal service to forward a number of letters and court notices to respondent's new office addresses strongly suggests otherwise. Likewise, the fact that the postal service continued to deliver respondent's mail to his old office addresses where it was accepted on respondent's behalf strongly suggests that respondent did not properly and timely notify the postal service of his changes of address. Thus, we find that respondent not only failed to properly and timely notify each of his clients and the immigration court of his four moves, but that he also failed to properly and timely notify the postal service so that, if nothing else, it could forward respondent's mail to his new offices.

5. Respondent failed to maintain adequate client records.

At least from mid-1995 through late 1997, neither respondent nor his staff kept a listing of the names, addresses, and telephone numbers of respondent's thousands of clients. Nor did they keep a record of most of the legal fees respondent earned in his immigration cases even though they totaled in the hundreds of thousands of dollars each year and, according to respondent's testimony, were often paid to him in cash. Even though he had thousands of clients, the record establishes, at best, that he maintained only the following limited files: (1) 200 client files that he kept in one or two boxes on the floor in his office on Lankershim Boulevard; (2) a small number of skeletal client files that he made while at the immigration court;[42] and (3) limited client records respondent personally wrote in his notebook-size calendars and hand-held computer organizer.

Respondent testified in the hearing department that, during the 10 months that he shared office space with Baliozian in 1996, he maintained the following information for each of his immigration clients in the computer that respondent, Baliozian, and their staffs shared: (1) the client's name, address, and telephone number; (2) the next court hearing in the case; (3) the filing dates; and (4) "all the basic calendaring information and – calendaring information slash client

42. Respondent testified that he made the client files out of empty file folders he carried to court with him in his briefcase. Respondent claims that he did this on a regular basis, but the record strongly indicates that he did not. Respondent claim is clearly false at least with respect to the eight months' that Lopez worked for him in 1996. As noted *ante*, the testimony of respondent and Lopez establish that respondent had no more than 200 client files in 1996. In any event, respondent admitted that the files he made at court were skeletal and almost always contained only (1) the clients' asylum applications and copies of the deportation OSC's and (2) the clients' names, addresses, and telephone numbers. In sum, we reject respondent's claim that he made client files on a regular basis at the immigration court.

database." Respondent asserts that the computer was his. According to respondent, when he and Baliozian were evicted, Baliozian's "people were there and they were basically walking out with files and my computer and printer" and he (i.e., respondent) "was never able to recover [his] computer or [his] printer and some of [his] files."

However, when viewed in light of the entire record, respondent's testimony was neither probative (e.g., respondent admitted that he did not "know how many clients were on that [purported] database at the time the computer was taken") nor believable. Moreover, it was impeached by his own inconsistent testimony in the hearing department. Respondent unequivocally testified that, in June 1996, the only places he recorded "important dates" were (1) the notebook-size calender that he took with him to court each day and (2) his client files. In addition, respondent's testimony is inconsistent with Lopez's disinterested and credible testimony, which respondent did not challenge, that no client information was stored in the computer and that respondent's staff used it only to draft letters and notices.

Moreover, respondent did not proffer any evidence on what steps he took to recover this purportedly stolen computer and printer. Specifically, respondent never testified that he reported it to the police as being stolen or that he even asked Baliozian to recover them for him. Even assuming that respondent owned the computer and that he did store important information regarding his clients in the computer, it would raise additional ethical concerns. It would be reckless for an attorney to store important client information on a computer that he shared with a nonattorney immigration services provider and that he stored in that provider's separate office.

Equally self-serving and unbelievable is respondent's testimony that, in his notebook-size calendars he maintained the following detailed information for each of his thousands of immigration clients: (1) the client's name, address, and telephone number; (2) the name of the IJ presiding over the client's case; (3) a description and the date and time of every hearing scheduled in the client's case; and (4) a notation of every filing deadline in the client's case. Moreover, in light of the record as a whole, his failure to produce even one of his calendars to support his testimony is a strong evidence that it is not just implausible and unbelievable, but deliberately false. (See, e.g., Evid. Code, §§ 412, 413; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122 [a witness's failure to produce corroborating documentary evidence is an indication that the witness's testimony is not credible]; *Breland v. Traylor Eng.etc., Co.* (1942) 52 Cal.App.2d 415, 426 [when a party fails to introduce evidence that would naturally have been produced, the trier of fact may properly infer that the evidence is adverse to the party].)

6. Respondent failed to properly protect client records.

From at least mid-1995 through late 1997, respondent was reckless and grossly careless in protecting his clients' records and files. He displayed very little regard for the 200 client files he kept in one or two boxes on the floor of his office on Lankershim Boulevard, his calendars, and his hand-held computer organizer.

Secretary Lopez credibly testified as follows. When respondent and Baliozian were evicted from their office space on Lankershim Boulevard in mid-November 1996, she was unable to promptly notify respondent of the eviction because respondent was out of town. When she went to the office the Saturday morning following the eviction, almost everything was gone from the office space except respondent's 200 client files. When she telephoned respondent at his home that Saturday morning and told him of the eviction, respondent told her that he did not want to go to the office and instructed her to "try to get as much as you can" and to bring the client files to him at his home. When she delivered the 200 client files to respondent at his home, respondent told her that he did not have room to keep them and instructed her to keep them. She kept all 200 files in her car for approximately one week. Thereafter, she gave them to a friend. That friend stored the files in her office until respondent claimed them approximately one week later.

Lopez further credibly testified that none of respondent's files were stolen when respondent and

Baliozian were evicted. Respondent, however, testified (1) that the file in one or more of the nine client matters that are the subject of this disciplinary proceeding was stolen at the time of the eviction and (2) that the "stolen" file or files should contain proof that would exonerate him on some of the disciplinary charges. Respondent's testimony is speculative. When initially questioned in the hearing department, respondent could not identify which or how many client files were purportedly stolen. Later, he testified that the file in the Padilla matter was missing after the eviction. Even if he could identify which client files were stolen, it would still not justify his admitted failure to take any precaution whatsoever to prevent Baliozian, Baliozian's staff, or the building's landlord from stealing his clients' files whether during the eviction process or otherwise.

Moreover, respondent testified that, after the eviction, Lopez brought the files to his house, that he stored the files in his house, and that he did not see Lopez again for a couple of months. Respondent's testimony and credibility as a witness is again impeached by his own inconsistent statements. During a November 22, 1996, immigration court hearing in the Gonzalez matter, respondent made the following statements to the IJ: "My only concern is my office has been in somewhat of a disarray, as I previously told you. My lessor, from whom I used to sublease, apparently did not pay rent for approximately five or six months, and subsequently, *all my files are presently in my secretary's home*." (Italics added.)

As noted *ante*, respondent testified that his 1996 calendar was stolen out of his car in April 1996 and that his 1997 calendar and hand-held computer organizer were stolen out of his car in June 1997. Respondent admitted that, after his 1997 calendar was stolen, he purchased a new calendar for 1997. But when the hearing judge asked respondent whether he still had that new calendar to show how respondent kept detailed client records in it, respondent answered that he did not know whether he still had it. Respondent never proffered his new 1997 calendar or any other calendar into evidence. Moreover, respondent offered no reason to justify his leaving what he asserts were his key client records in his car unattended.[43]

7. Respondent's repeated failures to properly file his clients' pleadings and to properly appear at his clients' immigration court hearings.

Respondent claims that he would record filing deadlines and hearing dates in his calendar by writing down the client's name and address, the name of the IJ, and the filing deadlines and hearing dates with descriptions as to what they were for. Even if accurate, this alleged practice of recording this crucial information in his calendar proved effectively useless in light of the repeated theft of respondent's briefcase and calendars.

Moreover, while respondent and secretary Lopez both testified that, as filing deadlines and as court appearance dates approached, they called the referring immigration services providers and the alien clients to verify that the documents or pleadings were prepared and timely filed, the hearing judge rejected this testimony, and so do we. Respondent's testimony on this issue is impeached by his own admissions in a number of the eight immigration services providers client matters that he did not take such actions.

In sum, during much of the time period between mid-1995 and late 1997, respondent spent most days at the immigration court making his many appearances. He spent little time at his law office. He routinely agreed to make multiple appearances in different cases even though the hearings in which he was to appear were set at the same time and before different IJs. At that time, there were at least 19 IJs in Los Angeles with courtrooms on various floors of either the Federal Building on North Los Angeles

43. Also troubling is respondent's admissions that, after his calendars were stolen, he obtained computer printouts from the immigration court's central administrative office that listed all of the scheduled hearings in each of his cases, but that he did not use those printouts to reconstruct replacement calendars that accurately listed the dates and times of all of the hearings in his cases. According to respondent, he did not use the printouts because they were too voluminous and were not in either alphabetical or date order.

Street or of the Roybal Center and Federal Building on East Temple Street. He also had multiple immigration court hearings and merits hearings (i.e., trials) set for the same time. He did not proffer an explanation as to how he could try more than one immigration case at a time.

Obviously, respondent "ran" from courtroom to courtroom looking for his clients (often times having to also look for someone to translate for him so that he could communicate with his clients), checking in with the court clerks,[44] and checking with the court clerks regarding the calendar placements for his hearings. It is not surprising that respondent was repeatedly late for and missed court appearances or that respondent had a well-known reputation for such. Respondent also repeatedly missed filing deadlines. And, as far as we can determine, he never properly sought an extension of time or properly requested a continuance of a hearing. At the November 1996 hearing in the Israil case referred to *ante*, Immigration Judge Ohata admonished an attorney from respondent's law office: "Mr. Valinoti knows he's overbooked. Most attorneys have maybe one or two hearings set. He has anywhere from six to ten set each morning or afternoon, and he's all over this courthouse. The result is his clients are not represented in court."

We now consider the specific nine client matters forming the basis of the charges against respondent. We first consider the eight client matters that were referred to respondent by immigration services providers, and second consider the one client matter that may not have been referred to respondent by a provider.

V. THE NINE CLIENT MATTERS.

A. The eight client matters referred to respondent by immigration services providers.

1. The Padilla matter.

In response to a television advertisement for Cal State Legal Services (hereafter SIG), which is a nonattorney immigration services provider, Emilio Padilla hired SIG in August 1995 to get a green card for him. Padilla is a national of Mexico. Completion of the sixth grade was the extent of Padilla's formal education. From early 1993 through June 1999, Padilla worked as a machine operator for the same Los Angeles area company. However, that company fired Padilla in June 1999 because his work permit expired and because he still had not obtained his green card. At all relevant times, Padilla did not speak, read, write, or understand English.

When Padilla went to SIG, he dealt solely with a woman identified to him only as Veronica.[45] SIG's fee was $2,000. By May 1996, Padilla had paid SIG $700, leaving Padilla owing a balance of $1,300.

SIG prepared an asylum application for Padilla; in support of which, Padilla gave SIG a number of documents relating to his residency in the United States. Thereafter, Veronica met with Padilla in August 1995 and instructed him to sign the application, which he did. As noted *ante*, by signing the application, Padilla certified, under penalty of perjury, that the facts in it and its supporting documentary evidence were true and correct. Padilla admitted while testifying in the hearing that he did not read the asylum application before he signed it. However, he also credibly testified that he could not have read it before he signed it because it was written and answered entirely in English, which he did not read or understand.

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44. Although the testimony of one IJ indicates that respondent may not have always been checking in with a court clerk. According to that IJ, his clerk was in his courtroom only on master calendar days, and at least once, respondent improperly checked in with a court interpreter and then left to go to another courtroom.

45. The Veronica who worked at SIG is not Veronica Lopez who worked for respondent in 1996. We refer to the Veronica who worked for SIG as Veronica or as Veronica at SIG. And, as noted *ante*, we refer to the Veronica, who worked for respondent, by her last name of Lopez or by secretary Lopez.

In September 1995, SIG filed the application with the INS without signing the preparer's declaration to disclose that it prepared the application and to certify that it read the completed application to Padilla in Spanish for purposes of verification before he signed it. The INS interviewed Padilla on his asylum application in December 1995.

While testifying in the hearing department, Padilla admitted, that during that December 1995 interview, he lied to an INS official by falsely telling the official that the facts in his application and supporting evidence were true and correct. Padilla is one of the witnesses whose credibility respondent attacks on the basis that Padilla signed his asylum application under penalty of perjury and then answered "yes" to the INS official's question, at his asylum interview, as to whether the facts in his application and its supporting evidence were true when he knew that they were not. As we stated *ante*, we reject respondent's attacks on the credibility of his clients.

There is no evidence that indicates, much less establishes, that Padilla knew what facts were in his asylum application before he signed it or that he knew that, by merely signing the application, he was certifying, under penalty of perjury, that the facts in it were true and correct. Likewise, the evidence does not indicate, much less establish, that Padilla knew what facts were in his application and its supporting evidence when he answered "yes" to the INS official's question at his asylum interview. In fact, the only evidence on the issue indicates that Padilla did not learn that there were false statements of fact in his application until sometime after his asylum interview. Furthermore, Padilla is one of the witnesses whom the hearing judge expressly found to be credible in the face of respondent's attacks. Again, we must give that credibility determination great weight. (Rules Proc. of State Bar, rule 305(a).)

After Padilla's asylum interview, the INS denied Padilla's application and initiated a deportation proceeding against him by filing in the immigration court and serving on him an OSC ordering him to appear before an IJ in Los Angeles on February 2, 1996, and show cause why he should not be deported. Veronica at SIG made arrangements with respondent's secretary Lopez for respondent to represent Padilla at this February 2, 1996, hearing.[46] SIG paid respondent $100 for the appearance.

Veronica at SIG gave respondent's name and physical description to Padilla and told Padilla to meet respondent outside of the immigration court shortly before the February 2, 1996, hearing. Respondent met briefly with Padilla before the hearing, but they did not discuss Padilla's case. Respondent and Padilla signed a Form EOIR-28, which respondent filed, and Padilla gave respondent various documents regarding Padilla's employment, taxes, and residences in the United States. At the hearing, respondent admitted the factual basis on the issue of Padilla's deportability and designated Mexico as Padilla's country of deportation. Respondent did not tell the IJ that SIG had prepared Padilla's asylum application without signing the preparer's declaration.[47] He did, however, at least withdraw Padilla's application. Respondent also requested suspension of deportation relief for Padilla and, in the alternative, voluntary departure in lieu of deportation. The IJ ordered Padilla's application for suspension of deportation be filed by April 1, 1996,

46. The parties, the hearing judge, and the reporter's transcript of this February 2, 1996, immigration court hearing refer to the hearing as though it took place on February 27, 1996. However, the deportation OSC, the Form EOIR-28 that respondent filed, the IJ's written order filed after the hearing, and the reporter's transcript of the subsequent immigration court hearing on March 28, 1997, establish that the hearing was held on February 2, 1996. Accordingly, respondent's unequivocal testimony that he attended and appeared with Padilla at an immigration court hearing on February 27, 1996, when no such hearing ever occurred is yet another example of the evidence impeaching respondent's credibility and candor as a witness.

47. We do not consider, as uncharged misconduct aggravation, respondent's failure to notify the IJ of SIG's unlawful failure to sign the preparer's declaration on Padilla's application because SIG failed to sign the application before respondent began representing Padilla and because Padilla might have conceivably, albeit very unlikely, permitted SIG to file his application with the INS without signing the preparer's declaration. (Cf. § 6068, subd.(e).)

and set the application for a merits hearing on July 25, 1996. Further, the IJ admonished Padilla to cooperate with his attorney (i.e., respondent) in preparing the application and to secure for respondent all the necessary documents. The IJ also instructed Padilla: "Now, *your attorney* has a deadline for filing that application [for suspension of deportation]. *He* must file it by a certain date, and *he* must have that documentation." (Italics added.) Even though respondent heard the IJ give these instructions to Padilla and even though respondent knew that SIG, not he, would be preparing Padilla's application, respondent did not disclose this fact to the IJ, but instead permitted the IJ to believe that he (i.e., respondent) would be preparing and filing Padilla's application.

In early summer 1996, the immigration court sua sponte continued Padilla's July 1996 merits hearing until March 28, 1997, at 1:00 p.m. and properly notified respondent of the continuance. But respondent never told Padilla. Nonetheless, in either late 1996 or early 1997, Padilla somehow learned of the new hearing date.

As the hearing judge found, Padilla was unable to speak with respondent following the February 1996 hearing and neither SIG nor respondent told Padilla how to contact respondent. Therefore, Padilla returned to SIG's office the next day, and Veronica told him that SIG would prepare all of the "papers" and give them to respondent in time for the "following court date." Yet, SIG did not do so. Moreover, respondent did not call SIG to verify whether it had prepared and filed Padilla's application for suspension of deportation nor did respondent prepare and file the application himself before the filing deadline. We do not rely on respondent's failure to contact SIG to verify that it had prepared and filed Padilla's application to support a finding of misconduct because, had respondent contacted SIG, he would have engaged in an additional act of aiding and abetting SIG to represent aliens in violation of federal law and to engage in the unauthorized practice of law. Nonetheless, we do consider respondent's failure to contact SIG as strong evidence of respondent's inability to understand his professional obligation to competently represent Padilla and to comprehend the extreme peril to which he exposed Padilla by relying on and permitting SIG to prepare Padilla's application.

Later, Padilla returned to SIG's office on a couple of occasions, but their office was not open. Eventually, Padilla learned that SIG's office was abandoned. Thus, he started looking for respondent, but could not find him. Padilla ultimately got respondent's address and telephone number from either the INS or the immigration court and, thereafter, promptly spoke with respondent's office and made an appointment to meet with respondent. Even though respondent knew that Padilla's application was due by April 1, 1996, respondent did not meet with Padilla until May 8, 1996.

Respondent and secretary Lopez met with Padilla on May 8, 1996. At that meeting, respondent agreed to take over the preparation of Padilla's paperwork from SIG and to accept the $1,300 that Padilla owed SIG as his attorney's fee, Lopez gave Padilla her pager number, Padilla paid respondent $500, and Padilla gave respondent additional documents to support his application for suspension of deportation. Sometime before this meeting, SIG sent respondent, at least, some of the documents that Padilla had given to it earlier.

In the hearing department, respondent admitted that he never spoke with Padilla after their May 1996 meeting, but claimed that he later saw Padilla and Lopez meeting in his law office and that he presumed Lopez was working on Padilla's case. Respondent could not recall if he prepared Padilla's application for suspension of deportation, but claimed to have prepared, in either August or September 1996, a motion for leave to file Padilla's application after the filing deadline. Respondent proffered no explanation to justify waiting until August or September, more than five months after the filing deadline, to prepare a motion for late filing when his failure to timely file the application in the first instance alone could have constituted a complete waiver of Padilla's opportunity to file the application. (8 C.F.R. § 3.31(c).)

Respondent also testified in the hearing department that Lopez was supposed to have filed the motion for late filing that he purportedly prepared, but

that Lopez failed to file it for some unknown reason. Respondent's testimony is impeached by Lopez's credible and unchallenged testimony that it would have been respondent's responsibility, not hers, to file the motion. In any event, even if respondent prepared a motion for late filing and instructed Lopez to file it, respondent's reckless manner of practicing law precludes him from claiming that Lopez's failure to file the motion was an inadvertent mistake for which he should not be held responsible. (*Vaughn v. State Bar, supra,* 6 Cal.3d at pp. 857-858.)

When respondent did not contact him, Padilla attempted to contact respondent in late 1996. Padilla tried to telephone respondent, but respondent's telephone had been disconnected apparently without a recorded notice of a new telephone number. When Padilla went to respondent's office on Lankershim Boulevard, he found that respondent was no longer there (as noted *ante*, respondent and Baliozian were evicted from that office in November 1996 for not paying rent). Respondent never notified Padilla when he moved his office to 3540 Wilshire Boulevard after the eviction.

In late November 1996, Lopez quit her job with respondent, began working as an independent immigration services provider, and opened an office in Norwalk, California. Around that same time, Padilla was somehow able to contact Lopez either by paging her on her pager or by running into her at the immigration court. Lopez told Padilla that she did not know if respondent would appear with Padilla at the March 1997 merits hearing, but that she would try to get his file from respondent. Lopez obtained Padilla's file.[48] However, Padilla thereafter had difficulty contacting Lopez. Therefore, at approximately 10:00 a.m. on the morning of the March 1997 merits hearing, Padilla went to Lopez's office in Norwalk. At that time, Lopez rapidly prepared an application for suspension of deportation for Padilla, gave it to him, and told him to take it with him to his hearing at 1:00 p.m.

Even though Padilla appeared, respondent remained his attorney of record. Accordingly, the IJ waited for respondent until 2:25 p.m. before she called Padilla's case. When the IJ called Padilla's case, she stated on the record that the hearing had been properly set and noticed for 1:00 p.m., that it was 2:25 p.m., and that respondent had not come into the courtroom or otherwise notified the court that he was detained or unavailable for the hearing. Attorney Hovsepian from respondent's law office then walked into the courtroom and told the IJ that respondent sent her to appear on his behalf because he had been called away on a family emergency, which Hovsepian did not identify for the IJ. Attorney Hovsepian admitted that she was late to the hearing because she was making a filing in federal court, a filing she presumably could have made up until the federal court's filing window closed later that afternoon or that an attorney filing service could have made for respondent.

Even though attorney Hovsepian explained to the IJ that she had only been working for respondent for one week, the IJ admonished Hovsepian over the grave situation in which respondent's failures (1) to prepare and file Padilla's application for suspension of deportation and (2) to appear for the merits hearing had placed his client. The IJ also admonished Hovsepian that this was not the first application that respondent had failed to file in her court. Next, the INS attorney stated that the INS's position was that Padilla's request for suspension of deportation relief should be deemed abandoned because respondent had not filed the application. That attorney further stated that the INS "holds the position that Mr. Valinoti has done this on numerous occasions, in front of numerous courts" and that he (i.e., the INS attorney) "can personally attest to the fact that [he has] seen at least four similar situations before other

48. Respondent testified that, sometime after his eviction, Padilla's file was missing, but respondent admitted that he did not know when the file disappeared or what happened to it, but speculated that Lopez took it without his knowledge. Lopez, who testified after respondent, testified that, while she was storing respondent's client files after the eviction, respondent told her to give the file to Padilla. However Lopez obtained Padilla's file, it is clear that she either (1) obtained it with respondent's permission or (2) was able to improperly obtain it without respondent's knowledge because of respondent's reckless conduct and failure to adequately care for his client records.

judges."[49] **[21 - see fn. 49]** Padilla then told the IJ that he no longer wanted respondent to represent him. The IJ continued Padilla's merits hearing so that he could obtain competent counsel to represent him and informed Padilla of his right to file a complaint against respondent with the State Bar. Thereafter, Padilla hire new counsel and filed a complaint against respondent with the Bar.

In the hearing department, respondent could not identify what family emergency called him away and justified his sending attorney Hovsepian to the merits hearing. Had there truly been a family emergency that would justify respondent's failure to appear without even notifying the court before the hearing, respondent certainly would have been able to recall it and recall it with at least some specificity.[50] Accordingly, we find that there was no such family emergency and that respondent instructed Hovsepian to appear for him at the merits hearing because he had not filed Padilla's application or prepared for the hearing.

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-110(A) as charged in count 8 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform in Padilla's immigration case. Respondent did not meet with Padilla before the initial hearing in Padilla's case in February 1996 to review Padilla's case and obtain the relevant facts necessary to provide Padilla with legal representation at that hearing. Respondent never prepared and filed Padilla's application for suspension of deportation or a motion for late filing. Respondent did not prepare for the March 1997 merits hearing; nor did he counsel and prepare Padilla for that hearing or otherwise tell Padilla what questions he was going to ask Padilla while Padilla was testifying at the merits hearing. Respondent failed to appear at the March 1997 merits hearing without notifying the court of his unavailability. Even though respondent sent attorney Hovsepian (a new associate attorney employee who apparently did not have any immigration court training) to appear on his behalf, he failed to establish good cause for sending her; Padilla hired respondent, not Hovsepian, to represent him. Respondent instructed Hovsepian to tell the IJ that he had been called away on a family emergency when he had not, Hovsepian appeared more than one hour and twenty-five minutes late without good cause and without notifying the immigration court of her inability to appear by the 1:00 p.m. hearing. Because of his reckless method of practicing law, respondent's is responsible for attorney Hovsepian's late appearance, which the IJ judge refused to accept as an appearance.

We also adopt the hearing judge's conclusion that respondent willfully violated rule 3-700(A)(2) as charged in count 9 by improperly withdrawing from employment and abandoning Padilla without taking steps to protect his client's interests. "Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641.) Moreover, "gross negligence in failing to communicate with clients may be construed as abandonment. [Citations.]" *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680.)

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49. [21] These facts were taken from the transcript of the March 1997 hearing, which was admitted for all purposes without any hearsay objection and which we consider for the truth of the matters stated in it. (See footnote 32, *ante*, page 26, and cases there cited.) Moreover, we consider the unsworn statements of the INS attorney and attorney Hovsepian in the transcript to be highly credible because, as attorneys, they have a professional duty to employ means only as are consistent with truth (§ 6068, subd. (d); rule 5-200(A)), because they are both largely disinterested parties, and because Hovsepian made the statements within the course and scope of her employment as attorney in respondent's law office.

50. Respondent admitted, while testifying in the hearing department, that he falsely answered, under penalty of perjury, the interrogatory the State Bar propounded to him regarding Padilla's complaints by falsely answering "that he was first consulted by Padilla in about 1996 after Padilla had already hired and paid another office to prepare and file his asylum application. . . . [Respondent] recalls making an appearance on behalf of Padilla, and going to court to attend a second hearing on behalf of Padilla, but not being able to locate Padilla in the courtroom on that date." Even though we do not consider these acts of misrepresentation under penalty of perjury as uncharged misconduct aggravation, we do consider them as further evidence significantly impeaching respondent's credibility and candor.

Even if respondent prepared, but did not file, a motion for late filing of Padilla's application, it is undisputed that respondent did not provide any legal services to Padilla after August or September 1996. At a minimum, respondent was reckless and grossly negligent in failing to communicate with Padilla. When respondent first appeared in court with Padilla in February 1996, he never told Padilla how he could be contacted. Respondent moved his law office without notifying Padilla. Respondent never told Padilla that he did not prepare and file Padilla's application for suspension of deportation. Nor did he tell Padilla the July 1996 merits hearing had been continued until March 1997; the fact that Padilla somehow independently learned of the continuance does not excuse respondent's failure to tell Padilla of it in the first instance. Respondent's complete cessation of work on Padilla's case and respondent's repeated and reckless, if not deliberate, failure to communicate with Padilla establish respondent's culpability for violating rule 3-700(A)(2). (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at p. 641; *In the Matter of Hindin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 680.)

[22] Because we rely on respondent's repeated and reckless failure to communicate with Padilla to establish respondent's culpability for violating rule 3-700(A)(2), we do not adopt the hearing judge's conclusion that respondent violated section 6068, subdivision (m), as charged in count 10, by not adequately communicating with Padilla; to do so would be duplicative. (Cf. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 43.) Accordingly, we reverse the hearing judge's culpability determination under count 10 and dismiss that count with prejudice.

Finally, based on Padilla's credible testimony, we adopt the hearing judge's finding that, after the March 1997 hearing, Padilla was unable to obtain from respondent all of the documents that SIG and he had given to respondent and that respondent's failure to return those documents to Padilla was a willful, but uncharged violation of rule 3-700(D)(1), which is an aggravating circumstance. An express element of a rule 3-700(D)(1) violation is that the client make a request on his former attorney for the return of his documents or other property. Even though Padilla admitted that he never asked respondent to return all of his documents, he credibly testified that the reason he did not do so was that he could never find respondent after the March 1997 merits hearing and that respondent had never informed him how he could contact respondent. Respondent may not avoid culpability for not returning all of Padilla's important documents by failing to inform his clients of how to contact him. Nor may respondent avoid culpability for not returning all of Padilla's documents by claiming that Padilla's file was "missing" or that Lopez lost those documents out of Padilla's file while she was storing it and respondent's other client files after the November 1996 eviction because respondent was reckless and grossly careless in his handling and protecting his client files.

2. The Gonzalez matter.

On the recommendation of a friend, Calixto Gonzalez hired the nonattorney immigration services provider Consultorio Internacional (hereafter IC) in March 1996 to get a green card. Almost all Gonzalez's dealings were with the owner of IC, who is identified in the record only as Gaston. IC agreed to handle Gonzalez's case and to prepare his "paperwork" for $1,500, which Gonzalez paid in installments; he made his final payment in September 1996. Gaston told Gonzalez that he had attorneys associated with him who would appear with Gonzalez in immigration court and that, each time one of his associate attorneys made an appearance, Gonzalez had to pay an additional $300 fee.

Gonzalez is a national of Mexico. His highest level of education is one year of secondary school, which he completed as a child in Mexico. At all relevant times, he did not speak, read, write, or understand English. During the seven years before he testified in the hearing department, he supported himself by selling corn in the streets.

IC began representing Gonzalez by preparing an asylum application for him, which he signed under penalty of perjury and which IC later filed with the INS in May 1996 without signing the preparer's declaration to disclose that IC prepared the application and to certify that it read the completed application to Gonzalez in Spanish for verification before he

signed it. Thereafter, the INS interviewed Gonzalez on his asylum application in June 1996. The INS denied Gonzalez's application and served a deportation OSC on Gonzalez ordering him to appear in immigration court on August 9, 1996. Thereafter, Gaston told Gonzalez to go to a lounge in the federal building on August 9, 1996, and to wait for the attorney who was going to represent Gonzalez in court. Gaston did not tell Gonzalez the attorney's name; instead, he told Gonzalez that the attorney would "call out" Gonzalez's name.

As a "professional courtesy" to Gaston and IC, Rene Reyes, another nonattorney immigration services provider who refers immigration clients to respondent and who often translates for respondent at the federal building, approached respondent in the federal building on the morning of August 9, 1996, and arranged for respondent to appear with Gonzalez at the hearing that afternoon. Even though Gonzalez paid IC $300 as respondent's legal fee for appearing at the hearing, IC paid respondent only $100, which Reyes paid to respondent for IC. According to respondent, it is not unusual for nonattorney providers to assist each other in finding attorneys at the immigration court to appear with their alien clients in court and in paying the attorneys for their appearances.

Before the August 1996 hearing, respondent executed and filed a Form EOIR-28 in Gonzalez's case. Respondent spoke with Gonzalez right before the hearing, but did not discuss Gonzalez's case. At the hearing, respondent admitted the issue of Gonzalez's deportability and designated Mexico as Gonzalez's country of deportation. Respondent did not tell the IJ that IC had prepared Gonzalez's asylum application without signing the preparer's declaration.[51] He did, however, withdraw Gonzalez's asylum application, request suspension of deportation relief for Gonzalez, and request voluntary departure in the alternative. Respondent told the IJ that he had a hearing before the IJ in another case on the morning of October 11, 1996, and asked if Gonzalez's application for suspension of deportation could be filed in court on that same date. The IJ agreed and instructed Gonzalez that, if he did not appear on October 11, the IJ would order him deported. Implicit in the manner in which respondent asked the IJ to have until October 11, 1996, to file Gonzalez's application was the representation that respondent, or perhaps respondent's law office, would be preparing Gonzalez's application. The representation was false because respondent knew that IC, not he, would be preparing Gonzalez's application.

Contrary to respondent's testimony, but consistent with Gonzalez's testimony, the hearing judge found that, after the August 1996, hearing, respondent did not give Gonzalez his business card or otherwise tell Gonzalez how Gonzalez could contact him. Instead, respondent gave him a slip of paper with only the date of October 11, 1996, written on it and then instructed him to go back to Gaston. Gonzalez's testimony is consistent with respondent's admission that IC was going to prepare Gonzalez's application for suspension of deportation and respondent's assertions that he never agreed to prepare Gonzalez's application for suspension of deportation and that the scope of his representation of Gonzalez was limited to that of an "appearance attorney." Respondent did not remember if he ever disclosed his purported "limited" legal representation to Gonzalez. The hearing judge correctly found that he did not.

Shortly, before the October 11, 1996, hearing, Reyes gave respondent an application for suspension of deportation that IC had prepared for Gonzalez. Both respondent and Gonzalez appeared at the hearing, but it was continued because the IJ was ill. The court clerk gave respondent and Gonzalez a notice stating that the hearing was reset for January 17, 1997. Respondent did not file Gonzalez's application on October 11 because respondent recklessly assumed that, because the hearing was continued, the filing deadline was extended. Gonzalez paid IC $300 for respondent's October 1996 appearance, but the record does not indicate if IC gave any portion of it to respondent.

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51. For the reasons stated in footnote 47, *ante*, page 24, we do not consider, as aggravation, respondent's failure to disclose to the IJ that IC did not sign the preparers declaration.

[23a] Later in the day on October 11, 1996, the immigration court reset the hearing in Gonzalez's case again by moving it up from January 17, 1997, to November 22, 1996. On October 11, 1996, the court properly served notice of the new November hearing date on respondent by certified mail to his law office on Lankershim Boulevard. The return receipt for that notice establishes that the notice was actually delivered to and signed for by respondent's law office on October 16, 1996.[52] Respondent, however, never told Gonzalez of the November hearing date.

[23b] Respondent appeared at the November hearing without Gonzalez and again without ever filing Gonzalez's application for suspension of deportation.[53] Respondent seeks to avoid responsibility for his failures to notify Gonzalez of the November hearing and to file Gonzalez's application by asserting that he did not receive the notice of hearing that the immigration court sent him. Respondent further asserts that the only reason he learned of and attended that hearing was because he saw it listed on the daily docket sheet of hearings that the immigration court posted on November 22, 1996. Respondent testified that he checks the immigration court's posted docket sheet of hearings every day to make sure that he does not miss any hearings in his cases.

[23c] **[24]** We reject respondent's assertions and his testimony in support of them. First, respondent's claim that the did not receive the court's notice of the November hearing is belied by the fact that, on October 16, 1996, the court's notice was delivered to and signed for by respondent's law office. "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." (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 735.) However, this principle is based on the presumptions that the attorney has adequate office procedures in place for the proper operation of a law office (cf. *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26; *In the Matter of Respondent E, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 726-727); that the attorney has trained his staff with respect to those procedures; that the attorney employs adequate safeguards to insure that his staff actually follow the procedures; and that the attorney otherwise adequately supervises his staff to insure that they perform their jobs. To conclude otherwise would result in a distortion of justice.

[23d] Where the record shows that a court has properly served a notice of a trial setting on an attorney of record in a proceeding, the attorney's failure to appear will not be excused in a disciplinary proceeding even if the attorney credibly testifies that he did not have actual knowledge of the trial date unless the attorney also establishes that he had office procedures in place that, at a minimum, require his staff (1) to promptly inform him each time a notice of a court or administrative trial or hearing is delivered to his office, (2) to promptly record the date of the trial or hearing in his court calendaring system and in the client's file, and (3) to promptly give the client actual notice of the date, time, and location of the trial or hearing. (Cf. *Bruns v. State Bar, supra*, 18 Cal.2d at p. 672.) The record does not indicate, much less establish that respondent had any such office procedures in place. In fact, as noted *ante*, the record clearly and convincingly establishes that respondent did not have any such office procedures in place. Accordingly, he may not be excused from his failures to notify Gonzalez of the November 1996 hearing; to prepare for that hearing; and to counsel and prepare Gonzalez for that hearing.

Second, at the November 1996 hearing, respondent did not claim that he did not receive the notice of that hearing that the court sent to him on October 11, 1996. Nor did he claim that he just learned of the

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52. Respondent's contention that this return receipt is for the notice of a December 13, 1996, hearing in the Gonzalez case is erroneous.

53. The parties, the hearing judge, and the reporter's transcript refer to this November 22, 1996, hearing as being held on November 7, 1996. However, the contents of the transcript and the immigration court's file clearly establish that the hearing was noticed for and held on November 22, 1996. Respondent's repeated testimony that he appeared at a November 7, 1996, hearing in Gonzalez's case, when it is clear that he did not, adversely reflects on respondent's credibility and candor.

hearing that day when he saw it on the immigration court's posted daily docket sheet. Instead, respondent told the IJ (1) that he believed that Gonzalez was supposed to appear with him and to file his application for suspension of deportation that day, (2) that he did not know why Gonzalez was not at the hearing, and (3) that he did not know the status of Gonzalez's application because all of his client files, including Gonzalez's file, were at his secretary's home because he and Baliozian had just recently been evicted from their offices.

At the November 1996 hearing, respondent asked the IJ for a short extension of time so that respondent could move into a new office, contact Gonzalez, and "prepare whatever needs to be prepared" for Gonzalez's case. The IJ offered "to cut [Gonzalez] some slack" and to continue the hearing until December 6, 1996. However, respondent pressed the IJ for additional time. After noting his displeasure over the fact that Gonzalez's application for suspension of deportation was not filed in October 1996 as it should have been and noting that respondent's conduct was "taxing the system," the IJ reluctantly agreed to give respondent additional time. The IJ continued the hearing until December 13, 1996, and expressly instructed respondent to give notice of the new hearing date to Gonzalez. Thereafter, the immigration court properly mailed written notice of the December 13, 1996, hearing to respondent at his address on Lankershim Boulevard. That notice was mailed to respondent's Lankershim Boulevard office because, after the eviction, he did not promptly notify the immigration court's central administrative office or the Postal Service of his new office address.[54]

Respondent never notified Gonzalez of the December hearing date, filed Gonzalez's application for suspension of deportation, or even attended the December 13, 1996, hearing.[55] Because respondent neither appeared at the December 13, 1996, hearing nor filed Gonzalez's application, the IJ ruled that all of Gonzalez's applications were deemed abandoned and denied, found that Gonzalez was deportable,[56] and ordered Gonzalez deported in absentia. On December 16, 1996, the immigration court properly served a copy of the IJ's December 13, 1996, deportation order on respondent at his office at 1543 West Olympic Boulevard, Suite 231, Los Angeles, California. Respondent, however, never notified his client of the deportation order.

Respondent seeks to avoid responsibility for his failures to appear at the December 1996 hearing and to file Gonzalez's application by claiming, inter alia, that they were the results of a simple "calendaring error," which must have occurred because he forgot to record the new hearing date in his notebook-size calendar.[57] We reject respondent's claim. First, assuming that respondent missed the December hearing because he forgot to record it in his calendar and not because he had too many hearing schedule on the same day and recklessly overlooked Gonzalez's hearing, we cannot view his purported failure to record the hearing in his calendar as a simple calendaring error because the setting was made in direct response to respondent's request for additional time to get prepared, because the IJ instructed respondent to notify Gonzalez of the December hearing date, which respondent did not do, and because respondent did not maintain an adequate calendaring system. Second, the immigration court properly mailed respondent notice of the December hearing date. **[25]** Third, even if respondent missed the hearing because he simply forgot to record the hearing in his calendar, we must review his failure to appear at the hearing in light of the record as a whole because, under the plain language of rule 3-110(A), even if an attorney does

54. Because respondent had actual knowledge of the December hearing, it is immaterial whether this notice was ever delivered to respondent's office or whether it was even mailed to him by the immigration court.

55. In his decision, the hearing judge erroneously refers to this hearing as being held on December 18, 1996. These clerical errors are not material to any issue on review.

56. According to IJ's deportation, his finding of deportability was based on evidence the government presented at the December 13, 1996, hearing and not on respondent's prior admission of Gonzalez's deportability.

57. We note that respondent did not proffer any explanation as to why he did not learn of this hearing when he checked the immigration court's posted docket sheet of hearings on December 13, 1996, in accordance with his purported daily practice.

not intentionally or recklessly fail to competently perform legal services, he violates the rule if he repeatedly fails to competently perform. The record establishes that respondent's failure to attend the December hearing was not an isolated "failure to appear" at an immigration court hearing, but was one of many such failures.

Both respondent and Gonzalez appeared in court on January 17, 1997. Gonzalez appeared because he did not know that his hearing had been reset for November 1996 or that it had been reset for December 1996 at respondent's request. When Gonzalez appeared, he learned that he had been deported in absentia. Fortunately for Gonzalez, the IJ concluded that Gonzalez was not at fault for failing to appear at the two earlier hearings and even offered to let Gonzalez file a motion to reopen his case without having to pay a filing fee. Respondent and the State Bar agree that, on January 17, 1997, respondent told the IJ that he would prepare a motion to reopen and not charge Gonzalez. Respondent, however, never prepared or filed such a motion.

Accepting Gonzalez's testimony and rejecting respondent's, the hearing judge found that, even after the January 1997 appearance, neither respondent nor Gaston told Gonzalez how he could contact respondent. The hearing judge also rejected respondent's testimony that respondent told Gonzalez to come to respondent's office so that he could prepare a motion to reopen. The hearing judge found respondent's testimony that he never prepared the motion because Gonzalez never came to his law office as respondent instructed was misleading and lacked candor.[58] We agree. Respondent did not need Gonzalez's assistance in preparing the motion. It was respondent, not Gonzalez, that had to execute a supporting declaration that established that respondent never notified Gonzalez of the November or December 1996 hearings. Moreover, even if respondent needed Gonzalez's assistance, respondent had an affirmative duty to notify Gonzalez of that fact and give Gonzalez the address and telephone number of his law office, but he did not do so.

The only person Gonzalez was able to contact after the January 1997 appearance was Gaston, and he told Gonzalez that there was an additional fee of $390 for the "attorney" (i.e., respondent) to prepare the motion to reopen. Gonzalez, believing that he had no other real alternative, paid Gaston an additional $390 in January 1997. Yet, even then respondent still did not prepare a motion. Because respondent never prepared and filed a motion to reopen, Gonzalez was forced to retain other counsel.

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-110(A) as charged in count 11 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform in Gonzalez's immigration case. Respondent did not meet with Gonzalez before the initial hearing in August to review his case and obtain the relevant evidence. Respondent never prepared and filed Gonzalez's application for suspension of deportation or counseled and prepared Gonzales for the November 1996 hearing. Respondent appeared at the November hearing unprepared and, as the IJ aptly noted, his misconduct was "taxing the system." Respondent failed to prepare for or attend the December 1996 hearing.

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58. Respondent admitted, while testifying in the hearing department, that he falsely answered, under penalty of perjury, the interrogatory the State Bar propounded to him regarding Gonzalez's complaints by falsely answering that the immigration court had initially set the hearing in Gonzalez's case for January 17, 1997, but that "unbeknownst to Respondent, the Court on or about November 22, 1996, sent notice that it was arbitrarily moving up the hearing date from January 17, 1997, to December 13, 1996. Said notice was apparently mailed to Respondent at his office on 4605 Lankershim, but Respondent had just moved from that address and did not receive actual notice of the new hearing date from the Court. Since Respondent was unaware of the advanced date, neither he nor the client appeared in December 1996. Respondent did appear in Court on behalf of Gonzalez on January 17, 1997, the original hearing date set by the Court, and learned at that time, for the first time, that the case had been called in December 1996." The facts that we recited *ante*, establish that respondent's answers were clearly false. Even though we do not consider these additional acts of misrepresentation under penalty of perjury as uncharged misconduct aggravation, we do consider them as significantly impeaching respondent's credibility and candor.

We also adopt the hearing judge's conclusion that respondent is culpable, as charged in count 12, of willfully violating his duty, under section 6068, subdivision (m), to adequately communicate significant developments to Gonzalez by failing to communicate with Gonzalez after the January 1997 appearance. We also adopt the hearing judge's determination that the following additional uncharged willful violations of section 6068, subdivision (m), are properly considered as aggravating circumstances. Respondent failed: to notify Gonzalez of respondent's addresses and telephone numbers; to contact Gonzalez between the October 11, 1996, and the January 1997 appearance; to notify Gonzalez of the November 1996 hearing; to notify Gonzalez of the December 1996 hearing as the IJ instructed respondent to do; or to promptly notify Gonzalez of the IJ deportation order and explain to Gonzalez why he had been ordered deported.

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-700(A)(2) as charged in count 13 when he withdrew from employment without taking reasonable steps to protect Gonzalez's interest. Respondent's failure to take any steps to reopen Gonzalez's case and his failure to communicate or to attempt to communicate with Gonzalez after the January 1997 appearance establish respondent's culpability for violating rule 3-700(A)(2). (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at p. 641; *In the Matter of Hindin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 680.) Even if we accepted respondent's argument that he was unable to prepare the motion because Gonzalez never contacted him after the January 1997 appearance, "respondent could not simply let the months pass with no action. Respondent's choice was to either pursue [the motion to reopen that] was warranted by the facts and law . . . or to withdraw from [Gonzalez's] employment if and as appropriate under rule 3-700(C). [Citations.]" (*In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126, 133.)

3. The Salgado matter.

In 1995, Rodolfo Baza-Salgado (hereafter Salgado) hired JV (the nonattorney immigration services provider that respondent shared offices with on Garvey Avenue) to assist him and his wife, Paz Reynoso (hereafter collectively the Salgados) to obtain visas for them. The Salgados are nationals of Mexico. Salgado has no formal education other than elementary and secondary school, which he completed as a child in Mexico. He works as a tree trimmer for a Los Angeles area school district. At all relevant times, he did not speak, read, write, or understand English.

On October 27, 1995, Salgado met with Mr. Enriquez at JV and respondent's Garvey Avenue offices. At that meeting, Mr. Enriquez told Salgado that JV had a "good" attorney who would be representing the Salgados when they went to immigration court. Sometime shortly thereafter, Salgado was again in the Garvey Avenue offices, and Mr. Enriquez pointed to respondent and told Salgado that respondent as the attorney associated with JV who would represent the Salgados in court. During one of his office visits, Salgado was given one of paralegal Enriquez's business cards, which as noted *ante*, has both the name "Law Offices of: James Robert Valinoti" *and* the insignia "JV & Associates" printed at the top.

The Salgados agreed to pay a $4,000 flat fee for both JV's and respondent's services. That $4,000 fee was the combined total for handling both of the Salgados' cases. At the October 27, 1995, meeting, Salgado made a $300 payment on and agreed to make an additional payment of $500 before JV would begin working on the Salgados' cases. Salgado agreed to pay the remaining balance in monthly installments of $125.

JV prepared asylum applications for the Salgados, had the Salgados sign them, and filed them without signing the preparer's declarations. Salgado did not, and could not have, read his asylum application before he signed it; he relied on JV to prepare it honestly. The INS denied the Salgados' applications and served them with deportation OSC's ordering them to appear in immigration court on June 12, 1996.

Norma, Mr. Enriquez's wife, took the Salgados to immigration court on June 12, 1996. When they arrived, she introduced them to respondent and paid respondent a $300 cash fee. Respondent then executed and filed a "joint" Form EOIR-28 in the

Salgados' cases. At the hearing, respondent admitted the issues of the Salgados' deportability and designated Mexico as their country of deportation. Respondent did not tell the IJ that JV prepared and filed the Salgados' asylum applications without signing the preparer's declarations; however, he did withdraw the applications and request for suspension of deportation and voluntary departure in the alternative. The IJ set the matter for merits hearings on October 8, 1996, at 1:00 p.m.

As of the June 1996 hearing, the only address and telephone number the Salgados had for respondent were the address and telephone numbers of JV and respondent's Garvey Avenue offices. In the hearing department, respondent testified that, after the hearing, he instructed Salgado to come to his law office for help in preparing his paperwork or for him to review the Salgados' paperwork, but that Salgado told respondent that JV was going to prepare the paperwork. However, consistent with Salgado's credible testimony, the hearing judge found (1) that, after the hearing, respondent instructed Salgado to return to JV and told him that JV was going to be in charge of everything (i.e., preparing and filing the paperwork) and (2) that respondent did not give the Salgados his business card or otherwise inform them how they could contact him. We adopt the hearing judge's findings.

After the June 1996 hearing, Salgado went to the Garvey Avenue offices approximately eight times and made installment payments to JV. He also made several attempts to speak with respondent, but either Mr. Enriquez or Norma told him that he could not do so and that he would have to speak with them about his and his wife's cases. JV lied and told Salgado that their cases were going well. JV was able to accomplish this because respondent failed to tell the Salgados how they could contact him. Moreover, respondent admits that he never told the Salgados that the scope of his legal representation was limited to that of an "appearance attorney." He also admits that he never called or wrote the Salgados after the June 1996 hearing. Moreover, respondent never called JV to verify that it had prepared and filed Salgados' applications for suspension of deportation before the filing deadline, nor did respondent prepare and file the applications himself.[59]

Respondent did not prepare for the October 8, 1996, merits hearings in the Salgados' cases. Nor did he meet with, counsel and prepare the Salgados for those hearings. As respondent admits, by not preparing for the merits hearings, he did not know whether the Salgados were even entitled to suspension of deportation relief or whether they were entitled to some other more favorable form of relief of which JV was unaware. Shortly before the merits hearings, Salgado went to the Garvey Avenue offices and found that they had been closed. Salgado could not find JV's new office. JV never notified the Salgados when it moved its offices. Finally, the night before the merits hearings, Norma telephoned Salgado and told him to come into JV's new office the next morning with his wife and to bring $1,500 with him.

The Salgados arrived at JV's new office at 9:00 a.m. the morning of October 8, 1996, and were told that their applications for suspension of deportation were not ready. In fact, the applications were not finished until 1:05 p.m., at which time the Salgados and Heidi, a JV secretary, left for the immigration court. By the time they arrived, paid the applications' filing fees, and found respondent, their cases had already been called. Because they did not appear in court when their cases were called at 1:20 p. m., the IJ ruled that they abandoned their requests for relief and then, based on respondent's prior admissions of their deportability, ordered them deported in absentia. Understandably, Salgado became upset when he learned that he and his wife had been deported in

59. As in the Padilla matter, we do not rely on respondent's failure to call JV to verify that it had prepared and filed the Salgados' applications to support a finding of misconduct because, had respondent done so, he would have engaged in an additional act of aiding and abetting JV to represent aliens in violation of federal law and to engage in the unauthorized practice of law. Nonetheless, we do consider respondent's failure to contact JV as strong evidence of his inability to understand his professional obligation to competently represent his immigration clients and to comprehend the extreme peril to which he exposed his clients by relying on and permitting JV to prepare his clients' applications.

absentia because he knew that deportation meant he would lose both his job and house. Accordingly, Salgado wanted to speak with the IJ and explain that it was not his or his wife's fault that they missed their hearings, but respondent did not even attempt to find the IJ for Salgado. Instead, respondent told Salgado that the Salgados' only option was to file motions to reopen their cases, gave the Salgados one of his business cards, and handed Heidi copies of the IJ's deportation orders. After they retained new counsel, the Salgados were eventually able to have their cases reopened on the grounds that respondent's representation of them was incompetent.[60]

When the IJ called Salgados' cases at 1:20 p.m., the IJ asked respondent where his clients were, and respondent replied: "I have absolutely no idea where my clients are, your Honor. They never came into my office for preparation of the suspension application. I advised them they should make an appointment at my office and either speak with me or one of my paralegals in my office so that we could assist in the preparation of their applications. [¶] They never came to my office, and I have not had physical contact. I have not – they have not been in my presence since the last hearing."

The IJ went on to state on the record that the Salgados had actual notice of the hearing and "also their failure to contact their attorney to file their applications for relief suggests their position with respect to these deportation proceedings. There certainly is no exceptional circumstances on this record for their failure to appear. [¶] And before [the Salgados] are ordered deported to Mexico and all applications for relief are deemed abandoned, I am serving the written orders in this case. [The Salgados] do not have a right to appeal the decision in their case. Their remedy is to reopen, if in fact there were exceptional circumstances for their failure to be here." Respondent then stated: "Your Honor, while we are still on the record, as my clients had never come to my office subsequent to the last hearing, I would make a motion to withdraw as attorney of record, as they have not assisted me in the preparation of their cases. And I would also, if that is granted, I would request that the notice of being deported in absentia be mailed directly to them." The IJ promptly denied respondent's motion.

The hearing judge found respondent misled and misrepresented the truth to the IJ "by making it seem that [Salgado] did not want to contact Respondent or one of his paralegals for assistance in the preparation of his application . . . ." The hearing judge further found that respondent mislead the IJ into believing that the Salgados had abandoned their cases when respondent told the IJ "that he had absolutely no idea where his clients were." We agree and adopt the hearing judge's findings. Under section 6068, subdivision (d), attorneys have a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth. . . ."[61] That statute "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, 389.) "No distinction can therefore be drawn among concealment, half-truth, and false statement of fact. [Citation.]" *Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) "A member of the bar should not under any circumstances attempt to deceive another. [Citations.] 'An attorney's practice of deceit involves moral turpitude.' [Citation.]" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888.) In short, respondent had an affirmative duty to insure that all of his statements to the IJ were complete, true, and not misleading. With respect to his motion to withdraw as attorney of record, this duty required him to fully and completely disclose all relevant facts and circumstances to the IJ. (Cf. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 163.)

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60. Salgado is one of the clients whose credibility respondent attacks on the ground that Salgado signed fraudulent declaration that JV prepared in support of a motion to reopen Salgado's case. Salgado admitted, in the hearing department, that he knew the declaration contained a false statement when he signed it, but explained that JV insisted that signing it was the only way he could have his case reopened and avoid being deported and losing his job and house. In light of Salgado's testimony, the hearing judge found that Salgado's execution of the fraudulent declaration did not impeach his credibility. We agree.

61. To the same effect is rule 5-200(A). Additionally, section 6128, subdivision (a), makes it a misdemeanor to intentionally deceive a court or a party.

Contrary to respondent's statements to the IJ, respondent never told the Salgados to make an appointment at his office and to either speak with him or one of his paralegals so that he could assist them in preparing their applications. As noted *ante*, respondent told Salgado something completely different. He told Salgado to return to JV and that JV was going to be in charge of everything. Moreover, as note *ante*, respondent never even told the Salgados how to contact him after he appeared with them at the initial hearing in their cases; respondent moved out of the Garvey Avenue offices in late 1995 or early 1996. Moreover, respondent did not disclose to the IJ that he was relying on and permitting JV to prepare and the Salgados' applications for suspension of deportation. We hold that respondent made the foregoing false statements to the IJ and that respondent failed to tell the IJ the foregoing facts, which were unquestionably relevant to respondent's motions to withdraw, with the intent of misleading the IJ and of securing a favorable ruling on his motions to withdraw. (Cf. *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144; *Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240.) Accordingly, we adopt the hearing judge's conclusion that respondent willfully violated section 6106 (moral turpitude) as charged in count 15 when respondent misled and misrepresented the truth to the IJ at the October 8, 1996, merits hearing.

In addition, we adopt the hearing judge's conclusion that respondent willfully violated rule 3-110(A) as charged in count 14 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform services in the Salgados' immigration proceedings as he did not meet and review the Salgados' case with them before the initial hearing in June 1996, and he never filed the Salgados' applications for suspension of deportation or prepared for the merits hearings on them. We also adopt the hearing judge's determinations that the State Bar failed to prove the violations of rules 3-700(D)(1) and 3-700(A)(2) as charged in counts 16 and 17, respectively. Accordingly, we dismiss those counts with prejudice.

Finally, we adopt the hearing judge's determinations that respondent is culpable of two counts of uncharged misconduct in this client matter, which are appropriately considered as uncharged misconduct aggravation. First, we adopt the hearing judge's determination that respondent willfully violated rule 3-700(D)(1) by abandoning the Salgados after the October 8, 1996, merits hearings. Second, we adopt the hearing judge's determination that respondent willfully violated section 6068, subdivision (m), by failing to adequately communicate with the Salgados. Respondent never contacted the Salgados about filing motions to reopen their cases.

4. The Israil matter.

In 1992, Amilie Israil, a national of Syria, filed an application for asylum. At that time, she was widowed, 68 years' old, and had lived in the United States for about 13 years with one of her sons and his wife, Arpine Misislyan.

When she testified in the hearing department, Israil was 75 years' old. At all relevant times, she (1) did not speak, read, write, or understand English; (2) signed her name with an "x"; (3) suffered from high blood pressure; and (4) had little, if any, understanding of United States immigration laws and procedures, of her State Bar disciplinary complaint against respondent, or of these State Bar Court proceedings. Because of these facts and because he concluded that Israil had a propensity to be led while being questioned, the hearing judge found Israil's testimony to be "suspect" and concluded that the State Bar failed to establish respondent's culpability on any of the misconduct charged in this matter. We, however, hold that respondent's culpability on two of the counts of misconduct charged in this matter is clearly established by evidence independent of Israil's testimony.

The INS denied Israil's asylum application in 1994 and served a deportation OSC on her in February 1996. Soon thereafter, Misislyan saw one of Baliozian immigration services' advertisements on television. In February 1996, Misislyan and Israil met with Baliozian at his and respondent's offices on Lankershim Boulevard. At that meeting, Baliozian was retained to obtain a green card for Israil, Misislyan paid Baliozian $500 in fees for Israil, and Misislyan took one of respondent's business cards that Baliozian had out on his (i.e., Baliozian's) desk. Thereafter, Misislyan paid Baliozian an additional $1,000 in fees for Israil, and Baliozian referred Israil to his office-mate, respondent.

On April 15, 1996, respondent filed a Form EOIR-28 in Israil's case. On May 8, 1996, respondent and Israil appeared at the initial hearing in Israil's case, and respondent admitted to Israil's deportability, designating Syria as her country of deportation. Respondent then withdrew Israil's asylum application and requested suspension of deportation and voluntary departure in the alternative. Next, respondent told the IJ he intended to file, with the INS, an Application to Register Permanent Resident or Adjust Status (INS Form I-485 [Rev. 09/09/92]) (hereafter Form I-485 application) seeking to have Israil's immigration status adjusted to that of a lawful permanent resident. Respondent further stated that he would seek such an adjustment for Israil on the "preferential" basis of Israil being a relative of a United States citizen, as two of Israil's children were soon to become naturalized citizens. To obtain an adjustment on the basis of being a relative of a citizen, the citizen relative must execute and file, with the INS, a Petition for Alien Relative (INS Form I-130 [Rev. 4/11/91]) (hereafter I-130 petition). The IJ set a merits hearing in Israil's case for June 19, 1996, and ordered that Israil's application for suspension of deportation and the I-130 petition be filed by that same day.

Israil's daughter became a naturalized citizen on May 31, 1996, but respondent did not file the I-130 petition, or the Form I-485 application, until the morning of the June 19, 1996, merits hearing. Both of those documents where skeletal and supported with only limited documentation. Moreover, respondent never prepared an application for suspension of deportation for Israil. Instead, when he and Israil appeared at the June 19, 1996, merits hearing, he withdrew Israil's request for suspension of deportation and elected to pursue only her request to become a lawful permanent resident based on the citizenship of her daughter as set forth in the I-130 petition he filed with the INS earlier that morning. Obviously, the INS had not adjudicated the I-130 petition at the time of the June merits hearing; accordingly, the IJ did not have jurisdiction over it. In fact, if the INS granted the I-130 petition, Israil's deportation proceeding would effectively be moot and the IJ could dismiss the case. To give the INS time to adjudicate the I-130 petition, IJ rescheduled the hearing in Israil's case for November 14, 1996, at 8:30 a.m.

As of the November 1996 hearing date, the INS had still not adjudicated the I-130 petition; yet, respondent failed to file a motion to continue that hearing on that ground as required by the local operating procedures.[62] Nor did respondent even appear at that hearing. Instead, he sent attorney Jensen from his law office in his place. Shortly before 8:30 a.m. on November 14, 1996, attorney Jensen filed a Form EOIR-28 with the clerk in the courtroom of the IJ presiding over Israil's case, but Jensen then left the courtroom without telling anyone.

Even though Israil was in the hallway outside of the courtroom no later than 8:15 a.m. on November 14, she did not go in the courtroom because she was waiting for respondent. Respondent never told her to go in even if he was not there. Israil's case was first called at 8:30 a.m., but no one appeared. Thus, the court's Arabic interpreter went out into the hallway and called Israil's name, but she did not hear him (she was 72 years old at the time). The IJ waited until 9:05 a.m. before he called Israil's case a second time, and when no one appeared, he deemed all of Israil's requests for relief abandoned, found her deportable based on respondent's prior admission, and ordered her deported in absentia.

Attorney Jensen returned to the courtroom at about 9:30 a.m. and learned that Israil's requests for relief were deemed abandoned and that she had been deported in absentia. The IJ told attorney Jensen (1) that Jensen's early morning check-in with his court clerk was not an appearance for Israil because he left the courtroom without telling anyone and (2) that the first appearance in Israil's case was when Jensen returned to court at about 9:30 a.m., which was 25

62. Local operating procedure 1 provides: "All matters shall proceed at the time and date scheduled for hearing. Parties shall be prepared to go forward with their cases at that time." Local operating procedure 5 requires that all requests for continuance of individual calendar hearings, such as a merits hearings, be in writing, filed no later than 14 days before the scheduled hearing, and supported by declarations setting forth in detail the nature of the request and the reasons for it. Procedure 5 provides: "The request will be rejected unless all required information is provided."

minutes after Israil's case had been called a second time and she had been ordered deported. Jensen asked the IJ to reopen Israil's case, but the IJ refused to do so because, as the IJ stated, respondent repeatedly failed to appear for immigration court hearings and to file properly prepared documents for his clients. The IJ informed Jensen that the pleading respondent had filed in Israil's case was "one of the shoddiest" he "had seen in a long time" and indicated that there was no evidence in the record on which he could grant Israil relief even if he reopened her case. Jensen claimed to have such evidence with him, but the IJ refused to accept it because, under the local operating procedures, respondent was required to have filed it at least two weeks before the November hearing. The IJ further noted that respondent routinely failed to comply with the local operating procedures and that, therefore, "every case [respondent] has is a problem."

The IJ reprimanded Jensen (1) for not knowing that the INS had still not adjudicated the I-130 petition, which meant that the IJ could not have ruled on Israil's request for legal permanent residency status even if Jensen had appeared with Israil when her case was called, and (2) for not filing a motion for a continuance on that ground.

Israil and Misislyan believe that they hired Baliozian and that Baliozian hired respondent to represent them in court. They do not know if or how much Baliozian paid respondent. Israil does not know what duties, if any, respondent owed her. She blames Baliozian, not respondent, for being ordered deported. However, any confusion Israil and Misislyan have over the extent of respondent's duties or whom they blame for Israil being ordered deported is immaterial. Once respondent filed the Form EOIR-28 in Israil's case, he undertook the duties federal law places on him as an attorney of record to properly prepare and timely file all applications, pleadings, and other documents in his client's case and to timely appear at every hearing with his client ready to proceed.

We conclude that respondent willfully violated rule 3-110(A) as charged in count 18 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform in Israil's immigration case, and we reverse the hearing judge's conclusion to the contrary. Respondent failed to adequately prepare the I-130 petition and to support it with sufficient evidence on which Israil could have prevailed, or with at least the supporting evidence that Jensen claimed to have had with him when he appeared in court for Israil. Respondent failed to file a motion to continue the November 1996 hearing on the ground that the INS had not yet adjudicated I-130 petition. Respondent did not appear at that hearing, but sent attorney Jensen in his place. Jensen did not properly and timely appear in respondent's place; Jensen was an hour late. Because respondent recklessly practiced law and failed to establish that he properly trained and supervised Jensen, he is ethically responsible for Jensen's failure to timely appear.

We also hold that respondent willfully violated rule 3-700(A)(2) as charged in count 19 when he withdrew from employment without taking reasonable steps to protect Israil's interest, and we reverse the hearing judge's conclusion to the contrary. Respondent withdrew his representation because he failed to properly prepare the I-130 petition, failed to contact Israil after the November 1996 hearing, and failed to take any steps to reopen Israil's case. Before respondent withdrew, he did not take steps to avoid reasonably foreseeable prejudice to Israil's rights. We agree with the hearing judge's determination that the State Bar failed to establish that respondent violated section 6068, subdivision (m), as charged in count 20. Accordingly, we dismiss count 20 with prejudice.

5. The Calderon matter.

Francisco Calderon and his wife, Bertha Gordillo (hereafter individually Calderon and Gordillo, respectively, and collectively the Calderons), nationals of Guatemala, filed applications for asylum. At all relevant times, the Calderons did not speak or have much, if any, knowledge of English. When Calderon testified in the hearing department, he and Gordillo had lived in the United States for eight years, during most of which Calderon was a machine operator in a paper bag factory in the City of Industry, California. In Guatemala, Calderon was a grammar school teacher.

The INS denied the Calderons' asylum applications in which the Calderons stated, that if they returned to Guatemala, they feared that they would be killed or jailed because of Calderon's activities as a student activist in Guatemala. After the INS served deportation OSC's on them, the Calderons hired the nonattorney immigration services provider INTI Immigration Service (hereafter IIS) to handle their cases. They initially paid IIS $600. IIS hired respondent to represent the Calderons in immigration court beginning with hearings set for January 22, 1996. Respondent filed Forms EOIR-28 in the Calderons' cases on January 22, 1996.

Before the January 1996 hearings, Calderon gave respondent a folder containing extensive documentation of his life and activist activities in Guatemala. When respondent and the Calderons appeared at the hearing, respondent renewed the Calderons' asylum applications and requested voluntary departure in the alternative. The IJ was quite accommodating with respondent in setting the merits hearing on the Calderons' asylum applications. Only after discussing multiple dates and times with respondent and after exacting an agreement from respondent that he would not have any conflicting court appearances and would be ready to proceed on the merits, did the IJ set the merits hearings for April 19, 1996, at 1:00 p.m. as an accommodation to respondent.

The only way the Calderons knew to contact respondent was through IIS. After the January 1996 hearing, respondent did not give the Calderons his business card. The Calderons were told to communicate with IIS, not respondent. Respondent did not communicate with the Calderons between the January 1996 hearing and the April 1996 merits hearing. Nonetheless, respondent claims that he prepared for the April merits hearing by reviewing the Calderons' applications and supporting documents, but it is undisputed that he never counseled and prepared the Calderons for their merits hearings.

Finally, respondent spoke with Calderon right before the April 1996 merits hearings outside of the immigration courtroom. Calderon gave respondent a note from Gordillo's doctor stating that she was unable appear at the hearings because she had recently had a baby. Respondent checked in with the clerk and told Calderon to wait for him in the courtroom. When the Calderons' cases were called, respondent was not there, and Calderon did not understand what was going on and became very confused. The IJ told Calderon to wait for respondent to return; however, respondent never returned because he went to appear in a hearing for another client. After all the other cases were called and after waiting for more than an hour, the IJ told Calderon that he would not wait any longer. The IJ told Calderon that he would give the Calderons new hearing dates and send the notices of the new dates to respondent, but Calderon did not completely understand what the IJ was doing or why. Accordingly, Calderon became more confused and upset, and he felt abandoned by respondent. Because respondent never contact them after the April 1996 hearing, the Calderons decided to hire a new attorney.

When the Calderons attempted to obtain their client files and all the documents that they gave to IIS and respondent to support their asylum claims, IIS told them that respondent had their files, but that it would try to get them from respondent. Calderon called IIS for the next two months, but never got the files or documents. Respondent's testimony as whether IIS ever gave him the Calderons' and as to what happened to the Calderons' files and documents is vague and evasive; yet, he claims to have reviewed them all during his preparation for the April 1996 merits hearings. Beginning in July 1996, the Calderons' new attorney repeatedly asked respondent for the Calderons' files, but respondent informed the new attorney that IIS, not he, had them. Respondent never returned the Calderons' file or documents. We adopt the hearing judge's finding that respondent willfully violated section 6106 by misrepresenting to the Calderons, or to their new attorney, that he did not have their files and documents. However, because the State Bar failed to charge this violation, we consider it only for purposes of aggravation as did the hearing judge.

We conclude that respondent willfully violated rule 3-110(A) as charged in count 21 by repeatedly, recklessly, and intentionally failing to competently perform the legal services that he had a legal and professional duty to perform in the Calderons' cases, and we reverse the hearing judge's conclusion to the

contrary. Respondent did not meet with, counsel, and prepare the Calderons for the April 1996 merits hearings; nor was respondent even in the courtroom when the Calderons' cases were called for hearings; nor did he contact the Calderons after the April 1996 merits hearings. Respondent intentionally failed to perform when he left Calderon in the immigration courtroom on April 19, 1996, and never returned.

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-700(D)(1) as charged in count 23 by failing to return to the Calderons, or to their new attorney, their client files and documents notwithstanding their new attorney's repeated requests that he do so. Finally, we agree with and adopt the hearing judge's determinations that the State Bar failed to establish respondent's culpability of the violations of rules 3-700(A)(2) and 3-700(D)(2) charged in counts 22 and 24, respectively. Accordingly, we dismiss those counts with prejudice.

6. The Guevara matter.

In summer 1996, Ruben Torres-Guevara[63] (hereafter Guevara) and his wife, Silvia Torres (hereafter Torres) retained A.P. & Sons, a nonattorney immigration services firm owned by Alberto Perez (hereafter Perez), to obtain a work permit for Guevara and to handle the Guevara's, Torres's, and their oldest son's (hereafter collectively the Guevaras) immigration cases. The Guevaras are nationals of Mexico. All of their dealings with A.P. & Sons were through Perez. At all relevant times, Guevara spoke and read only a limited amount of English.[64] When he testified in the hearing department, he had worked for 11 years as an assembler in a factory in Moorpark, California.

When the Guevaras hired Perez in 1996, Guevara had lived in the United States for thirteen years, and Torres and their oldest son had lived in the United States for eight years. Perez charged Guevara $600 or $700. Perez told Guevara that he had attorneys associated with him who would appear in court with the Guevaras and that, each time one of his associate attorneys appeared in court, Guevara would have to pay an additional fee of $225 for the attorney. Perez prepared an asylum application for Guevara, had him sign it, and filed it without signing the preparer's declaration.[65]

During his asylum interview in August 1996, Guevara told an INS official that he was not seeking asylum in the United States, that he was not afraid of being persecuted if he returned to Mexico, but that he was seeking a green card based on his living in the United States for more than seven years. Accordingly, the INS denied Guevara's application and served a deportation OSC on him setting his initial hearing for October 28, 1996, at 8:30 a.m. (hereafter initial hearing).

Perez referred Guevara to respondent. Respondent filed a joint Form EOIR-28 in the Guevaras' case on October 28, 1996, before the initial hearing. Right before the hearing began, Perez paid respondent a $225 cash fee, and respondent met the Guevaras for the first time, but did not speak with them about their case. At the initial hearing, respondent admitted the Guevaras' deportability and designated Mexico as their country of deportation. Respondent did not tell the IJ that Perez had prepared Guevara's asylum application without signing the preparer's declaration. He did, however, withdraw the asylum application and request suspension of deportation relief for the Guevaras and voluntary departure in the alternative. The IJ ordered the applications for suspension of deportation filed by December 6, 1996, and set them for a joint merits hearing on July 1, 1997 (hereafter merits hearing).

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63. Torres-Guevara is another witness whom the hearing judge expressly found to be credible notwithstanding respondent's attacks on Torres-Guevara's credibility. Again, we adopt the hearing judge's credibility determination.

64. The record does not indicate Torres's educational level or whether she understood English.

65. Many facts are not clear from the State Bar's presentation of this client matter in the hearing department. For example, at times, Guevara's testimony implies that Perez represented only Guevara and that only one application for suspension of deportation was to be prepared when it is appears that an application should have been prepared for each Guevara.

The hearing judge (1) properly rejected respondent's testimony that, immediately after the initial hearing, he met with Guevara in the hallway outside the courtroom and warned Guevara that Perez was unreliable and known not to file applications for his alien clients. The hearing judge also properly found that, immediately after the hearing, respondent "rushed off to another courtroom" without giving Guevara any instructions about preparing the Guevaras' applications for suspension of deportation.

Shortly after the initial hearing, Guevara gave (1) Perez a $100 check for the filing fee for Guevara's application for suspension of deportation and (2) multiple documents supporting that application. Guevara thought Perez would be preparing his application under respondent's direction and that respondent would be filing the application with the court. At one point, Perez lied and told Guevara that his application had been filed. Guevara was unable to verify Perez's statement with respondent because he did not know how to contact respondent. Neither Perez nor respondent prepared an application for any of the Guevaras before the expiration of the filing deadline. In fact, Perez prepared an application only for Guevara and even then waited until June 30, 1997, which was the day before merits hearing, to prepare it.

On either the day before or on the morning of the merits hearing, respondent or his law office discovered, purportedly for the first time, that Perez never prepared or filed the Guevaras' applications for suspension of deportation before the December 1996 filing deadline, that the only person for whom Perez even prepared an application was Guevara, and that Perez had not filed the application he prepared for Guevara. Respondent did not appear at the merits hearing; instead, he sent attorney Arias, an experienced immigration attorney from his law office, to appear in his place. When Arias and the Guevaras appeared at the hearing, the IJ properly required attorney Arias to file a Form EOIR-28 before he would proceed.[66]

After she filed a Form EOIR-28 and the hearing began, Arias attempted to file the application that Perez had prepared for Guevara the day before, but the IJ refused to accept it because it was untimely. Arias explained to the IJ that she had just recently started working for respondent and did not know why the applications were never timely filed. Accordingly, she requested a continuance so that respondent could appear and explain why the applications were never filed. However, after briefly questioning Guevara and learning that respondent never contacted the Guevaras after the initial hearing in October 1996; that Guevara was not able to communicate with respondent after the initial hearing; that respondent had done nothing to prepare the Guevaras' applications during the seven or eight months since initial hearing; and that the application that Arias attempted to file with the IJ was prepared by "notary" Perez, the IJ rejected Arias's request for a continuance. The IJ stated that he held Arias and respondent "responsible for what has occurred; complete irresponsibility in terms of what has been going on. This is not the first time that this has happened. This has happened before, within the last month, with Mr. Valinoti. I do not know what his problem is." Arias agreed that it was respondent's responsibility to properly represent his clients and to prepare and timely file his clients' applications and other documents and that respondent's conduct was shameful. She advised the Guevaras to obtain new counsel and appropriately located new counsel for them.

Because respondent failed to file the Guevaras' applications, the IJ ruled that the Guevaras' requests for relief were deemed abandoned and granted them voluntary departure, but ordered them deported if they did not voluntarily depart. Thereafter, the Guevaras' new counsel filed a motion to reopen their cases, but the IJ denied the Guevaras' motion. The Guevaras then appealed the IJ's ruling to the BIA, but

66. The reporter's transcript of this hearing (State Bar exhibit 54) incorrectly refers to attorney Arias as Mimi Juarez; while the reporter's transcript of the hearing in the immigration court's file (State Bar exhibit 56) refers to her as "Maria Zarios (phonetic sp.)."

the BIA affirmed the IJ's order and dismissed the Guevaras' appeal[67] Next, the Guevaras appealed the BIA's decision to the United States Court of Appeals for the Ninth Circuit. In an unpublished opinion filed on June 29, 2000, the Ninth Circuit reversed the BIA and the IJ's rulings and remanded the cases for further proceedings.[68]

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-110(A) as charged in count 25 by repeatedly, recklessly, and intentionally failing to competently perform the legal services that he had a legal and professional duty to perform in the Guevaras' immigration cases. Respondent did not meet with the Guevaras and review their case before the initial hearing in October 1996. Respondent failed to prepare and file an application for suspension of deportation for each of the three Guevaras before the December 1996 filing deadline. Respondent admits that he never intended to prepare and file the Guevaras' applications, but relied on Perez to do so. Respondent failed to prepare for the July 1997 merits hearing and could not have prepared for that hearing since he had not prepared the Guevaras' applications for suspension of deportation. Respondent failed to meet with, counsel, and prepare the Guevaras for the merits hearing. In addition, we adopt the hearing judge's determinations that respondent's failure to communicate with the Guevaras between the October 1996 hearing and the July 1997 merits hearing (§ 6068, subd. (m)), and gross negligence in handling the Guevaras' cases (rule 3-110(A)), are both uncharged acts of misconduct, which are appropriately considered for purposes of aggravation.

7. The Jerez matter.

In June 1992, Megaly Hernandez-Jerez (hereafter Jerez), a national of Nicaragua, filed an asylum application. At all relevant times, she did not understand English. After her asylum interview in February 1996, the INS denied Jerez's application and served a deportation OCS on her setting her initial hearing for May 10, 1996, at 8:00 a.m. Jerez appeared at that hearing in propria persona. The IJ continued the initial hearing until August 12, 1996, to allow her time to obtain an attorney. When Jerez was leaving the immigration court, nonattorney immigration services provider Isabel Bernal approached Jerez and gave Jerez a business card describing Bernal as a "Legal Assistant/Interpreter" and "A Professional Law Corporation [¶] Casos Legales/Immigraction En General."[69]

Thereafter, Jerez met with Bernal, at which time Bernal told Jerez that she and "her attorneys" could take care of Jerez's and her pre-school age daughter's (hereafter collectively the Jerezes) immigration case. Jerez retained Bernal and paid her $500 in fees on August 5, 1996. Next, Bernal retained respondent to represent the Jerezes and at the initial hearing, which had been continued to August 12, 1996, hearing. Respondent did not appear at the hearing. Instead, he sent attorney Kazaryan from his law office, who filed a Form EOIR-28 in the Jerezes' case designating "James Robert Valinoti, [¶] . . . Kazaryan" as the Jerezes attorneys of record. At the hearing, attorney Kazaryan renewed and requested a de novo hearing on the merits of Jerez's asylum. The IJ set such a hearing for January 14, 1997 (hereafter merits hearing).

Between the initial hearing in August 1996 and the merits hearing in January 1997, neither respondent nor anyone from his law office communicated with Jerez. Respondent did not meet, counsel, or prepare Jerez for the merits hearing. More importantly, respondent did not meet with Jerez before the

67. The BIA ruled that: "The record reflects that the Immigration Judge may have accepted the late-filed application of another alien who had been represented by [Valinoti]. However, the Immigration Judge chose not to accept [the Guevaras'] late-filed application. There does not appear to be any invidious reason underlying the Immigration Judge's decision and we therefore find that she acted within the authority granted her by regulation. Accordingly, we dismiss the [Guevaras'] appeal."

68. Even though the parties failed to call this opinion to our attention, we are required to take judicial notice of it sua sponte. (Rules Proc. of State Bar, rule 214; Evid. Code, §§ 451, subd. (a), 459, subd. (a).)

69. Bernal's card was clearly deceptive because only attorneys (not legal assistants and nonattorney immigration services providers) may form a professional law corporation in the State of California. (§ 6165.)

merits hearing to determine whether her asylum application was fraudulent or meritorious or whether Jerez qualified for some other form of immigration relief. Had he done so, he would have learned that, since she filed her asylum application in June 1992, she had married a lawful permanent resident of the United States; had two daughters with her husband, who are both United States citizens by reason of their births in the United States; and had been physically and mentally abused by her husband, which would have supported a claim for suspension of deportation relief based on spousal abuse.

The day before the merits hearing, in response to a demand from Bernal, Jerez gave Bernal a $100 check made payable to respondent as respondent's attorney's fees. Bernal gave the check to respondent, and he cashed it. Respondent first met Jerez for the first time shortly before the merits hearing and, for the first time, asked her what evidence she had to support her claim for asylum. At that point, respondent determined for the first time that Jerez did not have enough evidence to support her claim for asylum. Accordingly, he told Jerez that her evidence was insufficient and that the best thing she could do was to permit him to withdraw her asylum application and get voluntary departure for her and her alien daughter. In shock from respondent's advice, she agreed. At the merits hearing, respondent withdrew her asylum application and requested voluntary departure, which the IJ granted.

Even after the merits hearing, respondent never communicated with Jerez or otherwise reviewed her case and determined whether she qualified for some form of relief other than asylum. Eventually, Jerez sought and obtained the assistance of Rosa Fregoso, an attorney with the Legal Aid Foundation of Los Angeles. Attorney Fregoso filed a motion to have the Jerezes' case reopened and the IJ's order of voluntary departure set aside based on respondent's incompetent representation, which the IJ granted. Thereafter, the Jerezes obtained legal permanent residency without their ever having to leave the United States under the IJ's order of voluntary departure, albeit under a law not in effect when respondent last represented the Jerezes in January 1997.

We conclude that respondent willfully violated rule 3-110(A) as charged in count 26 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform in the Jerezes' immigration case, and we reverse the hearing judge's conclusion to the contrary. Respondent recklessly failed to review Jerez's case and determine whether her asylum claim was appropriate or whether she was entitled to seek some other form of relief, and he recklessly failed to prepare himself and Jerez for the merits hearing. The fact that the Jerezes were eventually able to have their case reopened strongly suggests that respondent's representation of them was not just reckless, but clearly incompetent.

8. The Ramirez matter.

Rosa hired Bell Service, an immigration services provider that is owned and operated by nonattorney Roberto Lemus, to help her obtain legal residency. Bell Service prepared an asylum application for Ramirez, had her sign it, and filed it without signing the preparer's declaration. The INS denied the application and served a deportation OSC on Ramirez with the initial hearing set for November 13, 1996.

Ramirez retained respondent through Bell Service[70] and paid $200 in advanced attorney's fees for

70. Immigration Judge Ohata, who presided in Ramirez's case, warned respondent in early 1997 that aliens were appearing in his court with Bell Service's business cards, on which Bell Service identified itself as an immigration and tax service and on which respondent's name and title of attorney was printed. Respondent denied being the attorney for Bell Service. Judge Ohata warned respondent that permitting Bell Service to put his name and title on its business cards could lead to serious problems and correctly "suggested" that respondent make sure that Bell Service removed his name from its business cards. Respondent did not do so, and six months later, aliens were again appearing in Judge Ohata's court with Bell Service's cards with respondent's name and title of attorney on them. Judge Ohata again suggested that respondent take care of the problem and keep his name off Bell Service's business cards and told respondent that Bell Service might well be engaging in the unauthorized practice of law.

his appearance with her at the initial hearing. Right before the hearing, respondent met Ramirez for the first time and filed a Form EOIR-28. At the hearing, respondent did not inform the IJ that Bell Service filed Ramirez's asylum application without signing the preparer's declaration; nor did respondent withdraw Ramirez's asylum application. Accordingly, the IJ set a merits hearing on the application for May 20, 1997.

It is undisputed that, at some point, the May 20, 1997, merits hearing was continued twice. The second time was on October 8, 1997, when the immigration court reset the hearing for November 28, 1997, and when the court properly mailed respondent notice of the November 1997 hearing date to his office address at 3540 Wilshire Boulevard, which was the address that court's central administrative office had on record for respondent. However, as note *ante*, respondent moved his office to 510 West Sixth Street, Suite 924 in July 1997, without properly notifying the immigration court's central administrative office until sometime after October 8, 1997.

Respondent admits that, for the year between November 1996 and November 1997, he did not speak with Ramirez. He also admits that he never prepared any documents to support Ramirez's asylum application and that he left all of the document preparation to Bell Services. In October 1997, Ramirez paid an additional $200 in fees for respondent's appearance at the November 1997 merits hearing.

Respondent, however, did not attend that hearing. Minutes before the hearing was scheduled to begin, respondent approached Ramirez in the hallway outside the courtroom and told her that he was not going to appear at the hearing in her case that day because Bell Service had not instructed him to do so.[71] Accordingly, Ramirez appeared at the hearing alone and told the IJ, on the record, what respondent had just told her in the hallway. Very fortunately for Ramirez, the IJ did not require her to proceed with the merits hearing on her application in propria persona, but granted her a continuance so that she could obtain other counsel or assistance from the Legal Aid Foundation. The IJ also instructed Ramirez to advise the State Bar of respondent's nonperformance. The IJ later told respondent of Ramirez's statements and that, in response to them, he continued Ramirez's merits hearing so that she could obtain new counsel. Respondent, however, never filed a motion to withdraw as counsel. Nor did he ever speak with Ramirez again.

Like the hearing judge, we reject respondent's testimony that he did not see Ramirez at the immigration court on November 28, 1997. In addition, we reject his testimony that he failed to attend the November 1997 merits hearing because he did not receive the notice of that hearing date that the immigration court sent him on October 8, 1997. Even if we were to find respondent's testimony credible, his failure to attend the hearing would still not be excused because of his reckless practice of law, and we would question why he did not learn of the hearing when he checked the immigration court's posted docket sheet of hearings on November 28, 1997, in accordance with his purported daily practice.

We adopt the hearing judge's conclusion that respondent willfully violated rule 3-110(A) as charged in count 27 by repeatedly, recklessly, and intentionally failing to competently perform the legal services that he had a legal and professional duty to perform in the Ramirez's immigration case. Respondent failed to prepare for and intentionally failed to appear at the November 28, 1997, merits hearing in Ramirez's case without just cause. Respondent failed to meet with and prepare Ramirez for the November 28, 1997, merits hearing in her case.

We also adopt the hearing judge's conclusion that respondent willfully violated rule 3-700(A)(2) as charged in court 28 by deliberately abandoning Ramirez immediately before the November 1997 merits hearing without taking reasonable steps to avoid reasonably foreseeable prejudice to Ramirez's rights.

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71. Ramirez did not testify in the hearing department, but the transcript of the November 1997 merits hearing was admitted into evidence without limitation. Like the hearing judge, we rely on and find Ramirez's statements in that transcript credible.

B. The one client matter not referred to respondent by an immigration services provider – the Maya-Perez matter.

Sometime in 1995, Maria Maya-Perez filed an application for asylum. While she was in the INS office in Anaheim, California for her asylum interview, an unidentified woman approached her, gave her respondent's business card, and recommended respondent to her. Thereafter, the INS denied Maya-Perez's asylum application and served a deportation OSC on her setting the initial hearing on November 13, 1995.

On November 8, 1995, Maya-Perez met with respondent at his and Baliozian's Garvey Avenue offices, during which an unidentified man arrived claiming to have referred her to respondent and acting as an interpreter for the meeting.[72] At the meeting, Respondent agreed to represent Maya-Perez for a flat fee of $2,900,[73] which respondent agreed to let Maya-Perez pay in installments. The fee included all court and filing fees. Moreover, at this meeting, Maya-Perez made a $500 payment, and respondent told her that he could not appear at the initial hearing on November 13, 1995. He instructed her to go to the hearing and ask the IJ for a continuance based on her having just retained respondent to represent her. Maya-Perez did as respondent instructed and the IJ continued the initial hearing until January 16, 1996.

When respondent and Maya-Perez appeared at the January 1996 initial hearing, respondent filed a Form EOIR-28 and an application for suspension of deportation that he had previously prepared for Maya-Perez. The IJ set that application for a merits hearing on March 27, 1996. After the initial hearing, Maya-Perez telephoned respondent's office and left messages for him about eight times regarding the preparation for the March merits hearing. Respondent did not return any of her calls. Nor did he otherwise meet with or speak to with her again before the March hearing. In fact, respondent failed to appear for two scheduled appointments he had with Maya-Perez.

During the March 1996 merits hearing, which respondent and Maya-Perez attended together, Maya-Perez told the IJ that she lived with a man who is a permanent United States resident and that she had two children: one who is an American citizen by birth in the United States, and one, a daughter, who is an alien who would be eligible for legal residency status on June 13, 1996. The IJ told respondent that he did not want to hear Maya-Perez's case separately from that of her daughter's case and instructed him to join the daughter and to file an application for her no later than July 10, 1996. The IJ then reset the merits hearing for September 25, 1996, to giver respondent time to join the daughter and file her application and to give respondent additional time to request a criminal background check for Maya-Perez since he had failed to do so.

After the March 1996 hearing, Maya-Perez telephoned respondent's office about 20 times about filing an application for her daughter and preparing for the September 1996 hearing, but respondent would not accept or return her calls. In addition, respondent missed an appointment he had scheduled with Maya-Perez in April 1996. Finally, on June 13, 1996, respondent worked on the Maya-Perez case for the first time since the March hearing. Specifically, on June 13, respondent and Maya-Perez went to the INS office and requested an interview for her daughter. Respondent claims that he thereafter repeatedly checked with "a woman at the INS office" to see if an interview had been scheduled for the daughter, but respondent could not identify this woman other than to suggest a first name.

Respondent's next communication with Maya-Perez was on August 21, 1996, when they met in his office and he demanded that Maya-Perez pay him an additional $1,650 before he would perform any fur-

72. The record strongly suggests that the unidentified woman and man were soliciting employment for respondent, but respondent was not charged with using runners and cappers.

73. Maya-Perez testified that the $2,900 fee was to represent both her and her daughter, but the hearing judge accepted respondent's contrary testimony and found that the $2,900 fee was for representing only Maya-Perez. We adopt that finding.

ther services for her. As of that date, Maya-Perez had paid respondent a total of $2,520 of his $2,900 flat fee in her case and, therefore, owed him only $380. Therefore, the difference of $1,270 ($1,650 less $380) was presumably respondent's fee for handling the daughter's case. All that Maya-Perez could pay respondent that day was $350, which respondent accepted. After this August 21 meeting, respondent did not return any of Maya-Perez's telephone calls about the up coming hearing on September 25.

Even though the hearing judge did not find that respondent failed to appear at the September 25, 1996, hearing, it is undisputed that respondent was not in the courtroom when Maya-Perez's case was called. Respondent asserts in his opening brief that he "appeared for the September 25, 1996, hearing on time; Perez was late.... After checking in twice, and Perez had still not arrived, [respondent] proceeded to another courtroom to make an appearance. While [respondent] was in the other courtroom, Perez arrived and requested a continuance from Judge Gordon, which he granted. . . . When [respondent] returned to Judge Gordon's courtroom, he was advised of the continuance. He was also told that Perez no longer wished to be represented by him." (Footnotes omitted.)

Even accepting respondent's versions of the facts and ignoring Maya-Perez's contradicting testimony on the issues,[74] we must reverse the hearing judge's finding of no culpability of the charged violation of rule 3-110(A). We hold that respondent is culpable of willfully violating rule 3-110(A) as charged in count 1 by repeatedly and recklessly failing to competently perform the legal services that he had a legal and professional duty to perform in Maya-Perez's and her daughter's immigration case. Respondent failed to promptly file an application or request an INS interview for Maya-Perez's daughter. Respondent was not in the courtroom when Maya-Perez's case was called on September 25, 1996, as required. Respondent's argument that, even if he had been in the courtroom when the Maya-Perez's case was called, the hearing would have been continued since the INS had still not interviewed Maya-Perez's daughter is meritless in light of the fact that he did not file a motion for continuance on that ground as required by the local operating procedures.

We adopt the hearing judge's conclusion that respondent willfully violated section 6068, subdivision (m), as charged in count 2 by failing to adequately communicate with Maya-Perez and failing to respond to her reasonable status inquiries. Respondent failed to keep his appointments to meet with Maya-Perez. He also failed to return her repeated calls without otherwise adequately communicating with her. Moreover, we adopt the hearing judge's conclusion that respondent willfully violated rule 3-700(A)(2) as charged in count 3 by intentionally withdrawing from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of Maya-Perez and her daughter. If respondent checked into the courtroom twice on September 25, 1996, and saw that Maya-Perez and her daughter were not there, he should have remained in the courtroom so that, if their case was called before they did arrived, they would have been represented at the hearing by counsel. Instead, respondent abandoned Maya-Perez and her daughter and proceeded to another courtroom to generate fees in another appearance.

Finally, we adopt the hearing judge's determinations that the State Bar failed to prove that respondent willfully violated rules 3-700(D)(1) and 3-700(D)(2) as charged in counts 4 and 5, respectively. Accordingly, we dismiss those counts with prejudice.

74. Respondent's claims are inconsistent with Perez's unequivocal testimony (1) that, on September 25, 1996, she was not late for a pre-hearing meeting at the immigration court with respondent, (2) that she could not find respondent when she arrived at the immigration court, (3) that she was not late to the hearing, and (4) that respondent was never in court with her.

VI. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A. Aggravating circumstances.

1. Pattern of misconduct and multiple acts of wrongdoing.

The hearing judge determined that respondent's misconduct evidenced a pattern of failing to competently perform legal services and of client abandonment and that respondent's remaining misconduct evidenced multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Finding a pattern of misconduct or multiple acts of wrongdoing is not limited to the counts pleaded. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 714, citing *Grim v. State Bar* (1991) 53 Cal.3d 21, 34.) Yet, to be considered pattern-of-misconduct aggravation, an attorney's misconduct must ordinarily include not only the type of serious misconduct found against respondent in this proceeding, but it must also span over an extended period of time. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149-1150 & 1150, fn. 14.) Whether the two and one-half year span of respondent's misconduct qualifies as an "extended period of time" to support determination of pattern of misconduct aggravation is a close question because of the seriousness of respondent's misconduct and the extensive number of repeated charged and uncharged ethical violations found in this disciplinary proceeding. Regardless of whether respondent's misconduct spanned the requisite "extended period of time," at the very least, his misconduct demonstrates repeated, similar acts of misconduct which we must consider to be serious aggravation. (*Ibid.*)

[6h] **[11c]** Because respondent's own testimony and the evidence establish his culpability on the counts of uncharged misconduct for aiding and abetting immigration services providers to represent aliens in violation of federal law and to engage in the unauthorized practice of law; for engaging in a course of practicing law that was reckless and involved gross carelessness; for improperly accepting legal fees from third parties; and for lack of candor on which we independently find, he has no grounds to challenge our findings of aggravation based thereon. (*In the Matter of Robins, supra*, 1 Cal. State Bar Ct. Rptr. at p. 714.)

2. Aiding and abetting the representation of aliens in violation of federal law & the unauthorized practice of law.

[6i] Without question, respondent's uncharged misconduct is aggravation for deliberately aiding and abetting nonattorney immigration services providers to represent aliens in immigration cases in violation of federal law and to engage in the unauthorized practice of law, from at least mid-1995 through late 1997. Relying on or permitting the providers to, inter alia, prepare and file immigration applications, pleadings, and other documents for his clients is extremely serious. There can be little doubt that the federal regulations precluding nonattorney providers from representing aliens in immigration cases are designed to protect aliens from the clear harm to their immigration cases that can result from inadequately or improperly completed immigration applications, pleadings, and other documents prepared and filed by nonattorney providers.

"Deportation is often tantamount to exile, with consequences which affect family members as well as the individual himself. In the worst case, inappropriate deportation can lead to incarceration, torture, or death at the hands of a prosecutorial government from which the consumer sought refuge. . . . To the layman or [even the] untrained attorney, immigration forms may appear to be simple biographic questionnaires; however the implications and possible pitfalls from their use or misuse are abundant . . . ." (Ashbrook, *supra*, 5 Geo. J. Legal Ethics at p. 252, quoting from comments of Immigration Judge Dana Marks Keener made in the Report of the Immigration Consulting Group, reprinted in Report of the State Bar of California Commission on Legal Technicians (July 1990).) It is not just the omission or misstatement of a substantial relevant fact on an immigration application, pleading, or document that can cause devastating and, at times, irreversible harm to an alien case. The failure to completely fill out the simplest of immigration forms can also cause such devastating harm, as well as the mere failure to timely file an immigration application, pleading, or other document. If an application, pleading, or other document is not filed within the time set by an IJ, the alien's "opportunity to file that application or document *shall* be deem waived." (8 C.F.R. § 3.31(c) [italics added].)

Furthermore, a victim of unlawful representation and unauthorized practice of law by nonattorney immigration services providers " 'may forfeit his place on the years-long INS waiting list for immigration through family members, or lose all rights to apply for relief .... Unscrupulous consultants write down false asylum stories without the clients' knowledge, which destroys the credibility of applicants who do have a strong asylum claim; charge money for nonexistent "amnesty" programs or for immigration programs that exist but do not apply to the clients; and persuade unsophisticated clients to commit fraud by telling them that this is how it is done in America.' [Citations.]" (*Notorious Notaries*, *supra*, 32 Ariz.St.L.J. at p. 305, fn. 110.)

[5g] In sum, by improperly limiting the scope of his representation of the clients referred to him by immigration services providers to that of an "appearance attorney," respondent effectively provided them with no legal representation or services.

3. Reckless and careless method of practicing law.

[11d] Respondent's uncharged misconduct aggravation for engaging in a course of practicing law, from at least mid-1995 through late 1997, that was reckless and involved gross carelessness is also very serious aggravation. As noted *ante*, such recklessness and gross carelessness involved moral turpitude. (*Simmons v. State Bar*, *supra*, 2 Cal.3d at p. 729.) The extent and duration of respondent's recklessness and gross carelessness clearly lend support to the hearing judge's conclusion that respondent "wanted to make as much money as possible by taking on more cases than he could properly handle."

4. Improperly accepting payment of legal fees from third party.

The third count of uncharged misconduct aggravation that we independently find on review is respondent's repeated and deliberate violation of rule 3-310(F), which rose to a level involving moral turpitude in violation of section 6106. Respondent violated rule 3-310(F) by permitting the nonattorney immigration services providers who referred immigration clients to him to pay his attorney's fees for representing the clients they referred to him.

Under rule 3-310(F), an attorney may accept payment of his legal fees from a third party only if there is no interference with independence of attorney's professional judgment or the attorney-client relationship, information relating to the representation remain protected as client confidences and secrets, and the attorney obtains the clients' *informed written consent*. (See, generally, *People v. Merchants Protective Corp.*, *supra*, 189 Cal. at p. 538 ["The essential relation of trust and confidence between attorney and client cannot be said to arise where the attorney is employed, not by the client, but by some corporation which has undertaken to furnish its members with legal advice, counsel, and professional services. The attorney in such a case owes his first allegiance to his immediate employer, the corporation, and owes, at most, but an incidental, secondary, and divided loyalty to the clientele of the corporation."]

The record clearly establishes that respondent permitted the referring immigration services providers who paid his legal fees for representing their clients in immigration court to interfere with his judgment, to restrict the nature and extent of the legal advice he provided to the alien clients, and to restrict the legal services he provided to the alien clients, all to the detriment of the clients. The record also clearly establishes that respondent did not obtain the clients' *informed* consent (oral or written) to permit the immigration services providers to pay his legal fees. Respondent did not have written fee agreements with his clients, much less written authorization to receive payment of his legal fees from the immigration services providers.

5. Lack of candor.

a. Respondent's statements regarding IC & Gaston.

The hearing judge found that respondent's statement that "I have absolutely no relationship with Consultorio Internacional," in a February 28, 1998, letter that respondent sent to a State Bar investigator, who was investigating Gonzalez's complaints against respondent, was misleading and lacked candor. Respondent's statement was misleading because respondent knew that IC is a "d/b/a" for Gaston and

because respondent admitted to taking at least two or three other referrals from Gaston.[75] Furthermore, respondent's statement in that same February 28, 1998, letter that "I am unaware of any monies that were paid to this 'Gaston' person" is also misleading because it clearly indicates that respondent does not even know Gaston when the opposite is true.

It is well established that, while "[a]n attorney has no obligation to produce incriminating evidence on his own initiative. . . ., he has an obligation to respond to the State Bar's inquiries in a manner which is 'consistent with [the] truth' (see Bus. & Prof. Code, § 6068, subd. (d))." (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 708-709.) In sum, respondent's statements in his February 1998 letter were not consistent with the truth.

b. Respondent's statements regarding IIS.

As the hearing judge found, respondent's testimony that he had no professional "association" with IIS is contradictory with respondent's admission that he had handled about 10 other cases for IIS. Moreover, it lacks candor because the address of respondent's office in January 1996 was 124 West 2nd Street, Los Angeles, California (see respondent's January 2, 1996, Form EOIR-28 in the Calderons' case), which was the same address of IIS's office at that time (see respondent's exhibits BBB, DDD; State Bar exhibits 42, 44, 46).

c. Misrepresentations to the State Bar.

In March 1997, a State Bar investigator wrote respondent asking him to respond in writing to a complaint that Israil had filed against him with the Bar. Eleven months later, respondent finally responded to the investigators in a letter dated February 28, 1998, letter. In that letter, respondent stated that Israil's "allegations that I failed to appear at the [November 14, 1996,] scheduled hearing are inaccurate. On the morning in question, I checked into court to see if Ms. Israil, who is an elderly woman, was present. She was not. This was approximately 8:30 a.m."

[26a] Then, on January 22, 1999, 11 months later, respondent verified in his answers to the interrogatories that the State Bar propounded on him in this proceeding to be true of his own knowledge under penalty of perjury. In his answer to the interrogatory regarding Israil's complaint, respondent stated that he "arrived at the courtroom on time that day, but did not see Israil in or near the courtroom. [He] made contact with the Judge's clerk, advised that his client was not there yet, and left briefly to attend another matter. He returned to the courtroom without seeing Israil anywhere in or near the courtroom. Israil's case was called and she was ordered deported. [He] saw Israil for the first time out in the hallway after her case had already been called."

[26b] The record establishes that respondent's statements are false. As note *ante*, the only attorney who "appeared" for Israil on November 14, 1996, from respondent 's law office was attorney Jensen, and he was an hour late; by 8:15 a.m. on the morning of November 14, 1996, Israil and Baliozian were outside the courtroom waiting for respondent who did not appear; and neither Israil nor any attorney from respondent's law office were in court when Israil's case was called shortly after 8:30 a.m. or when the case was called again at 9:05 a.m. By making these false statements in his letter to a State Bar investigator and in his verified answers to the State Bar's interrogatories, respondent engaged in acts involving moral turpitude in willful violation of section 6106. These two acts involving moral turpitude are the fourth and fifth counts of serious uncharged misconduct that we independently find on review, which we consider only for purposes of aggravation because they were not charged.

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75. Respondent's statement might be technically true in a limited sense because, by the time respondent wrote the February 28, 1998, letter, Gaston had stopped making immigration case referrals to respondent and, therefore, as of February 28, 1998, respondent had no relationship with IC. However, respondent did not state that he no longer had any relationship with IC or that, as of February 28, 1998, he had so such relationship. In any event, when respondent's statement is considered in context, it is clearly misleading.

[26c] As we held more than 10 years ago, when an attorney makes misrepresentations in his verified answers to interrogatories propounded to him by the State Bar, it "is a serious factor in aggravation" and might well constitute a greater offense than the underlying misconduct. (*In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 340.) Thus, we reject as meritless respondent's contention that he should not be held responsible for the misrepresentations in his verified answers to the State Bar's interrogatories because they were prepared for him by his prior counsel in this proceeding and because he purportedly relied on her to prepare the answers for him.[76] While it might be improper to penalize a lay client for not correcting mistakes that his attorney made in a pleading that the client verified, such reasoning carries little weight when the client is also an attorney. (See *Calaway v. State Bar* (1986) 41 Cal.3d 743, 754 (dis. opn. of Bird, C. J.) .)

[27] We also reject as meritless respondent's contentions that he should not be held responsible for the misrepresentations in his interrogatory answers because they were the first interrogatories that he has ever answered and because, with respect to the nine client matters that are the subject of this disciplinary proceeding, he did not have adequate client files or complete copies of the immigration court files and transcripts of the immigration court hearings when he prepared his answers. Respondent had an affirmative duty to insure that his answers to the State Bar's interrogatories were true and correct even if he had to refresh his recollection of the facts by going to the immigration court and reviewing the complete court files and listening to the tapes of the relevant court hearings in each of the nine client matters. (§ 6068, subd. (d); *Franklin v. State Bar, supra,* 41 Cal.3d at pp. 708-709; *Rodgers v. State Bar, supra,* 48 Cal.3d at p. 389; *Grove v. State Bar, supra,* 63 Cal.2d at p. 315.) **[28]** Of course, that affirmative duty is in addition to respondent's duty, under Code of Civil Procedure section 2030, subdivision (f)(1) (Civil Discovery Act), to answer each of the State Bar's interrogatories as complete and straightforward as the information reasonably *available* to him (e.g., the immigration court files and tapes of the court hearings) permitted. (See Rules Proc. of State Bar, rule 180 [Civil Discovery Act is applicable in State Bar Court proceedings except when modified by State Bar's Rules of Procedure].)

Also, we reject as frivolous respondent's claim that he had Israil confused with another client. Respondent took more than 11 months to respond to the State Bar investigator's letter. Thereafter, respondent had an additional 11 months to continue investigating the facts before he answered and verified his answers to the State Bar's interrogatories. Finally, respondent never retracted his letter to the investigator nor, as far as the record indicates, did he ever amend the answers to his interrogatories.

Finally, we reject respondent's statements that his interrogatories answers were incomplete and inaccurate because the information needed to answer the questions was stored in his computer, which he alleges was stolen out of his office by Baliozian's staff when respondent and Baliozian were evicted from their offices on Lankershim Boulevard in late 1996. The record herein clearly establishes that these statements, which are made in respondent's interrogatory answers, are false. Respondent admitted in the hearing department that the only real client records he kept were in his notebook-size calendars, a hand-held computer organizer, and 200 client files. Secretary Lopez credibly testified that they did not maintain a master list of his clients (either manually or on a computer), that respondent did not keep any client records on a computer, that respondent did not have a computer in his office on Lankershim Boulevard, but that Baliozian had one that respondent and his staff were allowed to use for drafting letters and notices.

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76. Not only is this his contention meritless, it is irreconcilable with respondent's contention that we should reject the adverse testimony of his alien clients because they signed, under penalty of perjury, the "fraudulent" asylum applications that were prepared and filed with the INS for them by immigration services providers.

6. Substantial client harm.

Respondent's repeated misconduct, particularly his failure to competently perform legal services, caused substantial harm to the Salgados, Gonzalez, the Guevaras, and Ramirez. (Std. 1.2(b)(iv); cf. *Gadda v. State Bar* (1990) 50 Cal.3d 344, 354-355 [client neglect in an immigration case has "potentially serious consequences"].) Because respondent failed to competently represent the Salgados, Gonzalez, Israil, and the Guevaras, all had their applications for relief deemed abandoned and were either ordered deported or granted voluntary departure, which is effectively an order of deportation. They were all forced to hire new counsel to have their cases reopened, and having an immigration case reopened after an order of deportation in absentia is very difficult " 'because of the immigration service's extremely hard line position.' " (*Gadda v. State Bar, supra*, 50 Cal.3d at pp. 354-355 [quoting testimony of Immigration Judge Dana Marks Keener].)

Having all of their requested relief deemed abandoned and being ordered deported not only delayed their immigration cases, but was personally devastating and stressful for all of the foregoing clients. In that regard, Salgado's testimony establishes that he suffered substantial anguish. He worried for months that he and his wife would be deported, he would lose his job, and they would lose their house through foreclosure because they could not make their mortgage payments if Salgado did not have a job in the United States. It was only after one motion, two appeals, and three years that the Guevaras' new counsel was able to remedy respondent's misconduct by getting their case reopened by the Ninth Circuit. The stress of living under an order granting voluntary departure (which, contrary to respondent's assertions, is effectively an order of deportation) while their motion to reopen was denied by the IJ and their appeal to the BIA was rejected was certainly extremely difficult for the Guevaras.

Similarly, there can be no question that it was emotionally very difficult on Israil to have her request for relief denied and ordered deported to Syria when she was more than 70 years old and after she had lived with her immediate family in California for 17 years.

7. Lack of remorse and failure to accept responsibility for misconduct.

We agree with the hearing judge's finding that respondent lacks remorse for his misconduct. He still refuses to accept responsibility for his misconduct blaming his clients and the referring immigration services providers for his failures to perform the *legal* services for which respondent had a duty to perform for his clients. When asked, in the hearing department, the extent to which he accepts responsibility for his failures to properly prepare and timely file his clients' immigration applications, pleadings, and other documents, respondent testified that he will not accept any responsibility because as he stated without regret: "I never promised to do any paperwork and I never received money for paperwork." **[6j] [5h]** And, as noted *ante*, respondent persistently argues that his continuing customary practices of relying on or permitting referring immigration services providers to, inter alia, prepare and file his clients' applications, pleadings, and other documents and of representing the clients they refer to him only as an "appearance attorney" are legal, appropriate, and in his clients' interests when the law is clearly to the contrary. In addition, he persists with his practices, notwithstanding the fact that at least two of the IJ's in the nine client matters in this proceeding admonished respondent that it was his duty to properly prepare and timely file his clients' "paperwork."[77]

77. During the January 16, 1996, hearing in the Maya-Perez matter, Immigration Judge Nathan W. Gordon admonished respondent that, as Maya-Perez's attorney of record, he was responsible for everything in her application. Likewise, Immigration Judge Ohata admonished respondent on multiple occasions in spring and summer 1996. On one such occasion, in which which Judge Ohata spoke to respondent at length about one of respondent's cases that could not proceed to hearing because the client's documents were inadequate and contained what Judge Ohata considered to be "suspect" (i.e., fraudulent) statements, respondent all but told Judge Ohata that he (i.e., respondent) was not responsible for the documents "if his client goes off to see a notary after he leaves court." Judge Ohata again clearly told respondent that, as the attorney of record, he was responsible for his clients' documents. Because respondent continued to disagree, Judge Ohata suggested, as he "picked up" the telephone, that they call the State Bar to get the issue resolved. Respondent declined to do so, and Judge Ohata hung the telephone up without calling the State Bar.

This is all strong evidence of respondent's inability or unwillingness to fulfill his professional obligation to competently represent his immigration clients.

B. Mitigating circumstances.

1. Lack of harm.

Respondent's claims that a number of his clients did not suffer any harm as a result of his misconduct because they were not deported, but were granted voluntary departure in lieu of deportation is disingenuous and further evidence of his unwillingness to acknowledge or accept responsibility for his misconduct. Whether respondent's client was deported or forced to leave the United States under an order of voluntary departure in lieu of deportation, the client still lost his right to remain in the United States. Respondent himself acknowledges that, if his client did not voluntarily depart in accordance with the terms of the IJ's order, the client was ordered deported.

2. Good character evidence.

Respondent presented testimony as to his good character and abilities as an attorney from Immigration Judge Stephen L. Sholomson, whose testimony we discuss *post*; four attorneys, one of which used to work for respondent and one of which still works for respondent; an immigration court clerk; and three former clients. Like the hearing judge, we give respondent nominal mitigating credit for this testimony because it does not rise to the extraordinary demonstration of good character attested to by a wide range of references who are aware of the full extent of his misconduct as required under standard 1.2(e)(vi).

3. IJs' testimony.

a. The State bar's motion to strike portions of respondent's brief.

[29a] In response to various statements respondent made in his opening brief on review, the State Bar filed a motion to strike portions of respondent's brief, which we grant. In his opening brief, respondent recites that he subpoenaed Immigration Judges Sholomson, Lawrence Burman, and Richard D. Walton to testify as to his good character and professional competence. Respondent, however, asserts that the United States Department of Justice (1) greatly restricted the scope of the testimony that Judge Sholomson could give and (2) refused to permit Judges Burman or Walton to testify at all. Respondent argues that this was not fair because the Department of Justice may not limit the scope of testimony that Immigration Judge Ohata could give as a witness for the State Bar and against respondent. In an attempt to "correct" this perceived unfairness, respondent includes statements in his opening brief as to the favorable testimony he believes that Judge Sholomson would have presented had the Department of Justice not restricted his testimony and that Judges Burman and Walton would have given had they been permitted to testify. Respondent then appears to assert in his opening brief that we should consider these statements as evidence in this proceeding because the statements are supported by a declaration that his counsel executed and filed in the hearing department on February 1, 2000. Respondent argues that his counsel's declaration is, or should be treated as, a formal offer of proof. The State Bar requests that we strike from respondent's brief all statements based on that February 1, 2000, declaration.

[29b] Respondent fails to cite any authority, and we are unaware of any, to support his assertion that his counsel's declaration is an offer of proof. Again, the law is to the contrary. An offer of proof is a summary of proffered evidence that has been excluded by a trial judge, which is presented (1) to the trial judge to insure that he knows what evidence he has excluded and to provide him with an opportunity to reconsider his denial and permit the introduction of the evidence before the end of trial and (2) to an appellate court so that it may effectively review the trial judge's exclusion of the evidence. (Evid. Code, § 354; *People v. Whitt* (1990) 51 Cal.3d 620, 648.)

[29c] Respondent cannot plausibly argue that the hearing judge excluded any portion of Judge Sholomson's testimony, excluded the testimony of either Judge Burman or Judge Walton, or otherwise precluded Judges Burman and Walton from testifying. Judge Sholomson's testimony was restricted by

the Department of Justice. And Judges Burman and Walton were prohibited from testifying by the Department of Justice. We lack jurisdiction to review the Department of Justice's actions. In short, the declaration of respondent's counsel filed on February 1, 2000, is neither an offer of proof nor otherwise part of the evidentiary record in this proceeding. We, therefore, grant the State Bar's motion and deem all of the statements in respondent's opening brief that are based on the declaration filed on February 1, 2000, to be stricken.

The State Bar also requests that we strike from respondent's opening brief the statement to the effect that Maya-Perez failed to appear for her deposition in this disciplinary proceeding without a valid excuse. According to the State Bar, the only thing in the record supporting that statement are the self-serving statements that respondent's counsel made "on the record" at Maya-Perez's deposition after she failed to appear. However, contrary to the State Bar's argument, the transcript of Maya-Perez's deposition was not admitted into evidence; accordingly, it is on that basis that we grant its request and must deem the statement in respondent's opening brief regarding Maya-Perez's failure to appear at her deposition to be stricken.

b. Immigration Judge Sholomson's testimony.

Judge Sholomson testified that, between mid-1995 through late 1997, respondent made too many immigration court appearances and had to go back and forth between courtrooms, but that, since that time, he believes that respondent has since greatly reduced his appearances to a more manageable level, which has greatly reduced the number of client and judicial complaints against respondent. Judge Sholomson also testified that it was his experience that respondent almost always filed the necessary applications and pleadings in his cases, but that respondent's filings were also often deficient and had to be supplemented or modified. According to Judge Sholomson, however, many of the applications and pleadings filed in his court by other immigration attorneys are deficient and have to be supplement or modified. We accept Judge Sholomson's testimony as true, but are unable to consider it as substantial mitigation or as substantially rebutting the overwhelming adverse evidence in the record of respondent's incompetent, reckless, and grossly careless representation of his immigration clients or the extensive aggravating circumstances.

4. Corrective measures.

While respondent still refuses to accept responsibility for his habitual, reckless, and intentional failures to competently perform legal services or his ethical obligations as the attorney of record in an immigration case, he has undertaken some corrective measures. Those measures include entering into a long-term lease for his law office, which is now located close to the immigration courts; hiring a full-time associate attorney; developing a method for tracking and meeting filing deadlines and court appearances; reducing the number of his immigration court appearances; using written fee agreements; and, reducing the number of referrals he accepts from nonattorney immigration services providers. We reject respondent's claim that his developing and using written disclosure forms of his limited scope of representation as an "appearance attorney" for the clients referred to him by immigration services providers as federal law clearly precludes such limited represention.

Like the hearing judge, we conclude that the mitigating weight of respondent's corrective measures is nominal. Respondent obviously ignored the warnings and admonitions from multiple IJ's before whom he appeared regarding his incompetent representations of his alien clients and failure to comply with applicable federal regulations and the immigration court's local operating procedures. Notably, almost all respondent's corrective measures were begun only after the State Bar undertook substantial involvement in response to numerous client complaints made against respondent.

Moreover, we decline to characterize respondent's use of written fee agreements as a corrective measure. Section 6148 has mandated the use of written fee agreements since 1994. Similarly, we decline to characterize respondent's reduction of the number of immigration case referrals he accepts from nonattorney immigration services providers as a corrective measure. The terms and conditions under which respondent continues to accept referrals from

such providers still amount to the aiding and abetting of the representation of aliens in immigration cases in violation of federal law and of the unauthorized practice of law in this state. Respondent's continued acceptance of any referrals from immigration services providers under the terms and conditions illustrated in this proceeding is an aggravating circumstance, not a mitigating circumstance.

VII. DEGREE OF DISCIPLINE DISCUSSION.

In determining the appropriate level of discipline, we first look to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 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.)

The applicable sanction in this proceeding 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. In the present proceeding, the magnitude of the misconduct is substantial. Thus, significant discipline is warranted under standard 2.3.

In the time period covered by this proceeding of more than two years (i.e., from mid-1995 through late 1997), respondent intentionally and recklessly failed to competently perform legal services in each of the nine different client matters and intentionally abandoned his client Ramirez minutes before the merits hearing was scheduled to begin on her application for asylum. " 'Asylum cases are probably the most sensitive cases that the field of immigration deals with. They are like death penalty cases.' " (*Gadda v. State Bar, supra,* 50 Cal.3d at pp. 354-355.) Respondent's misconduct not only presented the possibility of serious consequences, but actually resulted in substantial harm to many of his clients. In addition, respondent aided and abetted immigration services providers (1) in representing aliens in immigration cases in violation of federal law and (2) in engaging in the unauthorized practice of law in this state. He also improperly accepted his legal fees from the immigration services providers who referred cases to him and allowed, at least, two of them to put his name and title of attorney at law on their business cards.

Respondent continues to remain content to abdicate his role of attorney and officer of the court to nonattorney immigration services providers who refer clients to him regardless of the risks and dangers to the clients. Moreover, he continues to remain content to appear in immigration court proceedings seeking relief for his clients based on what could be fraudulent applications for relief. Respondent cannot plausibly deny that such a scenario is a real possibility in light of his knowledge that immigration services providers routinely prepare and file fraudulent applications for asylum. Respondent's actions involve moral turpitude in violation of section 6106. (*In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, 627.)

In addition, respondent failed to notify thousands of his clients when he moved his offices; failed to maintain his current office address with the State Bar and the immigration court; failed to maintain any real records regarding his clients and their names, addresses, and telephone numbers; and, failed to exercise any care for the important documents that were given to him by his clients.

He also misled and misrepresented the truth to the IJ during the October 1996 hearing in the Salgado matter. Respondent intentionally attempted to deceive that IJ into granting respondent's motion to withdraw as the Salgados' attorney of record. Next, respondent misrepresented facts to State Bar investigator Doukakis in response to Doukakis's inquiry as to the complaints made against him by Israil. Then, respondent repeated these false statements in his answers to the State Bar's interrogatories.

Furthermore, respondent committed the foregoing misconduct while practicing law in a such a reckless and careless manner that additional misconduct and serious client harm were not just likely, but inevitable. What is more, even after the admonitions

of at least two experienced IJ's, respondent continued to violate the federal regulations (1) requiring a party's attorney of record to prepare and file all applications, pleadings, or other documents in the party's case and (2) proscribing the preparation of immigration applications, pleadings, and other documents by nonattorney immigration services providers. (Compare *In re Morse, supra*, 11 Cal.4th at p. 209 [where Court held that attorney's "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 . . . went beyond tenacity to truculence"].)

[30] Respondent seeks to ameliorate the nature and extent of his misconduct by arguing that he committed his misconduct shortly after his admission to the bar and when he had little experience in immigration law. We reject respondent's argument. It is when an attorney is newly licensed or when an attorney begins to practice in a new area of the law that he should take the proper steps necessary to learn the governing law, rules, and regulations in that area of practice. (Rule 3-110(C) [if an attorney "does not have sufficient learning and skill when the legal service is undertaken, the [attorney] may nonetheless perform such services competently . . . by acquiring sufficient learning and skill before performance is required" or by associating with counsel who is competent].)

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.) The parties have not cited any prior case dealing with substantially similar misconduct as that present in this proceeding. There are only a few Supreme Court opinions and one review department opinion involving attorney misconduct in the area of immigration law.

In *Gadda v. State Bar, supra*, 50 Cal.3d 344 the misconduct included neglecting two immigration matters, instructing a client to lie to a government official, failing to properly supervise an associate attorney, and mailing between 500 and 800 letters falsely adverting his ability to provide legal services under a new immigration law that had not yet been passed by Congress. In aggravation, the attorney failed to recognize the seriousness of his misconduct and to accept responsibility for his wrongdoing. In mitigation, he had substantial pro bono work. The discipline was two years' stayed suspension and three years' probation on conditions including six months' actual suspension and until restitution. Even though the misconduct in *Gadda* involved false advertising letters, "the discipline rested mainly on the attorney's [immigration law] misconduct." (*In re Morse, supra*, 11 Cal.4th at p. 208.)

In *Gadda* the attorney's failure to perform in the two immigration matters was less serious than respondent's and did not involve the numerous failures to appear for immigration court hearing that are present in this case; yet, the Supreme Court imposed six months' actual suspension on the attorney. (*Gadda v. State Bar, supra*, 50 Cal.3d at pp. 356-357.)

While the misconduct in *In re Aquino* (1989) 49 Cal.3d 1122, which led to disbarment, also involved the practice of immigration law, the attorney there was convicted in federal court on some 13 felony counts, each of which involved intentional dishonesty and fraudulent conduct. (*Id.* at pp. 112-1128.) In addition, the attorney there "not only countenanced perjury; he affirmatively and repeatedly counseled his clients to perjure themselves before the I.N.S." (*Id.* at p. 1130.) Even though respondent's misconduct also involves fraudulent and deceptive conduct, it does not rise to the level of that in *Aquino*. Accordingly, we cannot rely on *Aquino* as supporting a disbarment recommendation in this proceeding.

Finally, the misconduct in *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416 (hereafter *Gadda II*), which led to disbarment, also involved the practice of immigration law. Like respondent, the attorney in *Gadda II* was culpable of engaging in misconduct in nine immigration client matters. Even though the attorney in *Gadda II* was found culpable on 16 counts of charged misconduct and respondent is culpable on 18 counts of charged misconduct and 15 counts of uncharged misconduct, the attorney in *Gadda II* had a prior record of discipline involving similar misconduct (*Gadda v. State Bar, supra*, 50 Cal.3d 344), and respondent has no prior record of discipline.

Even though respondent has no prior record, his misconduct is extensive and repeated. It clearly mandates substantial discipline for the protection of the public, the profession, and the courts. We conclude that the appropriate level of discipline is five years' stayed suspension and five years' probation with extensive rehabilitative and supervisory probation conditions, including at base, a three-year period of actual suspension.

VIII. RECOMMENDED DISCIPLINE.

We recommend that respondent James Robert Valinoti be suspended from the practice of law in the State of California for a period of five years; that execution of the five-year period of suspension be stayed; and that he be placed on probation for a period of five years on 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 he shows proof satisfactory to the State Bar Court of his 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 conditions of this probation.

3. The State Bar's Probation Unit shall promptly assign a probation monitor referee to respondent. Respondent must promptly review the terms and conditions of this probation with the probation monitor referee and establish a manner and schedule of compliance with them. Such manner and schedule of compliance must, of course, be consistent with the terms and conditions of probation. Respondent must furnish such reports concerning respondent's compliance as may be requested by the probation monitor referee. Respondent must cooperate fully with the probation monitor referee to enable the referee to discharge the referee's duties. (See Rules Proc. of State Bar, rule 2702 [duties of probation monitor referees].)

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 his assigned probation monitor referee that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

5. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles and his assigned probation monitor 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. 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 his assigned probation monitor. In addition, respondent must maintain with the Probation Unit in Los Angeles and his 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 his assigned probation monitor.

7. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) 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. (Accord Rules Proc. of State Bar, rule 3201.)

8. Each year of his probation, respondent must attend in person and complete a course on law office management that qualifies for at least eight MCLE credit hours and that meets with the prior approval of his assigned probation monitor. Each year respondent must provide satisfactory proof of his completion of such a course to his assigned probation monitor. In addition, each year, respondent must provide satisfactory proof of the prior approval and completion of such a course 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 these courses. (Cf. Rules Proc. of State Bar, rule 3201.)

9. Within the period of his actual suspension, respondent must develop an extensive law office management/organization plan that meets with the approval of his assigned probation monitor. At a minimum, the plan must include procedures to send periodic status reports to clients; the documentation of telephone messages received and sent; file maintenance; the meeting of deadlines; calendaring of court appearance dates; withdrawing as attorney, whether of record or not, when clients cannot be contacted or located; and the training and supervision of support personnel. This condition of probation is separate and apart from respondent's MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for developing this plan. (Cf. Rules Proc. of State Bar, rule 3201.)

10. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for five years shall be satisfied, and the suspension shall terminate.

IX. PROFESSIONAL RESPONSIBILITY EXAMINATION, RULE 955, AND COSTS.

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 his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Probation Unit in Los Angeles and his assigned probation monitor within that same time period. Additionally, 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 that rule 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 Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

I concur:
BACIGALUPO, J.*

*Hearing Judge of the State Bar Court designated by the Presiding Judge pursuant to rule 305(e) of the Rules of Procedure of the State Bar.

CONCURRING AND DISSENTING OPINION OF OBRIEN, J.

I concur fully with the majority's findings and conclusions of respondent's culpability and its analysis regarding mitigating and aggravating circumstances except in the two instances involving aggravating circumstances, which I discuss below. However, I dissent from the recommended level of discipline based on my conclusion that the appropriate level of discipline to recommend to the Supreme Court in this proceeding is disbarment.

I concur with the majority's conclusion that respondent's misconduct demonstrates repeated, similar acts of misconduct, which must be considered as serious aggravation. But, unlike the majority, I further conclude that respondent's misconduct evidences a pattern of misconduct, which is egregious aggravation under standard 1.2(b)(ii) of the Standards for Attorney Sanctions for Professional Misconduct (hereafter standards). Notwithstanding the facts, inter alia, that multiple immigration judges (hereafter IJ's) repeatedly reminded respondent of his duty to fully represent each immigration client for which he was the attorney of record and that his clients' cases were repeatedly being dismissed because of his misconduct, respondent began and continued a course of extensive misconduct that rises to the level of a "serious pattern of misconduct involving recurring types of wrongdoing." (*Garlow v. State Bar* (1988) 44 Cal.3d 689, 711; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 737.) In that regard, when an attorney commits multiple acts of similar misconduct or recurring types of wrongdoing, as respondent did in the present proceeding, the gravity of each successive violation increases. (Cf. *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531.)

Moreover, I concur with the majority's conclusion that respondent's misconduct caused substantial harm in at least five of the nine client matters in this disciplinary proceeding, which must be considered as aggravation. However, I further note that, although none of respondent's clients suffered any irreparable harm because of his misconduct, it was only because the clients were eventually able to obtain relief from the adverse consequences of respondent's misconduct from either the immigration court or the United States Court of Appeals for the Ninth Circuit. Thus, I conclude that respondent's misconduct harmed not only his clients, but also the administration of justice, which is additional aggravation under standard 1.2(b)(iv).

Furthermore, the Supreme Court has repeatedly stated: " 'willful failure to perform legal services for which an attorney has been retained in itself warrants disciplinary action, constituting a breach of the good faith and fiduciary duty owed by the attorney to his clients. [Citations.]' [Citation.] Moreover, habitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. [Citations.]" (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) In the present proceeding, not only do respondent's repeated failures to perform the legal services for which he was retained and had a legal duty to perform, failures to communicate with his clients, and client abandonment constitute such acts of moral turpitude, his misleading statements to an IJ and misrepresentations to the State Bar also constitute acts of moral turpitude. Respondent did not establish any compelling mitigation, nor did he establish any meaningful reform. Accordingly, I would recommend that respondent be disbarred and that his name be stricken from the roll of attorneys admitted to practice in this state.

OBRIEN, J.*

*Judge Pro Tem of the State Bar Court appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT AARON GORMAN

A Member of the State Bar

No. 01-PM-04164

Filed July 10, 2003

SUMMARY

In this probation revocation proceeding, respondent admitted to violating his probation by failing to complete restitution timely and by failing to attend the State Bar's Ethics School by the deadline. Those two probation conditions were imposed on respondent as part of the stipulated disposition in a prior disciplinary proceeding. Even though the hearing judge found multiple mitigating circumstances, she found only one aggravating circumstance (i.e., respondent's prior record of discipline). The hearing judge recommended two years' stayed suspension and two years' probation, but no actual suspension. (Hon. Patrice E. McElroy, Hearing Judge.)

The State Bar requested review and contended that the hearing judge erred by not recommending a period of actual suspension of at least 90 days. The review department adopted the hearing judge's culpability and aggravation finding. However, it also independently made two additional aggravation findings (i.e., that respondent completed restitution only after repeated reminders and pressure from State Bar's Probation Unit and that respondent repeatedly listed, in caption on his pleadings, his public employer, the Yolo County District Attorney's Office when that office had no role in representing respondent in this proceeding). Moreover, even though the review department adopted some of the hearing judge's mitigation findings, it concluded that she gave them more weight than was appropriate on the record. The review department adopted the hearing judge's recommended two years' probation, but added, as a condition, 30 days' actual suspension.

For State Bar: Donald R. Steedman

For Respondent: Robert Aaron Gorman, in pro. per.

HEADNOTES

[1] 1712 Probation Cases–Wilfulness
Neither bad purpose nor intentional evil is required to establish willful violations of disciplinary 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.

[2] **735.30 Mitigation–Candor–Bar–Found but Discounted**
735.50 Mitigation–Candor–Bar–Declined to Find
1719 Probation Cases–Miscellaneous
In probation revocation proceeding, while attorney's cooperation in stipulating to facts warranted some mitigative consideration, such consideration is not extended to either attorney's participation in prior disciplinary proceeding or in probation revocation proceeding, in which he had a statutory duty to participate.

[3] **1714 Probation Cases–Degree of Discipline**
Even if attorney had properly supported claim that he would lose his employment as deputy district attorney if he were actually suspended for probation revocation, it would not have excused a different degree of discipline than that which would have otherwise been warranted.

[4] **691 Aggravation–Other–Found**
1719 Probation Cases–Miscellaneous
In probation revocation proceeding, repeated reminders and pressure from State Bar needed to secure respondent's completion of restitution in accordance with the stipulated discipline imposed on attorney in prior disciplinary proceeding were aggravating factors and inconsistent with the self-governing nature of probation as a rehabilitative part of attorney discipline system.

[5] **691 Aggravation–Other–Found**
1719 Probation Cases–Miscellaneous
Attorney's injection of the district attorney's office in which he worked into the defense in his disciplinary probation revocation proceeding, by using its name in caption of his pleadings, when that office had no role in his defense was, at very least, a misrepresentation of that office's official participation and an aggravating circumstance.

[6 a-b] **1714 Probation Cases–Degree of Discipline**
More serious sanctions are assigned to probation violations closely related to reasons for imposition of previous discipline or to rehabilitation. Attorney's probation violation for not timely completing restitution to client was both centrally related to trust account violations underlying attorney's prior discipline and closely related to rehabilitation.

[7] **1714 Probation Cases–Degree of Discipline**
Discipline for willful violation of disciplinary probation often calls for actual suspension to reflect seriousness with which compliance with probation duties is held. Attorney who willfully violates a significant probation condition, such as restitution, can anticipate actual suspension in absence of compelling mitigating circumstances.

[8] **1714 Probation Cases–Degree of Discipline**
Where probation conditions in prior disciplinary proceeding were imposed as part of a stipulated disposition, appropriate level of discipline in probation revocation proceeding for respondent's admitted failure to complete restitution payments until nine months past the deadline and to complete ethics school until six weeks past the deadline included a 30-day period of actual suspension in addition to a period of stayed suspension and an extension of probation as the hearing judge recommended.

[9] **1711 Probation Cases–Special Procedural Issues**
The review department reduced hearing judge's recommended two-year stayed suspension to one year in view of the limits of suspension contained in rule 562, Rules of Procedure of the State Bar.

ADDITIONAL ANALYSIS

Aggravation

Found

511 Aggravation–Prior Record–Found

Mitigation

Found but Discounted

715.30 Good Faith
725.31 Disability/Illness
725.32 Disability/Illness
725.39 Disability/Illness

Other

1751 Probation Cases–Probation Revoked
1813.06 Stayed Suspension–1 Year
1815.01 Actual Suspension–1 Month

OPINION

STOVITZ, P. J.:

In this case, there is no dispute that respondent Robert Aaron Gorman wilfully failed to comply timely with two conditions of his disciplinary probation: making restitution and enrollment in the State Bar's Ethics School. The sole issue in this review, brought by the State Bar's Office of Chief Trial Counsel, is whether the hearing judge erred when she recommended only stayed suspension for respondent's violations of probation. The State Bar seeks at least a 90-day actual suspension from practice as appropriate discipline, and respondent urges that we adopt the hearing judge's recommendation.

Independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that, in view of respondent's undeniably wilful violations of probation, particularly of the duty to timely make complete restitution, a 30-day actual suspension recommendation is now warranted as a part of extended probation.

I. FACTS AND FINDINGS BELOW.

A. Introduction and prior stayed suspension.

Respondent was admitted to practice law in California in 1995. The facts of his prior discipline rested on a stipulated disposition. Moreover, the key facts surrounding this probation revocation proceeding rested either on stipulated facts or were not disputed.

Effective January 2001 respondent was placed by the Supreme Court on stayed suspension for one year and probation for two years. This discipline was based on respondent's failure during 1996 to maintain trust funds in his trust account. As a result, a trust account check respondent issued for $620 to a medical provider of his client was dishonored. In 1997 and during part of 1998, respondent also failed to keep a current office address on the State Bar's official records as required by the Business and Professions Code.

In aggravation, the hearing judge considered that trust funds were involved in respondent's 1996 violation. In mitigation, respondent offered to show that he had opened the trust account at issue to protect his client from a previous problematic trust account and that he had instructed his office staff to deposit adequate funds in the account. At about the time of his misconduct, respondent closed his practice and moved his practice records to his garage. A suspicious fire broke out in his garage and these events added to respondent's inattention to his trust account recordkeeping and State Bar obligations.

The stayed suspension required that respondent make restitution to the provider or his client of $620, plus 10 percent interest from June 26, 1996, and furnish satisfactory evidence of this payment to the State Bar's Probation Unit. The deadline for these restitution duties was April 7, 2001, ninety days from the effective date of the Supreme Court's order.

During respondent's probation, he was required to file quarterly reports of his probation compliance and identify restitution payments. By January 7, 2002, respondent was required to complete the State Bar's Ethics School and by the same date, he had to pass the professional responsibility examination.

B. Respondent's compliance and probation violations.

There is no dispute that respondent timely passed the professional responsibility examination and made timely quarterly probation reports. However, it is also undisputed that respondent did not complete the State Bar's Ethics School until February 21, 2002, about six weeks late. Also, respondent did not complete restitution payments until January 7, 2002, nine months late.

The record shows that respondent paid the principal sum of restitution, $620, sometime in June 2001. He reported incorrectly on July 6, 2001, that he had satisfied his restitution duties. However, the State Bar had learned from respondent's former client that she had not received the interest due on the principal amount. Thereafter, the State Bar tried repeatedly to have respondent complete his restitution or provide proof of having done so. A State Bar Probation Unit deputy, Lydia Dineros, left phone messages twice in

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In aggravation, the hearing judge considered that trust funds were involved in respondent's 1996 violation. In mitigation, respondent offered to show that he had opened the trust account at issue to protect his client from a previous problematic trust account and that he had instructed his office staff to deposit adequate funds in the account. At about the time of his misconduct, respondent closed his practice and moved his practice records to his garage. A suspicious fire broke out in his garage and these events added to respondent's inattention to his trust account recordkeeping and State Bar obligations.

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During respondent's probation, he was required to file quarterly reports of his probation compliance and identify restitution payments. By January 7, 2002, respondent was required to complete the State Bar's Ethics School and by the same date, he had to pass the professional responsibility examination.

B. Respondent's compliance and probation violations.

There is no dispute that respondent timely passed the professional responsibility examination and made timely quarterly probation reports. However, it is also undisputed that respondent did not complete the State Bar's Ethics School until February 21, 2002, about six weeks late. Also, respondent did not complete restitution payments until January 7, 2002, nine months late.

The record shows that respondent paid the principal sum of restitution, $620, sometime in June 2001. He reported incorrectly on July 6, 2001, that he had satisfied his restitution duties. However, the State Bar had learned from respondent's former client that she had not received the interest due on the principal amount. Thereafter, the State Bar tried repeatedly to have respondent complete his restitution or provide proof of having done so. A State Bar Probation Unit deputy, Lydia Dineros, left phone messages twice in

June 2001 with respondent to obtain information about his making of restitution. She also reminded him in an August 2001 letter of his restitution requirement. She did speak to respondent in December when he called her to report passage of the professional responsibility examination. In that call, she reminded respondent to register for the January 17, 2002, ethics school class. The record further shows that in November 2001, a State Bar attorney wrote to respondent reminding him that he had failed to make $330 of required restitution; and, that unless he confirmed payment by December 5, 2001, the State Bar attorney would move to revoke his probation. In a declaration Respondent filed in March 2002 opposing the State Bar's motion to revoke probation, he stated that he understood that if the State Bar received his payment by January 8, 2002, it would not seek probation revocation. In his testimony, he stated that he had informed the State Bar attorney that he could not make the payment until he received his salary in January. Even assuming arguendo that a State Bar attorney could grant respondent an extension of time to comply with a Supreme Court disciplinary order, the record shows no written grant by the State Bar attorney to respondent of an extension to January to complete restitution. As noted, not until January 7, 2002, did respondent complete restitution.

Finally, the record shows that when this probation revocation proceeding arose, respondent repeatedly used the pleading caption of his public office of employment, the Yolo County District Attorney's Office, when appearing, although that office had no role in his probation compliance.[1]

At the formal hearing, respondent openly and repeatedly admitted his probation violations. When he entered into the 2000 stipulation for his prior discipline, he was aware of the conditions he had to meet and their deadlines. He testified as to the pressures of the death of his father in October 2000 after nearly 12 months of attempts to get proper diagnosis and treatment for his father's brain tumor; and the birth of his first child also in October 2000. He also had to pay about $4,000 in the costs of disciplinary proceedings which was a sum far in excess of what he thought he would have to pay. His testimony suggested that he did not have immediate funds to pay the interest portion of the restitution when it was due. His primary resource at the time was his modest salary as a deputy district attorney. He asserted that he could continue his employment provided he would not receive any actual suspension.

C. The hearing judge's findings and conclusions.

The hearing judge found that the State Bar proved by a preponderance of the evidence[2] that respondent wilfully violated the restitution and Ethics School completion conditions of his probation. The hearing judge found respondent's prior stayed suspension as the sole factor in aggravation. She found many factors in mitigation: his participation in the previous disciplinary and present revocation proceedings; his remorse and display of candor and cooperation at trial; the absence of any bad faith, coupled with his belief that he was making good faith efforts to make restitution; and the effect of the illness and subsequent death of respondent's father, yielding mental and emotional exhaustion. After reviewing several probation revocation decisions in past cases, the hearing judge deemed the 90-day actual suspension recommended by the State Bar to be unduly harsh, considering the confluence of mitigating factors found and that respondent would lose his employment if actually suspended. Concluding that the State Bar had not adequately shown a need for actual suspension and that the public would be protected by extending respondent's probation with only stayed suspension, the hearing judge recommended only stayed suspension. The State Bar then requested review.

1. During the proceedings below, the State Bar moved to clarify the record by striking references to the Yolo County District Attorney's Office as the appearing attorney in the case. The hearing judge granted the motion.

2. We view the hearing judge's reference to the preponderance standard as not an assessment of the relative strength of the evidence adduced but rather as a reference to the lower proof standard required for probation revocation. (See Bus. & Prof. Code, § 6093, subd. (c); Rules Proc. of State Bar, rule 561.) Indeed, the hearing judge recited that the respondent admitted his violations.

II. DISCUSSION.

A. Culpability.

We uphold the hearing judge's decision finding that respondent wilfully breached probation terms. [1] As the judge stated correctly, the law does not require bad purpose or intentional evil to support a wilful violation of probation conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Here, respondent openly admitted his failures to complete restitution timely and attend the State Bar's Ethics School by the due date. Not until January 2002, did he provide proof that he paid the interest due his client.

B. Degree of discipline.

The State Bar urges that we increase the discipline for respondent's violations, pointing to alleged error by the hearing judge in weighing mitigation excessively and in devaluing aggravation inappropriately. As the State Bar contends, respondent did not display mitigating candor and cooperation, he did not show good faith, did not demonstrate extreme emotional problems caused by the death of his father, did not prove that his feared loss of his job would be a mitigating circumstance and demonstrated more aggravation than found by the hearing judge. According to the State Bar, comparable probation cases warrant at least a 90-day actual suspension. Respondent argues that the hearing judge's discipline recommendation is correct because he did show his candor and cooperation, he proved emotional difficulties linked to his father's death, and he acted in good faith because he was unable to pay restitution timely.

We agree with some of the mitigating factors found below, but we nevertheless conclude that the hearing judge weighed them somewhat heavier than is appropriate on this record in view of aggravating factors.

[2] Although we agree that respondent's cooperation in stipulating to facts in this matter warrants some mitigative consideration, we do not extend that treatment to his participation in the past case (see *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 61), or even in this case. It was respondent's statutory duty to participate in these proceedings (Bus. & Prof. Code, § 6068, subd. (i))[3], just as it was his duty to comply with the conditions of his probation (§ 6068, subd. (k)).

We acknowledge that respondent's testimony of his steps to make restitution and comply with probation appears sincere. That warrants some, but not extensive mitigation since the record shows considerable effort and even pressure on the part of the State Bar to effect respondent's completion of restitution. Respondent was never confused as to his probationary duties nor the deadlines for compliance; and he discharged several of his other duties timely, including paying a significant assessment of costs, in order to continue to keep his license in good standing. However, if he did not complete restitution earlier because of lack of funds, he never explained that to the probation unit nor did he seek an extension of time based on that reason. In our view, this history undercuts notably, respondent's claim of credit for good faith action.

[3] We are sympathetic with respondent's claim that he will be able to continue in employment if he is not suspended actually from practice. However, we note that respondent gave no details supporting this claim. Even if he had done so, that would not excuse a degree of discipline that is otherwise warranted. If avoidance of actual suspension were a prerequisite for respondent's continued employment, it would have been appropriate for respondent to have resolved his restitution obligation when the State Bar gave him ample opportunity to do so to avoid this very proceeding.

Although we do not minimize the trauma associated with the death of respondent's father after a period of illness, that event appeared separated by a significant time from the deadlines of respondent's restitution and his ethics school compliance. Absent

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

either expert evidence or more detailed evidence from respondent, as to specifically how his father's death affected his lack of compliance, we cannot consider it weighty in mitigation. We note that during this same time, respondent timely provided quarterly reports and passed the professional responsibility examination – accomplishments which collectively require a certain concentration, focus and organization.

[4] We find two aggravating factors of note, in addition to the one of respondent's prior record found by the hearing judge. We consider the repeated reminders and pressure needed by the State Bar for respondent to complete restitution to be aggravating. These were not one or two routine reminders, but continued past his deadline for restitution, and even these were not enough to secure respondent's completion of restitution by the deadline set forth. Indeed, even his payment of the principal amount of restitution was late. In short, the repeated need of the State Bar to intervene actively to seek respondent's compliance with duties he voluntarily undertook was inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney disciplinary system.

[5] Finally, we are concerned by respondent's injection of his public employer, the Yolo County District Attorney's Office, into the defense of this matter in which it had no role. Respondent's use of his agency name in pleadings in this court when probation revocation proceedings commenced, defies understanding. We have no proof and make no finding that this was respondent's inappropriate attempt to influence the State Bar Probation Unit or this court[4]. Whatever its reason, at the very least, it was a misrepresentation by respondent of official participation in these proceedings and we hold it to be an aggravating circumstance.

As the decision in *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. 525, 540 teaches, there has been a wide range of discipline imposed for probation violations from merely extending probation, as the hearing judge here recommended, to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension. **[6a]** Further, as we discussed in *Potack*, more serious sanctions should be assigned to those probation violations closely related to the reasons for imposing the previous discipline or closely related to rehabilitation. (*Ibid.*) Also to be weighed, per *Potack*, is the total length of stayed suspension which could be imposed as an actual suspension and the total length of actual suspension imposed earlier as a condition of probation. (*Ibid.*) *Potack* preceded the Supreme Court's opinion in *Potack v. State Bar* (1991) 54 Cal.3d 132 in which the Court imposed a two-year actual suspension, based on Potack's failure to timely file probation reports and that one was incomplete when filed. In aggravation, the Court found that Potack had failed to make restitution timely as ordered by his probation. (*Id.* at pp. 138-139.)

Although the hearing judge distinguished cases cited by the State Bar, as calling for excessive discipline here, other than *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. 525, she did not discuss cases in which the primary probation violation found was, as here, the failure to make timely restitution.

We have reviewed all of our reported decisions since 1989 in which probation revocation for failure to make restitution was the sole or significant factor in the case and find that although they resulted in actual suspension of six months or longer, they are also more serious than the present case.

In the Matter of Taggart (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 was clearly a more serious case than this one. Taggart had two previous suspensions, and he had failed to make any of the restitution of $1,528 plus interest due three years earlier. We held that Taggart had wilfully breached his restitution duty and found insufficient evidence of

4. However, in view of the mutual duties of cooperation found in statute in certain matters between the State Bar and criminal prosecution agencies (see §§ 6044.5, 6054), this potential concern is not solely academic.

mitigating circumstances. We noted that the record lacked evidence that Taggart had failed to comply with any other conditions of his probation. On our recommendation, the Supreme Court suspended Taggart for six months actual and until he completed restitution, as part of a longer stayed suspension.

In the Matter of Broderick (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138 is also more serious than the present one. Broderick had failed to make any of the required restitution of $4,666 plus interest, had filed no quarterly reports and failed to obtain required psychological counseling. We also found Broderick culpable of misconduct in an original disciplinary proceeding as well. We gave several mitigating circumstances considerable weight but also considered two aggravating ones. For the probation violations, the Supreme Court imposed a one-year actual suspension.

We also deem more serious than the present matter, the case of *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81. Hunter was found to have violated one of the quarterly-reporting conditions of his probation as well as to have failed to make about $1,166.50 of required restitution in the total amount of $1,766.50. Further defects in his probation reports were considered aggravating as was his uncooperative conduct in the hearing below. We considered the aggravating circumstances to outweigh the few mitigating ones, which consisted of emotional difficulties experienced by Hunter and favorable character evidence. We recommended, and the Supreme Court imposed, actual suspension of one year and until Hunter provided proof of restitution.

[6b] In this case, respondent's primary probation violation of failure to make restitution timely to his client, was centrally related to the trust account violation underlying respondent's prior discipline. As we have observed, the Supreme Court and our court have underscored the important functions of restitution in attorney discipline: "Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct." (*In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. at p. 312, citing *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009 and *In the Matter of Potack*, supra, 1 Cal. State Bar Ct. Rptr. at p. 537.)

[7] We also consider that discipline imposed for the wilful violation of probation often calls for actual suspension as a reflection of the seriousness with which compliance with probationary duties is held. Just as a wilful violation of an attorney's duties under California Rules of Court, rule 955 usually results in disbarment (e.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131, and cases there cited), an attorney who wilfully violates a significant condition of probation, such as restitution, can anticipate actual suspension as the expected result, absent compelling mitigating circumstances.

[8] Balancing all relevant facts and circumstances to reach the appropriate recommendation of degree of discipline (e.g., *Gary v. State Bar* (1988) 44 Cal.3d 820, 828), we conclude that aggravating circumstances weigh more than the hearing judge assessed and mitigating ones weigh less. Even considering fully the mitigating circumstances in this proceeding, we determine that a 30-day actual suspension is called for as a condition of a stayed suspension and the extension of probation recommended by the hearing judge.[5] **[9 - see fn. 5]**

III. RECOMMENDATION.

For the reasons set forth, we recommend that the stay of suspension previously ordered in Supreme Court case number S091756 (State Bar Court case numbers 96-O-06517; 96-O-08074; 97-O-11026 (consolidated)) be revoked and set aside, that the respondent, Robert A. Gorman, be suspended for one year, that execution of such suspension be stayed and that respondent be placed on probation for two years

5. **[9]** The hearing judge had recommended that respondent be suspended for two years, with execution stayed. In view of the limits of suspension contained in rule 562, Rules of Procedure of the State Bar, we shall reduce the stayed suspension in this case to one year.

on the conditions recommended by the hearing judge in her order granting motion to revoke probation filed June 17, 2002, with the added condition that respondent be actually suspended from the practice of law in California for the first thirty (30) days of the period of probation.

In view of respondent's passage of the professional responsibility examination and his ultimate completion of the State Bar's Ethics School, we do not recommend that he be required to recomplete those requirements.

We do recommend that the State Bar be awarded costs in accordance with the provisions of section 6086.10 and that such costs be payable in accordance with section 6140.7.

We concur:
WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES STEVEN DAVIS

A Member of the State Bar

No. 96-O-04662

Filed August 6, 2003; as modified October 20, 2003

SUMMARY

Respondent became involved in serious intra-corporate dispute over the control of a joint venture corporation by filing a petition for Chapter 11 bankruptcy petition with the authorization of only the corporation's president, who was one of the corporation's four directors. The State Bar charged respondent with misconduct with respect to his handling of the proceeds of a $79,875.89 insurance settlement check which was made payable to his corporate client and that the corporation president permitted respondent to deposit into his client trust account without the knowledge or consent of the remaining three directors. The hearing judge found that respondent willfully failed maintain trust funds in his client trust account, willfully failed to account for the trust funds, and willfully misappropriated, as his attorney's fees, $29,875.89 of the settlement funds from his trust account because of his grossly negligent misreading of the facts and incorrect interpretation of the law. In mitigation, respondent had no prior record of discipline in 12 years' practice, good character testimony, and community service. In aggravation, respondent's misconduct caused significant client harm and was surrounded by overreaching, indifference towards atonement for misconduct, numerous conflicts of interest, and multiple acts of uncharged but proved misconduct. The hearing judge recommended four years' stayed suspension and four years' probation on conditions including a two year period of actual suspension which will continue until respondent pays restitution and establishes his rehabilitation, fitness to practice, and learning in the law. (Hon. Michael D. Marcus, Hearing Judge.)

Respondent requested review, denying any culpability for misconduct and arguing that the hearing judge's discipline recommendation is excessive. The State Bar urged the review department to adopt the hearing judge's findings and discipline recommendation. The review department adopted the hearing judge's determinations that respondent failed to maintain trust funds in his client trust account and failed to account for trust funds. Even though review department adopted the hearing judge's finding that respondent misappropriated his client's funds, it did so only with respect to its determination that respondent disbursed settlement funds to the corporation's president in his individual capacity without the knowledge or consent or the remaining three directors. The review department also concluded that respondent knowingly and intentionally misappropriated $29,875.89 for his own use and benefit. With various modifications, the review department adopted many of the hearing judge's mitigation and aggravation findings. The department adopted the hearing judge's discipline recommendation after increasing the amount of recommended restitution.

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 preeedent.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: R. Gerald Markle

HEADNOTES

[1] **276.00 Rule 3-600 (no former rule)**
280.00 Rule 4-100(A) [former 8-101(A)]
401 Common Law/Other Violations in General
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
Because insurance settlement check that respondent deposited into his client trust account was made payable to his corporate client, he became a fiduciary of all members of corporation's board of directors who asserted a claim to those funds on corporation's behalf, and he owed those directors the same high duty of honestly and obedience to fiduciary duty as if he were their attorney. Respondent breached that duty when he distributed $50,000 of settlement funds to corporation's president, who was one of corporation's four directors, in the president's individual capacity without knowledge or consent of remaining three directors because he knew that president and other three directors were in intractable dispute over control of corporation and that corporation's board had suspended president and denied him access to corporation's funds.

[2] **276.00 Rule 3-600 (no former rule)**
280.00 Rule 4-100(A) [former 8-101(A)]
490.00 Miscellaneous Misconduct
Where respondent had certain knowledge of dispute over his fees and where respondent ignored explicit directive of board majority to immediately cease representing corporation, respondent violated rule of professional conduct requiring disputed funds to be held in trust when he withdrew $29,875.89 of corporate client's funds from his trust account as his attorney's fees.

[3 a-c] **221.00 State Bar Act–Section 6106**
276.00 Rule 3-600 (no former rule)
420.00 Misappropriation
490.00 Miscellaneous Misconduct
Once respondent deposited insurance settlement check that was made payable to his corporate client into his client trust account, he had a fiduciary duty to protect the settlement funds on behalf of all the members of the corporation's board of directors regardless of whether he considered them authorized to act on corporation's behalf. Respondent willfully misappropriated $50,000 of those funds when he disbursed $50,000 to corporation's president, who was one of corporation's four directors, in president's individual capacity without knowledge or consent of corporation's remaining three directors as he knew of intractable dispute between president and other three directors over control of the corporation and corporation's board had suspended president and denied him access to corporation's funds. Respondent's misappropriation involved moral turpitude.

[4 a-d] **221.00 State Bar Act–Section 6106**
276.00 Rule 3-600 (no former rule)
420.00 Misappropriation
When respondent, without the knowledge or consent of all of the directors, withdrew $29,875.89 of corporate settlement funds as his attorney's fees for representing the corporation in bankruptcy proceeding, he knowingly and intentionally misappropriated the $29,875.89 for his own purpose without an honest belief in his right to those funds because (1) he knew a majority of directors vigorously disputed his right to represent corporation and to incur legal fees; (2) he knew president could authorize payment of only $100 of respondent's fees; (3) he acknowledged, under penalty of perjury in a bankruptcy court declaration, he did not have right to withdraw fees from trust account without court's approval; yet, there is no evidence respondent ever obtained such court approval before paying himself; (4) he deceived and misled corporation's chairman and his legal counsel about existence and location of insurance settlement funds; (5) he refused to provide records of settlement check and funds to State Bar. Respondent's knowing and intentional misappropriation of $29,875.89 involved moral turpitude in violation of statute prohibiting acts of moral turpitude and dishonesty.

[5] **213.30 State Bar Act–Section 6068(c)**
271.00 Rule 3-200 (former 2-110)
490.00 Miscellaneous Misconduct
Even though attorneys have duty to zealously represent their clients and assert unpopular position in advancing clients' legitimate objectives, attorneys, as officers of the court, have duty to judicial system to assert only legal claims or defenses warranted by law or supported by good faith belief in correctness.

[6] **273.30 Rule 3-310 [former 4-101 & 5-102]**
276.00 Rule 3-600 (no former rule)
490.00 Miscellaneous Misconduct
A corporation's attorney must abstain from taking part in controversies amount corporation's directors and shareholders to avoid being placed in a position requiring attorney to choose between conflicting duties or to reconcile conflicting interests. As attorney for corporation, respondent's professional obligations were to corporation; not its officers, directors, or shareholders whether in their representative or individual capacities.

[7 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**
276.00 Rule 3-600 (no former rule)
A corporation is a statutory person that can speak only through its constituent officers, directors, shareholders, and agents. Faced with dispute over who was authorized to speak for corporate client, respondent should have first looked at corporation's organizational documents and other pertinent agreements.

[8 a-c] **273.30 Rule 3-310 [former 4-101 & 5-102]**
276.00 Rule 3-600 (no former rule)
277.40 Rule 3-700(c) [former 2-111(C)]
560 Aggravation–Other uncharged violations (1.2(b)(iii))
Because there was an actual conflict in intractable dispute between corporation's president, who was one of corporation's four directors, and corporation's remaining three directors over control of the corporation, respondent's proper course of conduct in representing corporation was to obtain

informed written consent of each of board member or to withdraw from representation if he could not do so. But respondent did not do so; he chose to join the fray asserting only the president's interest while representing the corporation. Because of respondent's multiple conflicts, he lost any objectivity or neutrality and gravely compromised his duty of loyalty to corporate client, which is a serious aggravating circumstance as uncharged, but proved misconduct under aggravation standard for attorney sanctions for professional misconduct with respect to surrounding violations of State Bar Act or Rules of Professional Conduct.

[9 a-d] **221.00 State Bar Act–Section 6106**
276.00 Rule 3-600 (no former rule)
280.00 Rule 4-100(A) [former 8-101(A)]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
490.00 Miscellaneous Misconduct
822 Standards–(a) Sanctions for misappropriation
1091 Substantive Issues re Discipline–Proportionality
1099 Substantive Issues re Discipline–Miscellaneous
Where respondent misappropriated $50,000 of $79,875.89 insurance settlement funds he held in his trust account for his corporate client by disbursing $50,000 to corporation's president, who was one of corporation's four directors, in president's individual capacity without knowledge or consent of corporation's remaining three directors; where respondent violated his fiduciary duty to remaining three directors by disbursing the $50,000 to president without their knowledge or consent; where respondent knowingly and intentionally misappropriated remaining $29,875.89 of settlement funds for his own use and benefit by withdrawing them from his trust account as attorney's fees without the knowledge and consent of remaining three directors; where respondent violated rule of professional conduct requiring disputed funds to be held in trust by withdrawing $29,875.89 in fees from his trust account when his right to collect fees was disputed; where respondent repeatedly refused to account for proceeds of insurance settlement check in accordance with requests of chairman of corporations board of directors; where there was extensive aggravation, including concealment, overreaching, and failure to make restitution, with mitigation for strong good character testimony, extensive community service, no prior record of discipline, and lack of additional misconduct in more than five years; and where misconduct involved only a single client matter; and even though standard for attorney sanctions for professional misconduct for willful misappropriation called for and Supreme Court has repeatedly held that usual discipline for willfully misappropriation of client funds is disbarment, appropriate discipline recommendation was not disbarment, but four years' stayed suspension, four years' probation on conditions, which included two years' actual suspension continuing until respondent pays restitution of $29,875.89 with interest.

[10 a-b] **171 Discipline–Restitution**
276.00 Rule 3-600 (no former rule)
280.00 Rule 4-100(A) [former 8-101(A)]
401 Common Law/Other Violations in General
490.00 Miscellaneous Misconduct
Attorneys cannot recover for services rendered if services are rendered in contradiction of attorney professional responsibility. And where attorney improperly withdraws fees from a trust account, restitution to client or client's estate is appropriate. Thus, where respondent withdrew $29,875 from his client trust account as his attorney's fees without his corporate client's authorization, respondent

should make restitution of $29,875 plus interest to either corporate client, its successor, appropriate recipient of its assets after its dissolution, or if such successor or recipient of assets after dissolution cannot be identified, the Client Security Fund.

ADDITIONAL ANALYSIS

Culpability

Found

221.11	Section 6106–Deliberate Dishonesty/Fraud
221.12	Section 6106–Gross Negligence
280.01	Rule 4-100(A) [former 8-101(A)]
280.41	Rule 4-100(B)(3) [former 8-101(B)(3)]
420.11	Misappropriation–Deliberate Theft/Dishonesty
420.12	Misappropriation–Gross Negligence
430.01	Breach of Fiduciary Duty
490.01	Miscellaneous Misconduct

Aggravation

Found

551	Overreaching
561	Aggravation–Uncharged Violations–Found
582.10	Harm to Client
591	Indifference

Mitigation

710.10	No Prior Record
720.50	Lack of Harm
740.10	Good Character
791	Other

Standards

822.55	Misappropriation–Declined to Apply
822.59	Misappropriation–Declined to Apply
831.90	Moral Turpitude–Disbarment

Discipline

1013.10	Stayed Suspension–4 Years
1015.08	Actual Suspension–2 Years
1017.10	Probation–4 years

Probation Conditions

1021	Restitution
1022.50	Probation Monitor Not Appointed
1024	Ethics Exam/School
1026	Trust Account Auditing
1029	Other Probation Conditions
1030	Standard 1.4(c)(ii)

OPINION

EPSTEIN, J.:

This matter presents an unfortunate example of an attorney who disregarded his ethical duties in the course of representing a corporate client. Respondent, James Steven Davis, who was admitted to the practice of law in 1984, seeks our review of a hearing judge's decision finding him culpable, inter alia, of acts of moral turpitude because he misappropriated with gross negligence the proceeds of a $79,875.89 insurance settlement check issued to his client Thermal Remediation Corporation (TRC). The judge also found respondent failed to account for the proceeds to TRC's Chairman of the Board. Respondent denies culpability and appeals the recommendation of the hearing judge that respondent be placed on four years' stayed suspension, with two years' actual suspension, which will continue until respondent pays restitution of $14,938 together with interest thereon and until respondent establishes his rehabilitation, fitness to practice and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[1]

We have independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), although we give great weight to the hearing judge's factual findings that resolve issues pertaining to the credibility of the witnesses. (Rules Proc. of State Bar, rule 305(a); *In re Menna* (1995) 11 Cal.4th 975, 985.) Accordingly, we adopt many of the hearing judge's culpability determinations, as well as aggravation and mitigation findings, as modified *post*. Also, for the reasons discussed herein, we adopt the hearing judge's disciplinary recommendations, with the exception of the amount of restitution to be paid by respondent, which we recommend should equal the $29,875.89 in legal fees (plus interest thereon) that respondent paid himself from the client trust account while these fees were in dispute.

I. FACTUAL AND PROCEDURAL BACKGROUND

The charges against respondent arose in the context of his representation of TRC, which was a joint venture corporation comprised of two 50 percent shareholders: Robert Ruppert, and a corporate shareholder, CERT Environmental Corporation (CERT). A review of the acrimonious history of TRC is necessary to understand the nature of the misconduct in this case.

A. Formation of the Joint Venture and Its Structure and Operation.

In February 1994, Ruppert and CERT, a wholly-owned subsidiary of the Union Oil Company of California (Unocal), formed TRC to operate a business that specialized in cleaning contaminated soil using a remediation process which Ruppert developed. TRC was a Delaware corporation, with its principal office in Fullerton, California and its soil remediation facility in San Bernardino, California.

At the beginning of the joint venture, Ruppert and CERT entered into several agreements, including a Shareholders Agreement, which restricted their rights to sell or transfer their TRC stock and included a mandatory buy-out provision in case of a deadlock between the shareholders. The Shareholders Agreement also provided CERT with three seats on the Board of Directors and gave Ruppert one seat on the board. CERT elected David Dassler, James Ellis, and Brian Kelly to the board, each of whom were employees of Unocal. Dassler served as Chairman of the Board; Ruppert elected himself to the board. Also, in February 1994, TRC executed an Employment Agreement with Ruppert employing him as its president and chief operating officer for three years, and specifying various restrictions on his authority to act on behalf of the corporation. Article 2.1 of the Employment Agreement stated that the president was subject to the direction and control of the board. Article 2.3(a)

1. The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

limited Ruppert's power to bind TRC in the absence of a board resolution or approved budget.

Unocal funded the joint venture with a loan of $3.405 million to TRC, secured by liens on the two soil remediation units. Unocal also provided operating loans to TRC totaling more than $630,000. In addition to its extensive funding, in April 1994, Unocal contracted with TRC for soil remediation services over a period of four years, which could have resulted in gross revenues to TRC in excess of $3.5 million.

In 1995, TRC discovered that Ruppert had engaged in several instances of financial impropriety and had repeatedly exceeded his spending authority. Accordingly, at its August 3, 1995 board meeting, TRC's directors voted to reduce Ruppert's spending authority from $25,000 to $100 per transaction except for routine operating expenses.

B. Dissolution of the Joint Venture

TRC was unable to operate at a profit or to repay its loans, and by fall 1995 CERT had lost faith in Ruppert's ability to operate the company. CERT thus decided to sell its 50 percent interest and notified Ruppert of this fact in a letter dated September 12, 1995. Ruppert wanted to purchase CERT's half interest, but he and CERT were unable to reach agreement, and CERT was unable to locate any other suitable buyer. Accordingly, CERT decided to dissolve TRC, and advised Ruppert of its intention to do so in December 1995. Ruppert opposed dissolution of the joint venture, but CERT decided to proceed without his approval, which it was entitled to do as a shareholder under the Delaware General Corporation Law.[2] TRC's board passed a resolution at its December 6, 1995 meeting to wind up TRC's operations and instructed Ruppert to effectuate the winding up process. On December 7, 1995, CERT served Ruppert with a copy of its petition to dissolve TRC, which it filed the next day in the Delaware Court of Chancery. Initially, Ruppert cooperated with the board in winding up TRC's operations. For example, Ruppert signed a form letter dated February 8, 1996, addressed to all of TRC's vendors notifying them that, effective January 15, 1996, TRC had closed its operations and instructing them to submit their final invoices to TRC for payment as soon as possible. However, at some point, Ruppert decided not to cooperate, but never informed the board of his decision.

C. Respondent's Involvement with Ruppert and TRC

Concerned about how he could protect Unocal's four-year soil remediation contract with TRC, Ruppert met with respondent on February 8, 1996. Respondent had been in practice for 12 years and was an experienced insolvency, bankruptcy and corporate attorney. At the initial meeting, Ruppert advised respondent that he was the president of TRC, a 50 percent shareholder, and a member of the board. Ruppert also advised respondent about his serious disagreements with the other three members of TRC's board over the dissolution of the corporation. Based on this conversation, respondent concluded "Unocal was trying to dodge the $3,000,000.00 [soil remediation] contract it had with TRC, and that the reason it was trying to destroy TRC was to dodge that liability." Respondent advised Ruppert "that the best way to stop Unocal and [CERT] from destroying TRC was -- and primarily breaching the contracts, was to file a Chapter 11 bankruptcy petition."

Ruppert hired respondent to file the bankruptcy petition without the knowledge and approval of the other three members of the board. Respondent nevertheless signed a fee agreement on February 16 (which Ruppert had previously signed) expressly designating TRC as respondent's client and authorizing him to act as "corporate counsel." Pursuant to the

2. Delaware Code, title 8, section 273, provides for "a stockholder's right to protect his investment in a [joint venture] corporation, the operations of which have become paralyzed by corporate deadlock." (*In re English Seafood (USA) Inc.* (D.Del. 1990) 743 F.Supp 281, 286.) "[A] shareholder in such an evenly-divided corporation has the right to assert control over the disposition of his investment in the assets of that corporation *without the agreement of the other shareholder*." (*Id.* at p. 288, italics added.)

fee agreement, respondent required $20,000 as a deposit against his future legal fees.[3] Respondent accepted two personal checks from Ruppert: a $5,000 check, which respondent promptly deposited into his office operating bank account, and a $15,000 check, which respondent did not deposit, knowing that it was insufficiently funded. Respondent agreed to go forward with his representation without cashing Ruppert's $15,000 check, because Ruppert said he would pay the legal fees from an insurance settlement check that was to arrive shortly arising from damage to one of the remediation units.

Prior to filing the bankruptcy petition, respondent reviewed TRC's Articles of Incorporation, Bylaws, Minutes of the directors' meetings, and the various corporate and shareholder agreements, as well as the applicable federal and state law. Notwithstanding the express restrictions on Ruppert's authority to act for TRC contained in the corporate documents, respondent filed the Chapter 11 petition on behalf of TRC on February 12, 1996. Neither respondent nor Ruppert notified the other members of the board of their intentions before filing the petition. Indeed, the three board members did not learn that Ruppert had even consulted with respondent until after the petition was filed. Respondent's explanation for proceeding without the authorization or knowledge of the other three board members was that, in his opinion, those members were "hopelessly conflicted" over the bankruptcy matter because they were employees of Unocal, which was both a creditor and debtor of TRC. In respondent's view, only Ruppert could speak for the corporation because Ruppert was the least conflicted member of the board since he was not an employee of a creditor.

The reaction by the other three TRC board members to the filing of the bankruptcy petition was swift and unequivocal. On February 12th, at a scheduled and noticed meeting of TRC's board (which Ruppert chose not to attend), Ruppert was suspended as president, he was removed as a signatory on all TRC accounts, and his authority to sign payroll checks was revoked. Two days after the filing of the petition, on February 14, 1996, Robert Kehr, an attorney who represented CERT's interest in TRC as a 50 percent shareholder, faxed a letter to respondent, which respondent received the same day, notifying him that the board had suspended Ruppert as TRC's president and "revoked any authority that he might otherwise have had to represent, speak for, or act for TRC in any way." Kehr's letter also advised respondent that "any commitment [Ruppert] might purported to have made on behalf of TRC to pay your fees and costs also was in excess of his spending authority which was limited to $100. . . ." Kehr further advised respondent that CERT intended to file a motion to dismiss the bankruptcy proceedings as soon as possible, and until then Kehr demanded that respondent "cease and desist from any attempt to represent TRC or to act contrary to the instructions of the TRC Board of Directors."[4] Finally, Kehr requested "the promptest possible dismissal of the bankruptcy petition."

CERT's newly hired bankruptcy attorney, Mark Fields, followed the next day with another faxed letter to respondent, reiterating the demands of attorney Kehr. Respondent was undeterred by Kehr's or Fields' demands. To the contrary, respondent immediately sent a return letter to Kehr, advising that he would seek injunctive relief "to stop all unlawful interference with the reorganization effort." Respondent also sent a letter to attorney Fields threatening to file a federal RICO action against the three TRC

3. The fee agreement uses the terms "deposit" and "retainer" interchangeably, but it was not intended as a classic "true" retainer agreement whereby "a sum of money paid by a client [is intended] to secure an attorney's availability over a given period of time. . . . [S]uch a fee is earned by the attorney when paid . . ." (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.) Rather, the fee agreement in this case was intended as an arrangement whereby the fees would be billed against the $20,000 deposit as the services were performed. Respondent's invoices to TRC conformed with this fee arrangement.

4. The hearing judge found that respondent received notice of Ruppert's suspension on February 14, 1996. We adopt this finding and also find that as of this date, respondent had notice that the majority of the board objected to his representation of TRC and had limited Ruppert's spending authority to $100, effective August 3, 1995. Accordingly, as of February 14, 1996, respondent had knowledge that his status as corporate counsel and his right to incur fees in excess of $100 were in serious question.

directors individually and CERT and Unocal, as well as sue the attorneys, for wire fraud and mail fraud if they continued to oppose the bankruptcy proceeding.

D. Respondent Obtains Possession of the Insurance Check

On February 14th, without the knowledge of the other three TRC board members, Ruppert picked up the settlement check from the insurance company and gave it to respondent. The check was in the amount of $79,875.89, dated February 13, 1996, and made payable to "Thermal Remediation Corp." Ruppert endorsed the check, signing it as "President TRC." Even though respondent knew that "Ruppert did not have access to corporate funds at the time, as the [three other] directors had denied him access," respondent deposited the settlement check immediately into his client trust account,[5] and his office manager, Mr. Brayshaw, returned Ruppert's uncashed $15,000 personal check to him. On February 20, 1996, when the settlement check cleared and the $79,875.89 was deposited in his trust account, respondent instructed his office manager to sign and deliver a $50,000 check made out to Ruppert, individually, drawn against respondent's trust account.[6] Ruppert, in turn, deposited the $50,000 check in a bankruptcy debtor-in-possession bank account, which respondent claimed he instructed Ruppert to do.[7]

The next day, February 21st, the TRC board held a duly noticed meeting. Both respondent and Ruppert attended this meeting, but neither one told the other TRC board members at the meeting about the $79,875.89 insurance check or that respondent had already disbursed $50,000 of the proceeds to Ruppert from his trust account.[8] At this meeting, the board passed a resolution closing the Fullerton office and ordering Ruppert to immediately cease and desist all of his business management responsibilities. Also, at the meeting Chairman Dassler once again advised respondent that he was not authorized to act as the attorney for TRC and demanded that he withdraw. The same demands to cease his representation were reiterated in a letter from Dassler to respondent on February 26th. Respondent nevertheless continued to disregard the directions of the majority of the board, again relying on his theory that the three board members were disabled from acting for the corporation due to their conflict as employees of Unocal.

Chairman Dassler discovered that Ruppert had intercepted the settlement check five weeks after it was deposited into respondent's client trust account. Dassler wrote to respondent demanding an accounting on behalf of TRC. Attorney Kehr also wrote to respondent in April, demanding an accounting and notifying respondent that Unocal had a lien on all of TRC's assets, including the insurance proceeds. Kehr also asked that the balance of the insurance funds remaining in the client trust account be returned to TRC. Respondent refused to accede to these demands. In addition, Chairman Dassler wrote to respondent's bank, requesting information about the insurance proceeds. This elicited a scathing letter from respondent to Dassler on June 4, 1996, threatening that "any further attempts to obtain information will result in immediate suit and injunction being filed against you. . . . [B]y implication, you are accusing me of felony bank fraud and interfering with my relationship with my bank. This constitutes libel, slander and interference with a business relationship. I will happily sue you immediately if you make any further allegations of this type to anyone. . . ." Dassler responded by letter

5. When the bank was advised by respondent of the dispute over control of TRC, the bank agreed to accept TRC's settlement check only if respondent deposited the check into his client trust account.

6. Respondent testified that he instructed Brayshaw to make the $50,000 check payable to TRC, but Brayshaw testified that respondent instructed him to make it payable to Ruppert. The hearing judge expressly found Brayshaw's testimony more believable than respondent's testimony. We adopt the hearing judge's credibility determination in favor of Brayshaw. (Rules Proc. of State Bar, rule 305(a).)

7. Ruppert quickly disbursed almost all the $50,000 without the consent or knowledge of TRC's board, with much of the funds going to himself and family members as payroll or as reimbursement for expenses.

8. The following day, February 22, 1996, respondent wrote to attorney Kehr, misrepresenting that Ruppert, not TRC, had paid his retainer.

on June 18th, asking again for an accounting of all of TRC's funds that had come into respondent's possession. Once again, respondent ignored Dassler's request.

On numerous other occasions, respondent was equally unresponsive to Dassler's requests for an accounting and return of the insurance proceeds, resorting instead to playing "hide and seek" with the insurance proceeds. For example, respondent directed Dassler to make his inquiries about the check to Ruppert even though respondent knew Dassler could not locate Ruppert, who had moved out of the state. Respondent also obfuscated his receipt of the insurance proceeds by noting them as a credit on his billing statement without explanation, and he disguised the disbursement of the proceeds to Ruppert by listing them in his statement as "out of pocket expenses for retainer refund." To further exacerbate the situation, he sent his billing statements to TRC's Fullerton office after he knew it had been closed.

E. Dismissal of Bankruptcy Petition and Sanctions Award Against Respondent

CERT obtained a dismissal of the bankruptcy petition one month after it was filed, on March 11, 1996. The court also granted leave to CERT to file a motion for sanctions against respondent and Ruppert for bringing a frivolous action. On September 30, 1996, the bankruptcy court imposed $5,000 in sanctions against respondent and Ruppert, with each liable for one-half of the amount, finding that respondent's petition was frivolous because it "was not warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law" within the meaning of the Federal Rules of Bankruptcy Procedure, rule 9011 (FRBP). Respondent failed to perfect his appeal, and the order became final and binding. There is evidence that respondent paid the sanctions to CERT.

Subsequent to the dismissal of the bankruptcy case, TRC was dissolved by order of the Delaware Court on May 29, 1996.[9] In spite of the sanctions order and the order of dissolution of TRC, respondent continued to incur legal fees on behalf of TRC and to send his billing statements to the corporation for two more years.

F. Proceedings in the State Bar Court

Dassler filed a complaint with the State Bar, and after an investigation, a Notice of Disciplinary Charges (NDC) was filed on November 16, 1999. An eight-day trial was held over an extended period of months and concluded on March 29, 2001. The hearing judge filed his decision on July 19, 2001, finding that respondent wilfully violated rule 4-100(A) of the Rules of Professional Conduct of the State Bar of California[10] by improperly disbursing the proceeds from the insurance check to himself as attorneys fees; wilfully violated rule 4-100(B)(3) by failing to properly account to TRC's Board of Directors in spite of their demands for such an accounting; and committed acts of moral turpitude in violation of Business and Professions Code section 6106[11] by misappropriating, through gross negligence, the $29,875.89 in proceeds that respondent disbursed to himself as attorneys fees.[12]

9. Notwithstanding the Dissolution Order, Respondent attempted to prove at trial in this case that TRC was still a viable corporation because of its registration as a foreign corporation in California. Such a registration could not breathe life into TRC once it was dissolved, since TRC was strictly a statutory creation of the laws of Delaware, which controlled its very existence as a corporation.

10. Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct.

11. Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

12. In the Notice of Disciplinary Charges the State Bar charged respondent with three additional counts of professional misconduct with respect to the same client: count 1 alleged a violation of rule 3-600(A) [failure to represent an organization through its highest body]; count 2 alleged a violation of section 6104 [appearing without authority of a party]; and count 6 alleged a violation of rule 3-700(B)(2) [failure to withdraw from employment]. Two weeks before trial, the State Bar moved to dismiss counts 1, 2, and 6 in the interests of justice as authorized by rule 262(c) of the Rules of Procedure of the State Bar. Respondent filed a statement of non-opposition to the motion to dismiss, and the hearing judge granted the motion and dismissed the three counts, provisionally without prejudice. In his decision after trial, the hearing judge modified his prior dismissal so that the three counts were dismissed with prejudice. The dismissal of these counts has not been raised as an issue on appeal, and we adopt the recommendation of the hearing judge in this regard.

The hearing judge also found serious aggravation surrounding the charged misconduct. Specifically, the judge found that respondent was culpable of harming his client (std. 1.2(b)(iv)); overreaching (std. 1.2(b)(iii)); and indifference towards atonement or rectification (std. 1.2(b)(v)). In addition, the hearing judge found numerous counts of uncharged but proved misconduct as further aggravation. On appeal, respondent urges us to exonerate him of all misconduct or, in the alternative, to recommend "the mildest form [of discipline] available." The State Bar asks us to adopt the hearing judge's findings, conclusions and discipline recommendations.

II. CULPABILITY

The underpinning of the misconduct in this case is best described by the hearing judge, who observed that respondent "acted with unabashed hubris in assuming that he was the appointed guardian of TRC's best interests. . . ." Respondent concedes that TRC was his client, yet from the very outset of his retention as "corporate counsel" he dealt with Ruppert as his client and considered the three-person majority of the board, led by Chairman Dassler, as "the enemy." (See *post*, p. 14.) As a consequence, the hearing judge found that respondent refused "to give the TRC board majority its due or to recognize its directives." Respondent thus arrogated to himself the authority to choose sides between the Board's competing factions, and in the course of his single-minded prosecution of the bankruptcy proceeding on behalf of Ruppert, he utterly failed to consider, much less protect, the interests of TRC as expressed through a majority of the board.

A. Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

At its essence, rule 4-100(A) requires that "[a]ll funds received or held for the benefit of clients by a member [of the State Bar] or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import." Rule 4-100 "is violated where the attorney commingles funds or fails to deposit or manage the funds in the manner designated by the rule, even if no person is injured. [Citations.]" (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976.) The rule "leaves no room for inquiry into attorney intent. [Citation.]" (*Ibid.*) Accordingly, good faith is not a defense to a rule 4-100 violation. (*Ibid.*; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11.)

[1] When respondent deposited TRC's insurance check into his trust account, he knew of the intractable dispute between Ruppert and the board over control of TRC and even advised the bank about it. When he in turn distributed the $50,000 to Ruppert individually, he also knew that: 1) the settlement check was payable to TRC; 2) TRC's board had suspended Ruppert; and 3) the board had denied Ruppert access to TRC's funds. Since the settlement check was payable to TRC, respondent became a fiduciary of *all* of the members of TRC's board who were asserting a claim to the insurance funds on behalf of the corporation. (See *Silver v. State Bar* (1974) 13 Cal.3d 134, 142; cf. *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; see also *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) Respondent therefore owed the other board members "the same high duty of honesty and obedience to fiduciary duty as if he were acting as their attorney. [Citations.]" (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 80.) Respondent utterly failed to exercise this duty when he distributed the insurance proceeds to Ruppert without the knowledge or consent of the other three board members.

[2] Moreover, respondent was expressly required by rule 4-100(A)(2) not to withdraw the remaining $29,875.89 from the trust account as his legal fees until the dispute over his fees was resolved. Yet in the face of his certain knowledge of the dispute over his fees, respondent distributed $29,875.89 to himself. He also ignored the explicit directives of the board majority to immediately cease his representation of TRC, claiming that he had the ability to decide who could act as TRC's corporate counsel.[13] Rule 4-

13. Respondent cites no cases demonstrating that the board majority was without authority to decide that respondent should cease his representation of TRC. In fact, it has long been settled that "[a]n attorney has no general authority to act for

100(A)(2) requires that "when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved." Faced with the intractable dispute among the Board of Directors, respondent could have interpled the funds in the bankruptcy action or asked the bankruptcy court or the Delaware Chancery Court to appoint a trustee over a separate trust account and the debtor-in-possession (DIP) account. (See *In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754.) Accordingly, we find on this record that there is clear and convincing evidence that respondent wilfully violated rule 4-100(A) as charged in count 3 of the NDC when he withdrew the disputed funds as his attorney's fees.

B. Failure to Account (Rule 4-100(B)(3))

It is an attorney's fiduciary duty to properly account for trust funds. (See *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020-1021.) Rule 4-100(B)(3) expressly requires an attorney "to maintain complete records of all funds . . . coming into the possession of the member or law firm and render appropriate accounts to the client regarding them. . . ." Respondent utterly ignored this duty. The record establishes that respondent violated rule 4-100(B)(3) when he failed to accede to Chairman Dassler's repeated demands for an accounting of the proceeds of the insurance settlement check, and instead, responded with: 1) evasion by directing Dassler to ask Ruppert about the whereabouts of the check when respondent knew that Dassler did not know where to reach Ruppert; 2) deceit in stating that Ruppert had paid his fees personally; 3) obfuscation by using his billing statements to conceal the insurance proceeds and the disbursement to Ruppert; and 4) intimidation and threats of lawsuits against the directors and attorneys individually because of Dassler's efforts to locate the records of the check and the proceeds. Respondent testified at trial that he was unwilling to disclose the records of the $79,875.89 insurance proceeds and the disbursements to Ruppert and himself because he regarded Dassler as "the enemy" and he "thought to [himself], why would the enemy want to see the fee statement. And I came to the conclusion that they want to know how long we can fight, that it was a tactic on their behalf to attempt to see could we afford the battle, and that is the only reason why they'd want to know."

The record amply supports a finding that respondent wilfully failed to account for the insurance proceeds in violation of rule 4-100(B)(3) as charged in count 4 of the NDC. (Cf. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123-124; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513; *Brody v. State Bar* (1974) 11 Cal.3d 347, 350.)

C. Misappropriation; Moral Turpitude (Section 6106)

[3a] The hearing judge found that respondent "misappropriated corporate funds because of his grossly negligent misreading of the facts and incorrect interpretation of the law." We agree with this finding as it applies to the distribution of the $50,000 to Ruppert. Although we are troubled by the evidence that respondent instructed his office manager to disburse the proceeds to Ruppert personally rather than to TRC, on the day respondent distributed the money, Ruppert still was president of TRC (although suspended from his duties). As such, Ruppert arguably had a colorable (although highly disputed) claim to act on behalf of TRC as of that date. The fact that Ruppert subsequently deposited the $50,000 into a DIP bank account for TRC corroborates respondent's testimony that he instructed Ruppert to do so. But, this does not alter our finding of respondent's grossly negligent misappropriation.

[3b] Respondent had a fiduciary duty to protect the funds in the client trust account on behalf of all of TRC's board members, regardless of whether he considered them as authorized to act for TRC. (Cf.

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his client." (*Woerner v. Woerner* (1915) 171 Cal. 298, 299.) Nor can the attorney make unilateral decisions that affect his clients' substantive rights. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-407.) Thus, "[t]he board of directors, not corporate counsel, has the right to control the affairs of the corporation. [Citations]" (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 623.) "The board of directors thus has the power to retain and discharge corporate counsel." (*Ibid.*)

Coppock v. State Bar (1988) 44 Cal.3d 665, 680.) Almost immediately after Ruppert deposited the funds in the DIP account, he depleted the account without the knowledge or approval of the majority of the board, disbursing much of the $50,000 to himself and his family as payroll and expenses.[14] "With proper supervision of the operation of [his client trust] account, petitioner would have been able to monitor . . . the use of account funds, and been able to guard against misuse of those funds." (*Ibid.*) Accordingly, we find there is clear and convincing evidence in the record that respondent wilfully misappropriated $50,000 of the insurance proceeds in his trust account by his gross negligence because he "was responsible for the funds in that account, and it was a breach of his professional duties to give complete control of the account to [Ruppert]." (*Ibid.*)[15]

[3c] Not every misappropriation that is wilful is equally culpable. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357,1367.) This court often uses the term to describe acts involving moral turpitude or dishonesty (see, e.g., *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26; accord *Resner v. State Bar* (1960) 53 Cal.2d 605, 612), especially when, as here, the misappropriation is the result of gross carelessness in handling and accounting of the trust funds. (*Lipson v. State Bar*, *supra*, 53 Cal.3d 1010, 1020-1021; see also *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [an attorney's gross carelessness and negligence in performing fiduciary duties involves moral turpitude even in the absence of evil intent].) Respondent's gross negligence violated his "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. [Citations.]" (*Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 795.) We therefore find there is clear and convincing evidence that respondent's conduct in distributing $50,000 to Ruppert involved moral turpitude in violation of section 6106 as charged in count 5 of the NDC.

[4a] As to the remaining $29,875.89, we find there is clear and convincing evidence that respondent misappropriated these funds knowingly and intentionally. Respondent knew with a certainty at the time he withdrew the funds from the trust account as his attorney's fees that Ruppert could authorize only $100 of respondent's legal fees. He also knew that his right to represent TRC and to incur legal fees on the corporation's behalf was vigorously disputed by a majority of the board. "An attorney may not unilaterally determine his own fee and withhold trust funds to satisfy it even though he may be entitled to reimbursement for his services. [Citation.]" (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 358; accord, *Jackson v. State Bar* (1979) 25 Cal.3d 398, 404; *Brody v. State Bar*, *supra*, 11 Cal.3d 347, 350, fn. 5.)

[4b] Not only was respondent aware of the board majority's opposition to the payment of his fees, he acknowledged under penalty of perjury that he did not have the right to withdraw his fees without the approval of the bankruptcy court, whose very jurisdiction he had invoked. In his Declaration in Support of Debtor's Application for Appointment of Attorney, filed on March 5, 1996, respondent attested that he had placed TRC's "retainer" which was to be used to "guarantee payment of the Firm's services" in an "interest bearing client trust account, [which] will be applied to fees and costs *only upon approval of the Court*. (Italics added.)" Respondent further attested that at the conclusion of the bankruptcy proceedings he would "file an appropriate application seeking allowance of all fees and costs, regardless of whether interim compensation has been paid." There is no evidence that respondent ever obtained court approval prior to paying himself his attorneys fees.[16]

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14. We are unable to determine from our independent review whether the disbursements from the DIP account were in satisfaction of valid claims against the corporation, even though Ruppert's authority to sign payroll checks had been revoked at the time he withdrew the funds. This does not affect our finding of grossly negligent misappropriation by respondent, but does affect our computation of restitution, as we discuss, *post*.

15. To be deemed a wilful misappropriation, "all that is required is 'a general purpose or willingness to commit the act or permit the omission.' [Citation.]" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.)

16. Respondent's first billing statement was issued on April 10, 1996, five days after he submitted his Fees Declaration to the bankruptcy court. As of April 23, 1996, respondent had billed $28,939.60 in fees and expenses.

[4c] Moreover, respondent's acts of deceit in misleading TRC's chairman and his legal counsel about the existence and whereabouts of the insurance proceeds are evidence that his misconduct involved moral turpitude. Respondent committed additional acts of concealment when he refused to provide his records of the insurance check and proceeds to the State Bar investigator in July 1996, and again in August 1997.[17] These acts are persuasive evidence of a lack of honest belief in his right to the funds and "justify attorney discipline as conduct involving moral turpitude. . . ." (*In the Matter of Wyshak*, *supra*, 4 Cal. State Bar Ct. Rptr. 70, 80; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 462-467, 469-471.)

[4d] Although an attorney's honest belief, even if mistaken and unreasonable, that he has a right to entrusted funds may be asserted as a defense to a charge of misappropriation involving moral turpitude or dishonesty (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662.), we are unable to find on our independent review of the record any basis to conclude that respondent held such an honest belief. To the contrary, this record amply demonstrates that respondent intentionally misappropriated $29,875.89 for his own purposes, and that these actions involved moral turpitude. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034; *Bate v. State Bar* (1983) 34 Cal.3d 920, 923.); *Grim v. State Bar* (1991) 53 Cal.3d 21, 30.) Notwithstanding respondent's "'disavowal of any dishonest intent'. . . 'the means used by [respondent] to further his position were dishonest and involved moral turpitude within the meaning of . . . section 6106 . . . .'" (*Coppock v. State Bar*, *supra*, 44 Cal.3d 665, 679.)

III. MITIGATION

A. Good Faith (Std. 1.2(e)(ii).)

Respondent asserts in his defense and as mitigation that he acted reasonably and in good faith. (std. 1.2(e)(ii).) Respondent contends that even if his analysis of the facts and the law in this matter are "without merit, or even frivolous . . . lawyers must be free to assert unpopular positions on behalf of their clients if they believe in good faith they are correct." Based on the record, we find his contention is implausible at best, and disingenuous at worst. "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. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.) Our previous finding of lack of honest belief alone vitiates respondent's assertion that he acted in good faith. But we also find no basis in this record to conclude that respondent's conduct was reasonable.

Respondent argues that the testimony of his expert, James Bovitz, a certified bankruptcy specialist, provided uncontradicted evidence that respondent's conduct in representing TRC was within the standard of care of a bankruptcy practitioner and therefore reasonable. We disagree. As a bankruptcy expert, Bovitz may well have been qualified to opine on the ultimate issues within his expertise (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277, fn. 7), but respondent failed to establish that Bovitz had any special knowledge of or experience with State Bar disciplinary matters, or the rules and regulations governing professional responsibility. Accordingly, we give Bovitz's testimony

17. Respondent used the State Bar investigation as another opportunity to threaten Dassler with dire legal consequences. In a letter to the State Bar in August 18, 1997, he said: "When this matter is concluded and it is determined that the "Complaint" filed against me is false, the State Bar will bring criminal charges against Mr. Dassler. . . . In another letter to a State Bar deputy trial counsel, dated February 28, 1998, respondent reiterated his "demand" that the State Bar "act to have [Dassler] prosecuted. . . ." We consider these threats to be evidence of overreaching which we address *post* in our discussion of aggravation.

minimal weight, particularly since this case does not involve the standard of care of bankruptcy practitioners, but rather involves the failure to adhere to the ethical duties and fiduciary obligations to maintain client trust funds under the rules and statutes governing professional conduct. "The purposes of a disciplinary proceeding are quite different from those of a civil proceeding (see, e.g., *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327), and the body of law is accordingly different." (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.)

Moreover, much of Bovitz's testimony was contradicted by the findings and conclusions of the bankruptcy court in its sanctions order. While not dispositive, the court's findings and conclusions are entitled to a strong presumption of validity if supported by substantial evidence. (*In the Matter of Lais*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 117.)[18] The court's conclusion that the filing of the petition was frivolous and "was not warranted by existing law or by a *good faith argument for the extension, modification, of reversal of existing law*" (italics added) was based on an objective standard of reasonableness. Indeed, the bankruptcy court went beyond its finding of frivolousness with respect to the filing of the petition, and made specific findings rejecting the very same legal theories that respondent asserts here to establish the reasonableness of his conduct.

The court dismissed respondent's argument that Ruppert was the only director without a conflict and therefore the only one authorized to act for the corporation. The bankruptcy judge stated that this theory made "no sense" because Ruppert could not act unilaterally for TRC in the absence of a decision by a majority vote of the directors taken at a meeting or a fully executed unanimous written directors' consent.[19] The judge thus applied a basic rule of corporate law: "[T]he board of directors *acting as a board* must be recognized as the only group authorized to speak for 'management' in the sense that under [8 Del. C. § 141(a)] they are responsible for the management of the corporation." (*Campbell v. Loew's, Inc.* (Del.Ch. 1957) 134 A.2d 852, 862, italics added.) Thus, directors have no power as individuals. "Their power is collective only." (Practising Law Institute, Corporate Law and Practice (2d ed. 1999) [hereafter Corporate Law and Practice], § 8:3, p. 155.) "The theory behind the traditional rule that directors may act only as a group, and only while assembled at a meeting, is that the give and take of a group discussion will help ensure the best corporate decisions." (Corporate Law and Practice, § 8:3.) In fact, any action taken by directors at a board meeting without a quorum being present would be *void* even if the meeting were duly noticed. (*Drob v. National Memorial Park, Inc.* (Del.Ch. 1945) 41 A.2d 589, 595-596; *Olincy v. Merle Norman Cosmetics, Inc.* (1962) 200 Cal.App.2d 260, 273.)

Directors who are disqualified from voting on a matter due to a conflict of interest are nevertheless counted in determining the presence of a quorum at any meeting of the board called to authorize corporate action. (8 Del.C. § 144(b); Cal. Corp. Code, § 310, subd. (c).) What is more, the fact that there was a struggle for control of the corporation "must not obscure the real principle that the actions of the board of directors, *speaking through the majority of its members*, must be recognized no matter which particular faction may be in control." (*Empire Southern Gas Co. v. Gray* (Del.Ch. 1946) 46 A.2d 741, 748, italics added.)

The bankruptcy judge also rejected respondent's interpretation of section 4.3 of the Shareholders Agreement as precluding the three directors from voting on the filing of the petition as a "transaction"

18. The bankruptcy judge's imposition of sanctions required an extremely high showing. (FRBP 9011.) Rule 9011 sanctions are warranted only when "'it is clear that: (1) a *reasonable inquiry* into the basis for a pleading has not been made; (2) under existing precedents there is no chance of success; and (3) no *reasonable argument* has been advanced to extend, modify or reverse the law as it stands.' [Citations.]" (*In re Frankel* (S.D.N.Y. 1995) 191 B.R. 564, 575, italics added.)

19. Article 6 of the Bylaws provided that the corporation could only act through a decision of a majority of a quorum of the board. In the absence of such a meeting, corporate action could only be taken by unanimous written consent of the board.

between TRC and any person which was an affiliate of CERT. The court found that "the filing of the Petition does not involve a transaction let alone a transaction covered by section 4.3. Any argument to the contrary is frivolous."[20]

Finally, the judge refused to adopt respondent's legal theory under Delaware's conflict of interest laws as precluding any action by the three board members because of their employment by Unocal, which was a creditor of TRC. The bankruptcy judge characterized this legal theory as "absurd" because, "if [respondent's] interpretation of the law is correct, it would likewise preclude Ruppert from voting on the issue because he would also be affected by the bankruptcy filing. Additionally . . . [TRC] would never be able to avail itself of the bankruptcy laws."

[5] We agree with respondent that attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing their clients' legitimate objectives. However, as officers of the court, attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. (Rule 3-200(B).) We are persuaded that the bankruptcy court's findings, and the applicable Delaware law, vitiates respondent's assertion that his conduct was reasonable and therefore taken in good faith.

B. Absence of Prior Discipline (Std. 1.2(e)(i).)

The hearing judge found that respondent practiced law for 12 years with no prior disciplinary record, and gave weight to this factor as mitigation. We agree. (Std. 1.2(e)(i).) Although the present misconduct is serious, the lack of a prior record of discipline may be considered as a mitigating factor. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [many years of practice without a prior record may be considered as a mitigating circumstance even if the present misconduct is serious].)

C. Good Character Testimony (Std. 1.2(e)(vi).)

The hearing judge also found the testimony of respondent's good character witnesses as a mitigating factor, but did not ascribe it "significant" weight because there were only three witnesses and they did not reflect "a wide range of references in the legal and general communities." (Std.1.2(e)(vi).) We are inclined to give greater weight to the good character testimony. Each of the witnesses had a basic understanding of the charges against respondent and the hearing judge's tentative culpability determinations. Attorney Sylvia Paoli had known respondent for approximately 10 years. They met each other while they were serving in the Judge Advocate Group (JAG) to the California Civil Air Patrol (CCAP). Eventually, Paoli became the chief JAG officer in the CCAP, and she selected respondent to serve as her chief deputy. Paoli spoke with respondent on the telephone intermittently and saw him at weekly CCAP meetings. Paoli testified that respondent "is incredibly honest, totally moral, and has an integrity that – as a matter of fact, those characters are basically why I chose him as my chief deputy, because I had seen that throughout my close association with him and everything that we did."

Attorney Stephen Stewart testified that he and respondent were law partners for about one year from 1985 to 1986 and had worked together since then "off and on over the years." In addition, they worked together with the Fraternal Order of Police, since Stewart was the state counsel and respondent was the assistant state counsel. During the five years prior to his appearance in the hearing department, Stewart spoke with respondent over the telephone on a weekly basis, and thus "would have lunch together just socially to discuss cases about every month or so." Stewart opined that respondent's skills as an

20. Respondent has cited no case, and we are aware of none, applying the term "transaction" under Delaware Code, title 8, section 144 to the filing of a bankruptcy petition. Rather this term has been applied to business or financial transactions between a corporation and its directors. (See, e.g., *Marciano v. Nakash* (Del. 1987) 535 A.2d 400 [loans to a corporation by interested directors]; *Parfi Holding AB v. Mirror Image Internet, Inc.* (Del.Ch. 2001) 794 A.2d 1211 [stock subscription and preferred stock offered by interested directors] revd. on other grounds (Del. 2002) 817 A.2d 149.)

attorney were superb and that respondent's moral character, honesty, integrity, trustworthiness, and candor were very high. Stewart would trust respondent with his money and with his life as a fellow peace officer.

Finally, Tom Wilson, who is a part-time assistant fire chief/fire marshal at Barstow Fire Protection District, a retired fire chief of the Manhattan Beach Fire Department, and a former reservist with the San Bernardino County Sheriff's Department, testified on respondent's behalf. Wilson met respondent in 1985 when respondent applied to be a reservist with the San Bernardino County Sheriff's Department in the arson/bomb unit. Wilson conducted respondent's "background check." After respondent joined the arson/bomb unit, he and Wilson "became good friends and close working associates." Respondent also employed Wilson as an expert witness and investigator in four or five cases involving police or fire issues. At the time of trial, Wilson saw respondent about once or twice a week. Wilson trusted respondent implicitly and very much admired him. The testimony of acquaintances, neighbors, friends, associates, employers, and family members on the issue of good character, with reference to their observation of the respondent's daily conduct and mode of living, is entitled to great weight. (Cf. *In re Andreani* (1939) 14 Cal.2d 736, 749-750.) While not an extraordinary showing of good character (*In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 490), we accord significant weight to respondent's character witnesses, due to their familiarity with him and their knowledge of his good character, work habits and professional skills.

D. Community Service

Respondent presented evidence of extensive community service, which the hearing judge found to be a strong mitigating factor. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521.) In addition to the community activities, which we previously discussed, respondent served as reservist in the Barstow Fire Protection District until he was placed on retired status because of physical injuries. We find that respondent's significant community service "is a mitigating factor that is entitled to 'considerable weight.' " (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785, quoting *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.)

IV. AGGRAVATION

In aggravation, the hearing judge found that respondent harmed his client, TRC (std. 1.2(b)(iv)); that his misconduct was surrounded by overreaching (std. 1.2(b)(iii)); and that he was indifferent towards atonement for the consequences of his misconduct (std. 1.2(b)(v)). We adopt these findings in aggravation. But first and foremost, we find as additional uncharged but proved misconduct, that respondent's representation of TRC involved multiple conflicts of interest which is an additional aggravating factor. (Std. 1.2(b)(iii); *Edwards v. State Bar*, *supra*, 52 Cal.3d 28, 35-36 [uncharged misconduct may not be used as an independent ground of discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

A. Multiple Conflicts of Interest

While condemning the Dassler-led faction of the board as "hopelessly conflicted," respondent steadfastly failed to recognize his own serious conflicts.[21] **[6]** A corporation's legal advisor must abstain from taking part in controversies among the corporation's directors and shareholders "to avoid placing the . . . practitioner in a position where he may be required to choose between conflicting duties or attempt to reconcile conflicting interests. [Citations.]" (*Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 936.) Without question, respondent owed a duty of undivided loyalty to his client, TRC, which was sadly lacking in this case. As corporate counsel to TRC, respondent's professional obligations were to the entity and not to its officers, directors, or shareholders

21. The record discloses that at various times (and sometimes simultaneously) respondent represented TRC; Ruppert, individually; two other individuals (Graham and Muni) who were interested in buying the assets of TRC; and his own interests in defending himself against the sanctions order and the State Bar complaint.

in their representative or individual capacities. (Rule 3-600(A); *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248, 254.) [7a] That being said, a corporation is a statutory person that can speak only through its constituent officers, directors, shareholders and agents.

[7b] Faced with a dispute over who was authorized to speak for TRC, respondent should have first looked to the corporation's organizational documents and other pertinent agreements. (See, e.g., Rest.3d Law Governing Lawyers, § 96, subd. (1)(a) ["the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to *the organization's decision-making procedures*." (italics added)].) Respondent testified this is precisely what he did. That being the case, respondent cannot now reasonably claim that he relied on Ruppert's implied powers as president of TRC since Ruppert's powers were expressly limited by the Articles of Incorporation, Bylaws, Shareholder Agreement, and Employment Contract. Ruppert clearly did not posses the ostensible authority that corporate presidents ordinarily possess, much less the express authority to retain legal counsel and authorize the filing of the bankruptcy.[22] (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 779-780, 783.)

[8a] From the outset, respondent's proper course of conduct was to obtain the informed written consents of each of the board members. (Rule 3-310(B) & (C).) Moreover, given that there was an actual conflict, as opposed to a potential conflict, respondent was obliged to withdraw from his representation of the corporation if he was unsuccessful in obtaining the informed consent of the board. (Rule 3-700(C).)[23]

The Supreme Court many years ago articulated the policy which underlies the proscription against representation of adverse interests found in rule 3-310: "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation]." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)

[8b] To here condone respondent's conduct would greatly diminish this important policy. Respondent should not have represented the corporation without first obtaining the informed written consent of all of the directors. (Rule 3-310(B) & (C).) Instead, respondent chose to join the fray, asserting only Ruppert's interests, which were antithetical to the business judgement of the remaining board members. Moreover, in his rush to file the Chapter 11 petition as directed by Ruppert, respondent ignored the specific procedures which TRC had put into place to deal with shareholder and board disputes. Article II of the

22. Even though "the office of president carries with it certain implied powers of an agency....without special authority or explicitly delegated power he may [only]...enter into a contract and bind his corporation in matters arising from and concerning the usual course of the corporation's business." (*Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.*, (Del.Super.Ct. 1931) 156 A. 350, 352.)

23. Parenthetically, several alternatives could have been presented to the board, which were designed to break the intra-corporate deadlock. (See, e.g., 8 Del.C. § 226(a)(2) [providing for the appointment of a custodian or receiver upon the application of any shareholder when "the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained."]; *Campbell v. Pennsylvania Industries, Inc.* (D.Del. 1951) 99 F.Supp. 199 and *Drob v. National Memorial Park, Inc., supra*, 41 A.2d 589 [dissolution by courts in equity as the result of intra-corporate dissension or business paralysis]; *Giuricich v. Emtrol Corp.* (Del. 1982) 449 A.2d 232 [appointment of a temporary custodian or manager of the corporate assets to run the business as a going concern]; *In re North European Oil Corp.* (Del.Ch. 1957) 129 A.2d 259 [new corporation formed where majority of stockholders could not be located]; see generally, Annot., Relief Other Than by Dissolution in Cases of Intracorporate Deadlock or Dissension (1984) 34 A.L.R.4th 13; Annot., Dissolution of Corporation on Ground of Intracorporate Deadlock or Dissension (1978) 83 A.L.R.3d 458.)

Shareholder Agreement expressly provided procedures for a mandatory buyout "in the event of an irreconcilable dispute between the parties . . . to minimize the business disruption," and there was a mandatory obligation to arbitrate all claims and controversies by Ruppert against TRC found in the Employment Agreement "whether or not related to his employment."

[8c] As a consequence of his multiple conflicts, respondent lost any claim to objectivity or neutrality, and in so doing he gravely compromised his duty of loyalty to TRC, which we consider to be a serious aggravating circumstance. The hearing judge found that respondent's conflicts of interest resulted in numerous violations of rule 3-310.[24] While we agree that respondent had numerous conflicts of interest, we do not believe that each of the violations of rule 3-310 should be considered as a separate and independent basis of aggravation since, to a great extent, all of the violations arise out of the same misconduct, and therefore are duplicative. The appropriate level of discipline does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

B. Harm to Client (Std. 1.2(b)(iv).)

The hearing judge found that respondent's misconduct caused significant client harm. (Std. 1.2(b)(iv).) We agree. Respondent's misappropriation of $79,875.89 of the insurance proceeds significantly harmed TRC, which was the payee of the settlement check, and also harmed a third party, Unocal, which had a lien on the insurance proceeds. In addition, CERT was significantly harmed because it was required to retain bankruptcy counsel to obtain the dismissal of the Chapter 11 petition. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 379.) In the declaration of Attorney Fields filed in the bankruptcy court in support of CERT's motion for sanctions, he averred that CERT's attorney's fees were at least $8,125 in obtaining the dismissal of the petition. The $5,000 sanction award thus would not fully compensate CERT for the harm directly caused by respondent's misconduct.

C. Overreaching (Std. 1.2(b)(iii).)

In further aggravation, the hearing judge found that respondent's misconduct was surrounded by overreaching. (Std. 1.2(b)(iii).) Again, we agree, and view as evidence of respondent's overreaching his abusive and threatening letters to Chairman Dassler, as well as those to Attorneys Kehr and Fields. Respondent's billing statements to TRC are additional evidence of overreaching, since he improperly charged TRC for legal services that he provided to himself in appealing the sanctions order, responding to the State Bar's investigation, and conducting legal research in response to the State Bar complaint against him. He also billed TRC for the legal services he provided to two acquaintances of Ruppert, Mr. Graham and Mr. Muni, who consulted respondent about buying the assets of TRC.

D. Indifference towards atonement or rectification (Std.1.2(b)(v).)

The hearing judge correctly found that respondent's "continued claim, in the face of overwhelming facts and legal authority, that his conduct was justified demonstrates an indifference toward rectification or atonement for the consequences of his misconduct." (Std.1.2(b)(v).) We agree and find this is additional aggravation. (*In re Morse*, *supra*, 11 Cal.4th 184, 197-198, 206, 209.) Respondent refuses to accept the findings and conclusions of the bankruptcy court, even though those findings are final and binding on him. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 [Meritless defenses show lack of

24. The judge found respondent violated: 1) rule 3-310(F)(3) because he accepted personal checks from Ruppert without his informed consent; 2) rule 3-310(B)(1) and (3) arising from his failure to disclose his financial and professional relationship with Ruppert to TRC; 3) rule 3-310(C)(1) because of his failure to obtain the informed consents of Ruppert and TRC to respondent's representation of their conflicting objectives; 4) rule 3-310(C)(2) because of respondent's failure to obtain TRC and Ruppert's informed consent to his continued representation after he received the insurance settlement check; and 5) rule 3-310(B)(1) and (3) and (C) because of respondent's representation of TRC, Mr. Poole, Ruppert and TRC's unsecured creditors, without obtaining their informed consents to his joint representation of all of these divergent interests.

insight in the wrongfulness of one's actions].) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Respondent's acts of defiance against the board's authority, even after Ruppert had long been terminated and the corporation dissolved, are additional evidence of his lack of insight into his misconduct. As late as June 2000 at the trial in the Hearing Department, respondent testified that he need not accede to the requests of the three board members to step down as legal counsel to TRC because he "felt it was not in the best interests of TRC for me to follow the instructions of the usurpers, especially in light of their failure to follow my advice."

Respondent, "like any attorney accused of misconduct, had the right to defend himself vigorously." (*In re Morse*, *supra,* 11 Cal.4th at p. 209.) However, his conduct, "reflects a seeming unwillingness even to consider the appropriateness of his [legal analysis] 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." (*Ibid.*) His demonstrated lack of insight into the seriousness of his misconduct is particularly troubling to this court because it suggests that it may reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.) Accordingly, we find that the record amply establishes respondent's failure to understand the nature of his wrongdoing, which is a serious aggravating factor.

E. Additional Uncharged Misconduct (Std. 1.2(b)(iii).)

The hearing judge found respondent culpable of additional acts of uncharged but proved misconduct, which he also considered for purposes of establishing aggravation under standard 1.2(b)(iii). Specifically, the hearing judge found that respondent: 1) violated rule 4-100(B)(1) by failing to advise the TRC board for more than two months of his receipt of the insurance check; 2) violated rule 4-100(B)(4) when he failed to return the proceeds after Dassler requested them; and, 3) violated rule 3-600(E) by improperly representing the corporation. We do not adopt these findings of aggravation. Although the evidence is clear and convincing as to the violations of rule 4-100(B)(1) and rule 4-100(B)(4), these violations arise out of the same misconduct that provided the bases for our culpability determinations with respect to the charged misconduct. Accordingly, we give no additional weight as aggravation in determining discipline. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 411; see *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 435, fn. 4.) We also do not adopt the hearing judge's finding of a violation of rule 3-600(E) as aggravation, although this violation is supported by clear and convincing evidence. As we noted *ante* at footnote 12, the State Bar moved to dismiss the charges relating to respondent's improper representation of TRC as an organization in violation of rule 3-600(A), and at the outset of the trial the State Bar represented to the hearing judge that it did not intend to assert the dismissed charges as uncharged aggravation. Therefore, we find it would be unfair to now look to evidence of the same misconduct alleged in count one of the NDC as a violation of rule 3-600 in support of a finding in aggravation since respondent may well have relied on the State Bar's representation to the hearing judge.

V. DISCIPLINE DISCUSSION

[9a] The hearing judge recommended that respondent be actually suspended from the practice of law for two years, and the State Bar asks us to adopt this discipline recommendation. We are mindful that the Supreme Court has repeatedly held that the "usual" discipline for wilfully misappropriating client funds is disbarment. (*Edwards v. State Bar*, *supra*, 52 Cal.3d 28, 37; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221; see also *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656 [intentional misappropriation generally warrants disbarment]; *Friedman v. State Bar* (1990) 50 Cal.3d 235, 244-245 [disbarment generally is warranted].) Wilful misappropriation "covers a broad range of conduct varying significantly in the degree of culpability." (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.) We find respondent's conduct to be on the more serious end of the continuum. "An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is

deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Ibid.*)

[9b] Standard 2.2(a) provides for disbarment for wilful misappropriation of trust funds unless the amount of the funds involved is insignificant or compelling mitigating circumstances clearly predominate. The amount here in question is substantial and respondent's mitigation evidence is outweighed by serious aggravating circumstances. We are particularly troubled by his failure to make any restitution. The significance of restitution is its probative value as evidence of rehabilitation, not the repayment of the underlying obligation. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr, 302, 312.)

Finally, respondent's various acts of concealment and duplicity offend "the fundamental rule of [legal] ethics – that of common honesty – without which the profession is worse than valueless . . . . [Citation.]" (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.) Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward . . . a client or another person or of concealment of a material fact to . . . a client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Respondent's misconduct was closely aligned with his practice.

[9c] In spite of the cases that impose disbarment for intentional misappropriation, we do not believe such severe discipline is needed in this case. Each case should be resolved on its own facts (*In re Young* (1989) 49 Cal.3d 257, 268), and the standards are to be used as guidelines rather than as "mandatory" sentences. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Respondent's misconduct was serious, but it was directed towards a single client and respondent has no other record of discipline. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 451-452; *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 36-37, 39.) We are also impressed with the strength of his good character testimony and his extensive community service. We note, too, that the misconduct occurred more than five years ago without any evidence of additional misconduct, which may be considered as a factor in deciding the appropriate discipline. (*Chefsky v. State Bar*, *supra*, 36 Cal.3d 116, 132.)

In addition to the standards, we look to the decisional law for guidance. (*In re Morse*, *supra*, 11 Cal.4th 184, 207.) There is precedent under these circumstances for actual suspension of two years, which we here recommend. A comparable case is *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, which involved the grossly negligent and/or intentional misappropriation of $20,000 where mitigating circumstances did not clearly predominate. In *McCarthy*, we were troubled, as we are here, "by respondent's lack of recognition of wrongdoing, lack of remorse, and failure to make any restitution. . . ." (*Id.* at p. 385.) Nonetheless, we rejected disbarment and instead recommended two years' actual suspension because the misconduct appeared to be "aberrational." (*Ibid.*) We also focused on the evidence of good character and the attorney's community service in arriving at its disciplinary recommendation.

We also consider as apt the case of *In the Matter of Hertz*, *supra*, 1 Cal. State Bar Ct. Rptr. 456. In *Hertz*, the attorney was found culpable of disbursing without authorization $15,000, which was to be held in trust for his client and the client's ex-spouse. Respondent disbursed $10,000 to the client for paying community debts and he took $5,000 for his own fees, without the knowledge or consent of the ex-spouse or her attorney. (*Id.* at p. 462.) *Hertz* involved a single client matter, but there was protracted deceit perpetrated against opposing counsel and the courts as to the whereabouts of the funds. There was also substantial mitigation evidence in the form of six character witnesses (including three judges) who attested to his high standing in the community, his diligence, and his substantial community service and pro bono activities. (*Id.* at pp. 467, 471.) This court imposed a two-year actual suspension even though 1) the funds paid to the client were later determined to have been properly reimbursable; 2) he later replaced the funds he had withdrawn as his fee; and, 3) there was a finding of acts of moral turpitude based only on Hertz's misrepresentations. (*Id.* at pp. 462, 471.)

In *Lipson v. State Bar*, *supra*, 53 Cal.3d 1010, the court imposed two years' actual suspension for wilful misappropriation involving acts of moral turpitude based on gross negligence. The attorney had an unblemished record of 42 years of practice and there was no evidence in aggravation. (*Id.* at p. 1021.) The court found "two years' actual suspension takes into account both the serious nature of [the] misconduct and the substantial evidence in mitigation." (*Id.* at p.1022.)

We also find the case of *Most v. State Bar* (1967) 67 Cal.2d 589 to be instructive. In that case, the attorney failed to advise his client of the receipt of a settlement check for more than $30,000, and he unilaterally took his legal fees from the insurance proceeds in his client trust account. He also refused to account for the funds in spite of repeated requests by his client. Although finding the attorney culpable of intentional misappropriation, the court imposed two years' actual suspension. (*Id.* at p. 599.) Finally, in the case of *Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23, the Supreme Court imposed two years' actual suspension when the attorney commingled client funds in violation of the trust accounting rules, and also deliberately and dishonestly misappropriated more than $20,000 in settlement proceeds that he held in trust for a client. Doyle misappropriated the funds for his personal use for about 10 months and did not remit them to his client until after the client retained a second attorney who made repeated demands for the funds and after the client filed a complaint with the State Bar. (*Id.* at pp. 17, 24.) Unlike respondent in the instant case, Doyle had a prior disciplinary record for misappropriation. (*Ibid.*) But there were also mitigating circumstances in *Doyle* not present here in that the attorney suffered severe financial and family problems during the time period in question and, most importantly, he remitted the misappropriated funds before the disciplinary proceeding actually began. (*Ibid.*) **[9d]** We therefore conclude after our *de novo* review of the record, that the two-year actual suspension recommended by the hearing judge will adequately serve the discipline goals of the protection of the public, the courts and the profession provided in standard 1.3.

[10a] However, we believe the hearing judge's decision falls short in his recommendation of the amount of restitution. Many of the Supreme Court's cases require restitution when a matter involves misuse of client funds and unearned fees (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044). In *Sorensen*, the Supreme Court extended the protective and rehabilitative principles of restitution to cover specific out-of-pocket losses directly resulting from an attorney's violation of his duties. (*Sorensen v. State Bar*, *supra*, 52 Cal.3d at p. 1044.) In the instant case, the judge determined that $14,938 plus interest was the appropriate amount of restitution by dividing by one-half the $29,785.89 in fees respondent improperly paid to himself, based on CERT's fifty percent ownership of TRC (the other fifty percent having been owned by Ruppert). The judge did not wish to enrich Ruppert's estate, due to his unclean hands. But we believe the judge's calculation of restitution unjustly enriches respondent. "[A]n attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility . . . ." (*Goldstein v. Lees*, supra, 46 Cal.App.3d 614, 618.) Moreover, the funds from the insurance settlement belonged to TRC, not its individual shareholders, and therefore any repayment should be made to the successor in interest of TRC in the manner discussed below. Where an attorney improperly withdraws fees from a trust account, restitution to the client or the client's estate is appropriate. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.)

We agree with the hearing judge in not recommending as restitution the $50,000 that respondent distributed from his client trust account to Ruppert personally, notwithstanding our finding of clear and convincing evidence that respondent misappropriated by gross negligence these additional funds when he ceded dominion and control over them. But we cannot ascertain from this record if the $50,000 was used to satisfy legitimate corporate claims after it was placed in the DIP account by Ruppert, and therefore we are unable to conclude whether or not TRC was denied the benefit of these funds.

[10b] Accordingly, we recommend that respondent make restitution to the successor of TRC in the amount of $29,875, which equals the entire amount be improperly withdrew from his trust account as his

fees without client authorization. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 168.) Payment of the restitution should be made to the successor in interest to TRC and in accordance with the final Order of Dissolution of the Delaware Chancery Court, or, if distribution of the restitution is not provided for in that order, pursuant to a new order of the chancery court upon application of CERT or its successor. If the successor in interest to TRC or the appropriate recipients of the assets cannot be identified pursuant to an order of the Delaware Chancery Court, then such restitution shall be paid to the State Bar Client Security Fund. (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231.)

...We further recommend that respondent be ordered to take and pass a Professional Responsibility Examination, that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and that he be ordered to pay the costs incurred by the State Bar in this matter.

VI. DISCIPLINE RECOMMENDATIONS

From the inception of his representation of TRC, respondent knew of the serious intra-corporate dispute. Yet he argues that faced with "battling factions," he made the best call he could "on the front line." He asserts that to now discipline him, *post facto*, will send an ominous message to attorneys who represent corporate clients that they proceed at their peril whenever they are called upon to make a judgement call among competing claimants in the heat of battle. We disagree. This was a protracted matter which afforded respondent numerous warnings that he was in deeply conflicted territory. Nevertheless, he repeatedly and resolutely refused to heed these dire warnings, including those provided to him by the United States Bankruptcy Court, opposing counsel and the various members of the Board of Directors, who acted with notable restraint. The hearing judge found, "Respondent's refusal to recognize his multiple conflicts led to his remaining in the fray rather than withdrawing, as he should have done." In so doing, respondent seriously compromised the interests of his client, TRC.

Accordingly, we recommend that respondent James Steven Davis be suspended from the practice of law in the State of California for a period of four years; that execution of the four-year period of suspension be stayed; and that he be placed on probation for a period of four years on the following conditions:

1. Respondent shall be actually suspended from the practice of law in the State of California during the first two years of this probation and (1) until he makes restitution to Thermal Remediation Corporation, or its successor in interest, in accordance with an order of the Delaware Chancery Court or, if no order is obtained, to the Client Security Fund, in the amount of $29,875 plus interest thereon at the rate of 10 percent simple interest per annum from February 14, 1996, until paid; and provides satisfactory proof of payment of such restitution amounts to the State Bar's Probation Unit in Los Angeles and (2) until he shows proof satisfactory to the State Bar Court of his 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 conditions of this probation.

3. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. 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.

5. During each calendar quarter in which respondent receives, possesses, or otherwise handles client funds or property in any manner, respondent must submit, to the State Bar's Probation Unit in Los Angeles with the probation report for that quarter, a certificate from a Certified Public Accountant certifying:

(a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction;

(b) whether respondent has, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name of such client,

(b) the date, amount, and source of all funds received on behalf of such client,

(c) the date, amount, payee, and purpose of each disbursement made on behalf of such client, and

(d) the current balance for such client;

(2) a written journal for each bank account that sets forth:

(a) the name of such account,

(b) the date, amount, and client affected by each debit and credit, and

(c) the current balance in such account;

(3) all bank statements and cancelled checks for each bank account, and

(4) each monthly reconciliation (balancing) of (1), (2), and (3); and

(5) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintained a written journal

that specifies each item of security and property held; the person on whose behalf the security or property is held; the date of receipt of the security or property; the date of distribution of the security or property; and, the person to whom the security or property was distributed. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the Probation Unit for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

6. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Probation Unit in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Probation Unit in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Probation Unit of any change in any of this information no later than 10 days after the change.

7. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) 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. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Client Trust Accounting and Record Keeping Course; and (2) 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. (Accord, Rules Proc. of State Bar, rule 3201.)

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for four years shall be satisfied, and the suspension shall terminate.

PROFESSIONAL RESPONSIBILITY EXAMINATION, RULE 955 AND COSTS.

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 his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Probation Unit in Los Angeles within that same time period. Additionally, 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 that rule 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 Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

We Concur:

STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALAN WESLEY CURTIS

A Member of the State Bar

No. 02-C-15210

Filed September 17, 2003

SUMMARY

Respondent moved to dismiss a disciplinary proceeding pending against him arising out of his federal court conviction in 2002 of conspiracy to violate federal law prohibiting structuring financial transactions in order to evade currency reporting requirements. The grounds for respondent's motion to dismiss were res judicata, collateral estoppel, and/or due process. Respondent asserted that the same facts were tried against him in a previous original disciplinary proceeding in the State Bar Court in 1997.

The review department concluded that bringing a conviction proceeding is not barred as a result of the proceeding arising from underlying facts which were the subject of an earlier original proceeding. The review department also adopted several factors to be considered, except in proceedings eligible for summary disbarment, in recommending the degree of discipline to be imposed should a basis for discipline appear.

COUNSEL FOR PARTIES

For State Bar: Dane C. Dauphine

For Respondent: James R. DiFrank

HEADNOTES

[1] **102.90 Procedure–Improper Prosecutorial Conduct–Other**
191 Effect/Relationship of Other Proceedings
1699 Conviction Cases–Miscellaneous Issues
The State Bar is required by statute to disclose to criminal investigatory agencies certain incriminating information discovered about an attorney as a result of an investigation or formal proceeding. The State Bar also is obligated by statute to refer all convictions to the State Bar Court. Where it appeared that the State Bar complied with these statutory duties by disclosing information to federal authorities well before the start of trial in an earlier original proceeding and by notifying the State Bar Court after respondent sustained a federal conviction, there was no evidence that the

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

subsequent State Bar Court conviction proceeding was the product of vindictive prosecution tactics of the State Bar.

[2 a-g] **159 Evidence–Miscellaneous**
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
1699 Conviction Cases–Miscellaneous Issues

A disciplinary proceeding arising from conviction of a crime is fundamentally different from and a complete alternative to an original proceeding brought under Business and Professions Code section 6075 et seq. The streamlined procedures following an attorney's conviction of a crime rest on proceedings in the criminal courts in which the burden is proof beyond a reasonable doubt. These procedures recognize that the basis for attorney discipline is not the provable violation of a rule of professional conduct but the mere existence of a certified copy of an attorney's record of conviction. Only convictions which do not inherently involve moral turpitude are referred for an evidentiary hearing to determine whether there is a legal basis for imposing discipline, but even in these cases guilt is conclusively established by the record of conviction and is not subject to collateral attack. Thus, where a conviction proceeding was commenced in the State Bar Court, which proceeding arose from the same underlying facts as an earlier original proceeding in the State Bar Court, neither res judicata nor collateral estoppel acted as a bar to the conviction proceeding, since neither the issues nor the causes of action in the two types of proceedings are the same.

[3 a, b] **191 Effect/Relationship of Other Proceedings**
1699 Conviction Cases–Miscellaneous Issues

Except in conviction proceedings eligible for summary disbarment, in determining the degree of discipline to be imposed in a conviction proceeding where an earlier original proceeding rested on the same underlying facts, a court should take into consideration any discipline imposed in the earlier original proceeding. To assess the appropriate discipline in the conviction proceeding, and to ensure fundamental fairness, a court should consider: (1) whether discipline in the conviction proceeding is needed to protect the public or the courts or to maintain the integrity of the administration of justice; (2) the extent to which the hearing judge or the parties in the original proceeding addressed the underlying facts supporting the criminal conviction which forms the basis for the subsequent conviction proceeding; (3) whether the criminal conviction yielded any relevant information that was not considered by the hearing judge in the original proceeding; (4) whether the discipline imposed in the conviction proceeding would unfairly duplicate any discipline actually imposed in the original proceeding, or would otherwise be unfair to the respondent; and (5) the extent to which the public policy sought to be protected in the original proceeding relates to the public policy sought to be protected in the criminal conviction which forms the basis for the conviction proceeding.

ADDITIONAL ANALYSIS

Discipline

1517 Conviction Matters–Nature of Conviction–Regulatory Laws
1542 Conviction Matters–Interim Suspension–Stayed

Other

117 Procedure–Dismissal
135.30 Procedure–Revised Rules of Procedure–Pleadings/Motions/Stipulations
135.40 Procedure–Rules of Procedure–Division IV, Subpoenas and Discovery (rule 150-189)
135.50 Procedure–Revised Rules of Procedure–Defaults and Trials Procedure
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs
192 Due Process/Procedural Rights
194 Statutes Outside State Bar Act

OPINION

STOVITZ, P. J.:

In this first impression case, we must decide whether a disciplinary proceeding initiated after an attorney's conviction of a crime may proceed, although it rests on the same essential underlying facts as an original disciplinary proceeding tried earlier in our court against the same California attorney.

Respondent, Alan W. Curtis, has a pending disciplinary proceeding against him arising out of his federal court conviction in 2002 of conspiracy to violate federal law prohibiting structuring financial transactions in order to evade currency reporting requirements. (18 U.S.C. § 371; 31 U.S.C. § 5324(a)(3).) Respondent moved to dismiss this proceeding on the grounds of res judicata, collateral estoppel, and/or due process because the same facts were tried against him in a previous original disciplinary proceeding in this Court in 1997 (Case No. 95-O-18504).[1] The State Bar's Office of Chief Trial Counsel (State Bar) contends that respondent has offered no good reason to dismiss this conviction proceeding.

Because of the issues in this first impression case, we invited briefs from the parties and heard oral argument on the motion. We shall conclude that the conviction referral proceeding may continue. However, as we discuss below, should the hearing judge find a basis to recommend discipline, the judge should consider the factors we set forth, *post*.

I. STATEMENT OF THE CASE.

We set forth the factual background of the two State Bar Court proceedings at issue.

A. The 1997 Proceeding.

As pertinent here, the 1997 proceeding charged respondent with acts of moral turpitude, dishonesty or corruption in wilful violation of Business and Professions Code section 6106[2] and with violating federal law in wilful violation of section 6068, subdivision (a). The State Bar alleged that in 1994, respondent's client, Mark Bailey, and a corporate party, agreed with a development company to form a venture to acquire the master lease to property in Southern California. In June 1994, the development company, Bailey and respondent agreed that respondent hold $310,000 of Bailey's funds in trust for the benefit of Bailey and the development company to purchase the master lease. Less than two weeks later, respondent opened a trust bank account but never deposited more than $100,000 in the account. The State Bar also charged that when respondent received $310,000 from Bailey, respondent failed to file with the Internal Revenue Service a required cash transaction receipt report under title 26 United States Code section 6050I. The State Bar further charged respondent with misrepresenting, including to a bankruptcy judge, that he held $310,000 in trust when he did not, and with placing the $310,000 in a safe deposit box which did not meet the requirements of rule 4-100(A), Rules of Professional Conduct.[3]

During the State Bar Court trial in the 1997 proceeding, the State Bar devoted two pages in its trial brief to the federal currency reporting requirements the State Bar claimed that respondent breached. The State Bar contended that not only did respondent fail to report the $310,000 from Bailey, but that "respondent and Bailey illegally structured the purchase transaction to avoid the bank's reporting requirement [for cash transactions in excess of $10,000]." Footnote six of the State Bar's brief pointed out that although respondent was not charged

1. For convenience, the present proceeding, arising under Business and Professions Code sections 6101-6102 and rule 951(a), California Rules of Court, will be referred to as the "conviction proceeding." The 1997 original proceeding, arising under section 6075 et. seq. of the Business and Professions Code, will be referred to as the "1997 proceeding."

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

3. The 1997 proceeding also charged other misconduct as to another client matter. As that matter is not alleged to be involved in the conviction proceeding, we do not discuss it.

with acting with Bailey to illegally structure the funds transactions, "it can be considered in aggravation."

The hearing judge made detailed findings of fact in the Bailey matter. As pertinent to this case, she found that in June 1994, Bailey gave respondent $310,000 in cash which respondent placed in a safety deposit box, not labeled with trust or escrow status. Although respondent opened a trust account for the Bailey property transaction, he did not place any of the cash from Bailey therein. Respondent did not report receipt of the cash to the Internal Revenue Service. Respondent contended that, as an escrow holder, he was exempt from filing such a report and that the State Bar did not show clearly that the tax law applied to respondent. The hearing judge concluded that the State Bar did not prove by clear and convincing evidence that respondent violated the Internal Revenue Code provision requiring a cash receipt report. She also found, however, respondent culpable of violating the trust account provision of the Rules of Professional Conduct in the Bailey matter and other misconduct in another charged matter. She did not make any findings in aggravation regarding respondent's charged conduct with Bailey in structuring the cash transactions. The hearing judge recommended 60 days' actual suspension as part of a stayed suspension. This decision was not appealed to us, and, effective July 22, 1999, the Supreme Court imposed the recommended discipline.

B. Conviction proceeding.

In late 1997, prior to the State Bar Court trial in the 1997 proceeding, the State Bar reported respondent's conduct in the Bailey matter to the Internal Revenue Service's Criminal Investigation Division.

In January 2002, federal criminal charges were filed[4] against respondent and Bailey. Respondent was accused of conspiring with Bailey and others to structure currency transactions to evade federal currency reporting requirements. (18 U.S.C. § 371 (conspiracy to violate 31 U.S.C. § 5324(a)(3)).) Charged as the sole object of the conspiracy, was the same $310,000 transaction between respondent and Bailey as was the subject of part of the 1997 proceeding. In particular, the United States charged that of the $310,000 respondent received from Bailey, respondent knowingly structured $34,000 in currency to evade reporting requirements by having that money deposited in a bank in increments of less than $10,000.

In February 2002 respondent pled guilty to the charge and he was sentenced on September 30, 2002.

The conviction proceeding was initiated in our Court in February 2003 when the State Bar filed the record of respondent's criminal conviction. The State Bar asserted that it was a crime involving moral turpitude and that it would seek respondent's summary disbarment when the conviction became final. (§ 6102, subd.(c).)

We disagreed with the State Bar's claim that respondent was convicted of a crime of moral turpitude; and, following precedent for similar currency reporting offenses, but unaware of the factual similarity with the 1997 proceeding, we classified it as a crime which may or may not involve moral turpitude or misconduct warranting discipline. Since respondent was convicted of a felony, however, we ordered his interim suspension. (§ 6102, subd. (a); Cal. Rules of Court, rule 951(a).)

In February 2003, respondent filed the current motion to dismiss the conviction proceeding and to stay the interim suspension. We stayed the interim suspension and, as noted, invited briefs from both parties on the issues raised by the motion to dismiss.

Respondent urges that the conviction proceeding is barred by the final decision of the hearing judge in the 1997 proceeding because the respondent's failure to file cash transaction reports and the manner in which he handled Bailey's $310,000 was fully litigated in the 1997 proceeding. He also urges that the

4. The record of conviction shows that criminal proceedings on this and other charges commenced against respondent and Bailey as early as 1998.

initiation of these conviction referral proceedings was an act of vindictive prosecution by the State Bar and that this deprived respondent of due process.

The State Bar contends that neither the doctrine of res judicata nor collateral estoppel applies to bar the conviction proceeding, that the issue of summary disbarment is not yet ripe for decision, that respondent's claim that the conviction was the result of vindictive prosecution is frivolous and that respondent has not established any due process violation.

II. DISCUSSION.

A. Respondent's contention of prosecutorial misconduct.

[1] At the outset, we dispose of respondent's contention that the conviction proceeding is the product of vindictive prosecution tactics of the State Bar. The State Bar is required by statute to disclose to criminal investigatory agencies the type of information it disclosed here as a result of an investigation or formal proceeding. (§ 6044.5.) The State Bar also is obligated by statute to refer all convictions to this court. (§ 6101, subd. (c).) There is no evidence that the State Bar acted inappropriately and it appears that the State Bar notified federal authorities, well before the start of trial in the 1997 proceeding, of information in fulfillment of its statutory duty. Respondent's claim is without merit.

B. The unique nature of attorney disciplinary proceedings.

Neither party has cited and we are unaware of any California attorney disciplinary opinion which squarely addresses the ability to prosecute a later disciplinary proceeding involving the same facts as an earlier one. The closest expression we can find is a very brief reference in *Urbano v. State Bar* (1977) 19 Cal.3d 16, 20, a case which is dissimilar to this one. Urbano had been suspended in 1975. In its 1977 opinion, the Supreme Court noted Urbano's claim that it was a due process violation to prosecute him a second time for the single course of conduct which was involved both in the 1975 matter and in the later proceeding then before the Supreme Court. The Supreme Court rejected Urbano's argument noting that the two proceedings "involve different acts of misconduct, different clients and different dates. Nothing in the record shows that bringing the instant proceeding violated due process." (*Ibid.*)

There are several principles pertinent to this motion. The first is that attorney disciplinary proceedings are unique. They are neither purely civil, criminal or even administrative in nature. (E.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302.) The reason for the uniqueness of these proceedings is that they are conducted within the inherent authority of the Supreme Court to regulate the legal profession. (*In re Paguirigan* (2001) 25 Cal.4th 1, 7, and cases there cited.) Accordingly, many rules invoked in criminal proceedings are generally inapplicable in State Bar proceedings, such as the constitutional prohibition against multiple prosecutions in criminal cases (*Urbano v State Bar*, *supra*, 19 Cal.3d at p. 20), or the exclusionary rules (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226-229).[5] Moreover, whether civil, criminal or unique rules apply, State Bar Court proceedings must afford the accused adequate administrative due process. (*Emslie v. State Bar*, *supra*, 11 Cal.3d at pp. 226, 229, citing *In re Ruffalo* (1968) 390 U.S. 544, 550-551; see also *Urbano v. State Bar*, *supra*, 9 Cal.3d at p. 20.) As our Supreme Court observed in *Emslie*, "[t]he Rules of Procedure enacted by the State Bar provide a wide array of procedural safeguards in addition to those otherwise provided by statute or the courts." (*Emslie v. State Bar*, *supra*, 11 Cal.3d at p. 226.)

The Supreme Court has also long recognized that acquittal or dismissal of criminal charges does not bar institution of a later disciplinary proceeding on the same acts charged in the criminal action. (*Wong v. State Bar* (1975) 15 Cal.3d 528, 531-532; *Emslie v. State Bar*, *supra*, 11 Cal.3d at p. 224.)

5. However, the Supreme Court has applied the doctrine of entrapment to medical disciplinary proceedings. (*Patty v. Board of Medical Examiners* (1973) 9 Cal.3d 356.)

C. Disciplinary proceedings arising after conviction of crime contrasted with original disciplinary proceedings.

[2a] In our view, and what most influences our decision of this motion, is that disciplinary proceedings arising from conviction of a crime (§§ 6101-6102) are fundamentally different from original proceedings brought under section 6075 et seq.

1. Original proceedings.

[2b] Respondent's 1997 proceeding was an original disciplinary proceeding authorized by article 5 of the State Bar Act (§ 6075 et seq.). As section 6075 declares, it is a complete alternative to conviction referral proceedings under article 6 of the State Bar Act (§ 6100 et seq.) (hereafter article 6), discussed, *post*. Together with implementing procedural rules adopted by the Board of Governors of the State Bar pursuant to section 6086, original proceedings require an investigation by the State Bar's Office of Chief Trial Counsel, the filing in this Court of a Notice of Disciplinary Charges, or a stipulated disposition in lieu of those charges, and a formal evidentiary hearing or stipulated disposition. (§§ 6085, 6085.5; Rules Proc. of State Bar, rules 101, 134-135.) If the matter proceeds by way of trial, the respondent is afforded the right to introduce evidence in defense of the charges, to examine and cross-examine witnesses, to issue subpoenas, to be represented by counsel, to receive exculpatory evidence possessed by the State Bar, to exercise constitutional rights and to engage in specified discovery. (§ 6085; e.g., Rules Proc. of State Bar, rules 150-189, 214, 219; *Brotsky v. State Bar*, *supra*, 57 Cal.2d at pp. 300-302.) Charges in original proceedings must be proven by clear and convincing evidence. (Rules Proc. of State Bar, rule 213; e.g., *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794.)

2. Conviction proceedings.

[2c] Conviction proceedings, such as respondent's present proceeding, are authorized by article 6 (§§ 6101-6102). They are considerably streamlined over original proceedings, recognizing that they rest on proceedings in the criminal courts in which the burden is proof beyond a reasonable doubt.

In a seminal 1970 report which studied lawyer disciplinary systems nationwide, the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, chaired by retired United States Supreme Court Justice Tom C. Clark, concluded that "no single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline." (ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (June 1970) Problem 22, p. 124.) Thus, in California streamlined conviction referral proceedings aid the maintenance of public confidence in the legal profession. (*In re Lesansky* (2001) 25 Cal.4th 11, 17.)

[2d] The procedures following an attorney's conviction of a crime recognize that the basis for attorney discipline is not the provable violation of a rule of professional conduct but the mere existence of a certified copy of a record of conviction of an attorney of a crime involving moral turpitude. (§ 6101 subd. (a); Cal. Rules of Court, rule 951(a).) The record of conviction of the crime is conclusive evidence of guilt of the crime (§ 6101, subd. (a)), and such evidence of guilt may not be the subject of a collateral attack. (*In re Prantil* (1989) 48 Cal.3d 227, 231-32.) Upon a conviction of a moral turpitude crime or upon any felony conviction, an attorney is subject to prompt interim suspension. (§ 6102 subd. (a).) When an attorney's conviction of a crime, which inherently involves moral turpitude, becomes final, the attorney is subject to summary disbarment without any hearing to decide whether lesser discipline should be imposed. (§ 6102, subd. (c); *In re Paguirigan*, *supra*, 25 Cal.4th at pp. 7, 9.)

[2e] Only convictions which do not inherently involve moral turpitude are referred for an evidentiary hearing to determine whether there is a legal basis for imposing discipline under article 6. (E.g., *In re Strick* (1983) 34 Cal.3d 891, 897.) Even under those convictions that "may-or-may-not" involve moral turpitude or other misconduct warranting discipline, the attorney's guilt of the convicted crime is conclusively established and the attorney is subject to

interim suspension if the conviction was a felony. (§§ 6101, subd. (a); 6102, subd. (a).)

D. Discussion of appropriate principles.

[2f] California has no express authority directing the effect of an earlier original proceeding on a later conviction proceeding resting on the same facts.[6] Since res judicata is designed to prevent relitigation of the same cause of action in a later suit between the same parties and collateral estoppel exists to prevent relitigation of the same issues when decided in prior actions (e.g., *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896), neither doctrine applies to this case. This is so because neither the issues nor "causes of action" are the same when the conviction proceeding is based on the mere existence of a criminal conviction, rather than a corpus of proven facts as in the original proceeding.

We are guided by two decisions of supreme courts of other states which involve situations similar to the case before us. (*Florida Bar v. Hochman* (Fla. 2002) 815 So.2d 624 and *Matter of Chastain* (2000) 340 S.C. 356 [532 S.E.2d 264].)

In *Florida Bar v. Hochman*, *supra*, the attorney was earlier found culpable of ethical misconduct in an original proceeding arising from an agreed disposition. He admitted in that proceeding that he had misappropriated client trust funds resulting from addiction to drugs. The Florida Supreme Court suspended Hochman for three years. (*Florida Bar v. Hochman* (Fla. 1998) 717 So.2d 539.) In 1999, Hochman pled no contest to felony grand theft charges based on the same facts underlying his earlier misappropriation; and, in 2000, the Florida Bar requested the state Supreme Court to suspend Hochman for three years on account of his criminal conviction. Hochman sought review by the Florida court on various grounds including that the earlier discipline was a bar to the second suspension since he was being disciplined twice for the same misconduct.

After reviewing a referee's report, which rejected Hochman's claims, the Florida Supreme Court concluded that a three year suspension reverting back to the date of his earlier suspension, was warranted as the discipline in the conviction case. (*Florida Bar v. Hochman*, *supra*, 815 So.2d at p. 626.) The Florida court did not expressly discuss Hochman's claims below that the discipline in the first proceeding barred the conduct of the second one. However, in imposing the suspension in the conviction proceeding that was coextensive with his earlier suspension, the Florida court noted "that both suspensions were ultimately based on the same underlying misconduct." (*Id.* at p. 626.) Finally, the court pointed out that Hochman's offenses of misappropriation of trust funds and felonies "typically resulted in disbarment." (*Id.* at p. 627.) The court stated that it would have imposed more severe discipline in both proceedings had Hochman not taken responsibility promptly for his acts and "doggedly pursued meaningful rehabilitation." (*Ibid.*)

Matter of Chastain, *supra*, presented a similar situation: an original proceeding which resulted in Chastain's two-year suspension for misconduct in six client matters, followed by a conviction proceeding arising from some of the same facts as in the original proceeding. Chastain's misconduct in the original proceeding was found to have involved neglect of client matters, failure to refund unused attorney fees and failure to reply to inquiries during the attorney discipline investigation. (*Matter of Chastain* (1994) 316 S.C. 438 [450 S.E.2d 578].)

In 1995, one year after Chastain was disciplined in the original proceeding, he was convicted of one count of breach of trust with fraudulent intent for failing to return the unearned fee to one of the clients

6. We believe that the question would be easier if the facts were different and if both the 1997 and present proceedings were original proceedings based on the same facts and ethical rule allegations. In that case, if the earlier proceeding had been dismissed with prejudice, it would have been a bar to commencing a "new proceeding based on the same transaction or occurrence." (Rules Proc. of State Bar, rule 261(b).) Moreover, principles of res judicata could be invoked to effect such a bar to commencing a new original proceeding, if the 1997 proceeding were a final determination on the merits. (Cf. *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447-448.)

involved in the original proceeding. In 1998, formal proceedings were brought against Chastain based on his conviction. Chastain objected on double jeopardy grounds as he was already disciplined for the underlying misconduct in 1994. The state's Commission on Lawyer Discipline concluded that Chastain's conviction was an independent ground for discipline but recommended that no added discipline be imposed in view of the 1994 discipline. The South Carolina court held that Chastain's claim of a double jeopardy bar was without merit. (*Matter of Chastain*, *supra*, 532 S.E.2d at pp. 268-269.)

In its analysis, the South Carolina court reviewed the scope of the double jeopardy clause, concluding that its application is limited to criminal proceedings. (*Matter of Chastain*, *supra*, 532 S.E.2d at p. 266.) It then reviewed the different labels applied to attorney disciplinary proceedings by different states, noting that they are either classed as civil in nature; or quasi criminal; or, as classified in California and other states, as unique, sui generis or special. (*Id.* at pp. 267-268.) Since the court concluded that disciplinary proceedings are not criminal in nature and do not have punishment as a purpose, it concluded that the double jeopardy provision did not bar imposing added discipline. Finally, the court stated that Chastain's "criminal conviction which followed a disciplinary proceeding in which he was sanctioned, provides a separate basis for an additional sanction. [Citations.]" (*Id.* at p. 269.)

Turning to the appropriate degree of discipline, the court determined that added discipline was not required in every case and the court stated it would review each case before deciding whether to impose an added sanction. It also identified seven relevant factors in assisting it to decide whether it would impose added discipline.[7] In this case, the Court concluded that imposing an added sanction would be unnecessary. (*Matter of Chastain*, *supra*, 532 S.E.2d at p. 269.)

[2g] We are persuaded to follow the analysis in *Chastain* and the result in *Hochman* that the bringing of a conviction proceeding is not barred because it arose from underlying facts which were the subject of an earlier original proceeding. We stress that the situation before us is extremely rare. Indeed we believe it is the only such proceeding to arise in the nearly 75-year history of State Bar proceedings.[8] Nevertheless, for those expectedly rare cases that may arise, we believe that our conclusion provides the correct result under California law. Moreover, it recognizes that underlying issues in criminal referral cases differ from the issues in original disciplinary proceedings. In addition, recognizing that a later conviction proceeding is not barred because of the pursuit of an earlier original proceeding allows the statutory standard for summary disbarment to be recommended to the Supreme Court in eligible cases. (See *In re Paguirigan*, *supra*, 25 Cal.4th at p. 9.) Finally, our conclusion recognizes and reinforces the goals of attorney discipline – protection of the public, the courts and the integrity of the legal profession – which are strong public policy considerations in this state. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.)

[3a] However, we share the concerns found in *Chastain*; and, at least implicitly, in *Hochman*, that, except for proceedings eligible for summary disbarment, the degree of discipline to be imposed in the later conviction proceeding should take into consideration any discipline imposed in the earlier original

7. In substance, the seven factors set forth in *Chastain* are: whether an added sanction was needed to (1) protect the public or (2) protect the integrity of the legal system or the administration of justice; (3) whether the conviction proceeding yielded information not considered during the previous proceeding; (4) whether the attorney was unable to practice due to criminal sanctions such as incarceration; (5) whether the disciplinary or criminal processes had been manipulated to harass the lawyer; (6) whether an added sanction would be unfair to the lawyer; and (7) any other factor deemed relevant. (*Matter of Chastain*, *supra*, 532 S.E.2d at p. 269.)

8. But compare with *Shafer v. State Bar* (1932) 215 Cal.706 in which a suspension recommendation was made in an original proceeding after the attorney was convicted of a felony for failing to account for trust funds involved in the original proceeding, but before the conviction became final. The court chose to impose the suspension recommended in the original proceeding. At the time, had Shafer's conviction become final, he would have been automatically disbarred. (See *In re Paguirigan*, *supra*, 25 Cal.4th at p.5.)

proceeding. This also comports with the earlier-cited requirements of due process in these proceedings.

[3b] For the purpose of assessing the appropriate discipline in the conviction proceeding, and to ensure fundamental fairness, we adopt the following factors: (1) whether discipline in the conviction proceeding is needed to protect the public or the courts or to maintain the integrity of the administration of justice; (2) the extent to which the hearing judge or the parties in the original proceeding addressed the underlying facts supporting the criminal conviction which forms the basis for the subsequent conviction proceeding; (3) whether the criminal conviction yielded any relevant information that was not considered by the hearing judge in the original proceeding; (4) whether the discipline imposed in the conviction proceeding would unfairly duplicate any discipline actually imposed in the original proceeding, or would otherwise be unfair to the respondent; and, (5) the extent to which the public policy sought to be protected in the original proceeding relates to the public policy sought to be protected in the criminal conviction which forms the basis for the conviction proceeding.

Since this conviction is now final, we shall refer it to the hearing judge as set forth below. If the judge so assigned finds a basis for imposition of discipline, we direct that the assigned judge consider the operation of the five factors set forth *ante* in determining the appropriate degree of discipline.

III. CONCLUSION AND ORDERS.

For the foregoing reasons, we conclude that this conviction proceeding, 02-C-15210, may proceed. As respondent's conviction is now final, this proceeding is referred to the Hearing Department under the authority of subdivision (a) of rule 951, California Rules of Court, for a hearing and decision recommending the discipline to be imposed in the event that the Hearing Department finds that the facts and circumstances surrounding the violation of title 18 United States Code section 371, of which respondent was convicted, involved moral turpitude or other misconduct warranting discipline. Should the hearing judge find a basis for recommending discipline, the judge shall consider the five factors we set forth *ante* before making a discipline recommendation.

We concur:
EPSTEIN, J.
HONN, J.*

* (Judge of the Hearing Department, sitting by designation under rule 305(e), Rules of Procedure of the State Bar.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JASMIN BANKS JACKSON

A Member of the State Bar

No. 00-C-15263

Filed October 2, 2003

SUMMARY

Upon a nolo contendere plea, respondent was convicted of a felony violation of Penal Code section 245, subdivision (a)(1), assault with a deadly weapon or by means likely to produce great bodily harm. After her conviction, the criminal court reduced the crime to a misdemeanor and granted her summary probation. After the State Bar filed a certified copy of respondent's conviction with the State Bar Court, the review department referred the matter to the hearing department to determine whether there was a basis for discipline, and if so, what discipline was appropriate. On referral, the hearing judge determined that respondent's crime was a misdemeanor rather than a felony for State Bar disciplinary purposes. (Hon Alban I. Niles, Hearing Judge.)

The State Bar sought interlocutory review. The review department determined that under controlling sections of the State Bar Act, respondent was convicted of a felony despite the criminal court's reduction of the crime to a misdemeanor at the time it granted her probation.

COUNSEL FOR PARTIES

For State Bar: Erin M. Joyce and Kristin L. Ritsema

For Respondent: Michael G. Gerner

HEADNOTES

[1a-c] **191 Effect/Relationship of Other Proceedings**
194 Statutes Outside State Bar Act
1691 Conviction Cases–Record in Criminal Proceeding
When an attorney pleads nolo contendere to a felony wobbler, i.e., a crime that may be charged or judged either as a felony or misdemeanor, and that offense is declared to be a misdemeanor at sentencing or at the imposition of probation under Penal Code section 17, subdivision (b), the Legislature made it clear that it remains a felony for State Bar Act purposes even if it is later declared

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a misdemeanor in postconviction proceedings, including proceedings resulting in punishment or probation. This does not mean that an attorney's conviction of a wobbler will always be of a felony. If the attorney's plea of guilty or nolo contendere or the verdict of guilty is to a misdemeanor charge, including a felony reduced to a misdemeanor at the time of the plea or verdict, the conviction will be of a misdemeanor.

[2] **169 Standard of Proof or Review–Miscellaneous**
1699 Conviction Cases–Miscellaneous Issues
To the extent that the grade of a crime, i.e., felony or misdemeanor, would influence the most significant actions following criminal conviction - eligibility for interim suspension, or summary disbarment - those issues are reserved to the review department rather than the hearing department.

[3] **159 Evidence–Miscellaneous**
1699 Conviction Cases–Miscellaneous Issues
The primary consequence of an order determining the grade of a crime for State Bar disciplinary purposes would be as to the evidence presented on the question of degree of discipline to recommend or impose should moral turpitude or misconduct warranting discipline be found. On the issue of degree of discipline, the ultimate grade of a crime, together with other mitigating evidence, could bear on the ultimate result.

ADDITIONAL ANALYSIS

Discipline
1541.10 Conviction Matters–Interim Suspension–Ordered
1543 Conviction Matters–Interim Suspension–Vacated

OPINION

STOVITZ, P. J.:

Respondent Jasmin Jackson was admitted to practice law in California in December 1996 and was convicted, on her nolo contendere plea, of a felony violation of Penal Code section 245, subdivision (a)(1), assault with a deadly weapon or by means likely to produce great bodily harm. (Bus. & Prof. Code, §§ 6101, subd. (e), 6102, subds. (a)-(b).) After her conviction, the criminal court reduced the crime to a misdemeanor and granted her summary probation. (Pen. Code, § 17, subd. (b)(3).) Pursuant to well established practice in such cases, after respondent's conviction, we referred the matter to the State Bar Court hearing department to determine whether there was a basis for lawyer discipline and if so, for a decision as to the discipline to impose. (Cal. Rules of Court, rule 951(a).) On referral, the assigned hearing judge determined that respondent's crime was a misdemeanor and that she had not been convicted of a felony for State Bar disciplinary purposes. The State Bar sought our interlocutory review from this decision.

Primarily because this issue could recur in State Bar Court proceedings, we granted interlocutory review and invited briefs from the parties. After considering the briefs, record and applicable law, we determine that under controlling sections of the State Bar Act, discussed below, respondent was convicted of a felony although the criminal court reduced it to a misdemeanor at the time it granted her probation. Accordingly, we shall reverse the contrary finding of the hearing judge.

I. BACKGROUND.

A. The criminal proceedings.

In November 2000, the San Bernardino County District Attorney's office filed in superior court a "felony complaint" charging respondent with the felony offense of Penal Code section 245, subdivision (a)(1), assault with a deadly weapon by means likely to produce great bodily harm. After a preliminary hearing, respondent was held to answer and the case was set for jury trial. On June 11, 2002, the first day of trial, respondent pled nolo contendere to the charge. The superior court judge accepting the plea made it clear to respondent that she was charged with and pleading nolo contendere to a felony crime. He stated that based on the information he was privy to at the time of plea, he would probably reduce "this case to a misdemeanor on [respondent's] motion at the time of sentencing." But the judge made it expressly clear that he was neither promising to reduce the conviction to a misdemeanor, nor was he obligated to do so.

On June 17, 2002, respondent appeared in superior court for sentencing. The parties waived their rights to a probation report and formal sentence recommendation. Although the district attorney's office objected, the court reduced respondent's crime to a misdemeanor pursuant to Penal Code section 17, subdivision (b) and immediately admitted respondent to summary probation, without imposing sentence.[1]

B. The State Bar Court proceedings.

This State Bar Court proceeding started in July 2002, when the State Bar filed with us the certified copy of respondent's conviction. Because of our determination that respondent had been convicted of a felony (Bus. & Prof. Code, §§ 6101, subd. (e), 6102, subds. (a), (b)), we placed respondent on interim suspension effective August 29, 2002. A few days later, we referred this matter to the hearing department of our court for a hearing and decision as to whether respondent's felony offense involved moral turpitude or other misconduct warranting discipline; and if so, for a decision or recommendation of the degree of discipline.

1. Although the superior court judge did not cite the specific subdivision of Penal Code section 17, subdivision (b) under which he reduced respondent's crime to a misdemeanor, it appears that it was section 17, subdivision (b)(3). References by the hearing judge and parties to the reduction having been pursuant to section 17, subdivision (b)(1), are an insignificant error as our later discussion will show.

In early March 2003, respondent moved to set aside her interim suspension. She claimed that the felony basis of that suspension was nullified when her conviction was reduced to a misdemeanor at the time of sentencing. The State Bar did not object to setting aside respondent's suspension on the sole ground that it was likely that the period of the interim suspension would exceed the degree of discipline recommended for respondent's conviction. (See *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465.) On March 21, 2003, we granted respondent's petition to set aside the interim suspension, but we did not decide whether the reduction of respondent's conviction to a misdemeanor made it such within the meaning of the State Bar Act.

In early April 2003, respondent made an oral motion to the assigned hearing judge for an order that her conviction be treated as a misdemeanor for State Bar purposes. The State Bar opposed the motion but on April 30, 2003, the hearing department made a verbal order determining that respondent stood convicted of a misdemeanor. The State Bar objected and sought reconsideration. On May 30, 2003, the hearing judge filed a two-page order denying reconsideration. He took issue with the State Bar's view that respondent had been convicted of a felony. In the hearing judge's view, respondent had never been convicted of a felony. Since, in his view, the conviction did not occur until sentencing, the hearing judge determined that respondent had been convicted only of a misdemeanor and it was a misdemeanor for all purposes, including State Bar purposes. As trial has not yet been held, the State Bar's interlocutory petition to us followed.

II. DISCUSSION.

We start by recognizing that the consequences of a conviction of a crime may be quite different based on particular statutes than under the substantive criminal law and that a "conviction" has varying meanings under different statutes. (*Truchon v. Toomey* (1953) 116 Cal.App.2d 736, 738-740.)

Many California crimes are referred to colloquially as "wobblers." They may be charged or judged either as felonies or misdemeanors. (See Pen. Code, § 17.) Petitioner's assault crime is such an offense. (Pen. Code, § 245, subd. (a)(1).) The criminal law recognizes that if so charged, the crime exists as a felony, at least until at a later time when it is reduced to a misdemeanor. (*People v. Banks* (1959) 53 Cal.2d 370, 380-383.) However, for at least the purposes of the three strikes law, it has been recognized that the grade of the wobbler is not determined until the court imposes sentence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 975.)

[1a] Notwithstanding criminal law provisions, the State Bar Act provides that what happened in respondent's case resulted in her conviction of a felony for State Bar purposes at the time she entered her plea of nolo contendere. Business and Professions Code section 6101, subdivision (e) provides that she was convicted when she pled nolo contendere. Business and Professions Code section 6102, subdivision (b) provides that an attorney is convicted of a felony either if it is declared to be so or declared a felony as defined in Penal Code section 17, subdivision (a). As noted, respondent's crime was charged as a felony and the superior court judge declared that respondent had pled to a felony. The Legislature expressly dealt with the situation before us. When an attorney pleads nolo contendere to a felony wobbler and that offense is declared to be a misdemeanor at sentencing or at the imposition of probation under Penal Code section 17, subdivision (b), the Legislature made it clear that it remains a felony for State Bar Act purposes even if it is later declared a misdemeanor in postconviction proceedings "including proceedings resulting in punishment or probation set forth in paragraph (1) or (3) of [Penal Code section 17, subdivision (b)]." (Bus. & Prof. Code, § 6102, subd. (b).)

This result may be seen in past cases where attorneys were convicted of wobblers as felonies and their convictions were later reduced to misdemeanors per Penal Code section 17. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 409-411 [felony assault conviction]; *In the Matter of Respondent M*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 468, 470-471 [felony driving under influence conviction].) Moreover, it is consistent with the long history by the Supreme Court of upholding the State Bar Act's declared consequences of criminal convictions. (Most recently, see *In re Paguirigan* (2001) 25 Cal.4th 1, 9-10).

[1b] This does not mean that an attorney's conviction of a wobbler will always be of a felony. If the attorney's plea of guilty or nolo contendere or the verdict of guilty is to a misdemeanor charge, including a felony reduced to a misdemeanor *at the time* of the plea or verdict, the conviction will be of a misdemeanor. (Bus. & Prof. Code, § 6102, subd. (b).)

[2] The hearing judge's decision in this case appears to be of limited effect. To the extent that the grade of the crime would influence the most significant actions following criminal conviction – eligibility for interim suspension, or summary disbarment – those issues are reserved to us. (Rule 320, Rules Proc. of State Bar; *In re Paguirigan, supra,* 25 Cal.4th at p. 3, fn.1; *In re Lesansky* (2001) 25 Cal.4th 11, 13, fn.1.) [3] The primary consequence of the hearing judge's order here would be as to the evidence presented on the question of degree of discipline to recommend or impose should moral turpitude or misconduct warranting discipline be found. On the issue of degree of discipline, the ultimate grade of a crime, together with other mitigating evidence, could bear on the ultimate result. (*In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 271, fn.11.) We express no view on the merits of the latter issue. [1c] However, since the hearing judge determined that respondent's conviction was a misdemeanor for all State Bar purposes, we reverse that determination. Since we reserved in a previous order the determination of whether respondent was convicted of a felony or misdemeanor, we determine that she was convicted of a felony within the meaning of the State Bar Act.

III. DISPOSITION.

For the foregoing reasons, the determination of the hearing judge that respondent was convicted of a misdemeanor for State Bar purposes is reversed. Consistent with this opinion, the hearing judge may resume the conduct of the conviction proceeding earlier referred to him.

We concur:

WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BOLDEN BRUCE KITTRELL

A Member of the State Bar

No. 95-O-14321

Filed November 18, 2003; reconsideration denied December 24, 2003

SUMMARY

The hearing judge found respondent culpable of several serious violations of Rules of Professional Conduct, rule 3-300 as a result of respondent entering into a business transaction with a client who lost her life savings in the transaction. The hearing judge also found respondent culpable of acts of moral turpitude while engaged in this business transaction and culpable of failing to report a civil judgment for fraud to the State Bar. The hearing judge recommended disbarment. (Hon. Robert M. Talcott, Hearing Judge.)

Respondent requested review, pressing a variety of substantive and procedural attacks on the findings. The review department upheld the hearing judge's findings and conclusions of culpability but determined that the appropriate discipline was five years' stayed suspension, five years' probation, and three years' actual suspension.

COUNSEL FOR PARTIES

For State Bar: Janice G. Oehrle; Geri VonFreymann; Charles Weinstein

For Respondent: Bolden Bruce Kittrell, in pro. per.

HEADNOTES

[1 a-c] 130 Procedure–Procedure on Review
169 Standard of Proof or Review–Miscellaneous
191 Effect/Relationship of Other Proceedings
After a review department opinion remanding a case to the hearing department for a new trial had become final, respondent could not, on a subsequent review following the new trial, continue to attack the findings and conclusions set forth in that opinion.

[2] 120 Procedure–Conduct of Trial
130 Procedure–Procedure on 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.

161 Duty to Present Evidence
162.20 Proof–Respondent's Burden
192 Due Process/Procedural Rights
After the hearing judge gave respondent the express opportunity to present his evidence, respondent's unpersuasive reasons for failing to do so could not be the basis of any claim of error on review.

[3 a-g] **221.11 Section 6106–Deliberate Dishonesty/Fraud**
221.19 Section 6106–Gross Negligence
273.00 Rule 3-300 [former 5-101]
1013.11 Stayed Suspension–5 Years
1015.09 Actual Suspension–3 Years
Review department recommended five years' stayed suspension and three years' actual suspension where, in a single client matter, (1) respondent committed multiple violations of Rules of Professional Conduct, rule 3-300; (2) respondent engaged in acts involving moral turpitude by concealing important information about a business transaction from his client and by overreaching his client; (3) respondent failed to report a civil fraud judgment to the State Bar; and (4) there were several factors in aggravation and two factors in mitigation, including respondent's long years of practice without prior discipline.

ADDITIONAL ANALYSIS

Culpability
Found
214.51 Section 6068(o) (comply with reporting requirements)
Aggravation
Found
521 Multiple Acts
541 Bad Faith–Dishonesty
582.10 Harm to Client
591 Indifference
621 Lack of Remorse
691 Other
Mitigation
Found
710.10 No Prior Record
765.10 Pro Bono Work
Found but Discounted
740.31 Good Character
740.39 Other
Discipline
1017.11 Probation–5 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)
Other
102.90 Procedure–Improper Prosecutorial Conduct–Other
159 Evidence–Miscellaneous
171 Discipline–Restitution
193 Constitutional Issues

OPINION

STOVITZ, P. J.:

Respondent, Bolden Bruce Kittrell, sought our review from a hearing judge's recommendation that he be disbarred. Respondent was admitted to practice in 1967 and has no prior record of discipline. The hearing judge found that respondent committed several serious violations of rule 3-300 of the Rules of Professional Conduct[1] regulating an attorney's conduct in a business transaction with an unsophisticated client who lost her life savings she had earmarked to use to buy a home. Following our earlier opinion in this proceeding (see *post*), the hearing judge also found respondent culpable of acts of moral turpitude while engaged in this business transaction proscribed by Business and Professions Code section 6106.[2] After respondent's client won a civil fraud judgment against him, respondent was found to have violated section 6068, subdivision (o)(2) by failing to timely report entry of this judgment to the State Bar. Respondent has pressed a variety of substantive and procedural attacks on the findings. The State Bar urges that we adopt the hearing judge's decision and disbarment recommendation. Upon our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's findings and conclusions but recommend suspension, which we believe better comports with the discipline imposed in similar cases, while recognizing the serious evidence of aggravating circumstances in this case.

I. PROCEDURAL BACKGROUND

This is the second plenary review we have conducted in this proceeding. In *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195 (*Kittrell I*), we upheld the hearing judge's conclusions, applying principles of collateral estoppel, that respondent committed acts of moral turpitude (§ 6106) but remanded that matter to the hearing judge[3] to determine the nature and extent of those acts. We also adopted the hearing judge's conclusion that respondent violated section 6068, subdivision (o)(2) by failing to timely notify the State Bar of the entry of a fraud judgment in a civil suit brought by his former client. We noted that respondent did not challenge earlier this conclusion or the factual findings supporting it. (*Kittrell I*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 210.). We also concluded that the application of collateral estoppel did not establish the elements of a violation of former rule 3-300, and we remanded this case to the hearing judge to make necessary findings of fact. Finally, we rejected the hearing judge's findings in mitigation and aggravation and remanded for the making of new findings and an appropriate recommendation of discipline.[4] Although we remanded this matter, we rejected respondent's argument that it was inappropriate to apply principles of collateral estoppel and his claim that the hearing judge was not impartial.

On remand, we authorized the use of the evidence already made a part of the record but required that respondent be given an opportunity to "contradict, temper, or explain" that evidence.

In July 2001 the hearing judge conducted the remand hearing. The State Bar argued that the evidence already adduced proved the charges and chose to introduce no additional evidence. The hearing judge gave respondent ample and repeated opportunities to temper or explain the evidence and to present evidence favorable to him concerning the charges. Respondent declined to do so giving two

1. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar. The version of rule 3-300 at issue here is that in effect between May 27, 1989, and September 13, 1992.

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

3. On remand, the case was assigned to a different trial judge than heard the matter originally.

4. The hearing judge in *Kittrell I* had recommended that respondent be suspended for five years, stayed, on conditions of probation including three years' actual suspension and until respondent established his entitlement to be returned to law practice.

reasons: that he did not want to waive any rights he had in view of a pending appeal before the Supreme Court of the United States and the evidence in *Kittrell I* already contained the evidence he would offer. After concluding that respondent was culpable of violations of the State Bar Act and former rule 3-300(A) and (B), and that evidence of aggravating circumstances outweighed evidence in mitigation, the hearing judge recommended disbarment. Respondent's current appeal followed.

II. FINDINGS AND LEGAL CONCLUSIONS OF CULPABILITY.

Unlike in *Kittrell I*, the current findings of the hearing judge do not rest on application of collateral estoppel. Rather, the judge independently used the evidence adduced in the civil trial brought by respondent's client to prove the charges. We summarize the hearing judge's factual findings. Despite the extensive evidence, the essential facts are simple and not the subject of any reasonable dispute based on the record.

At the pertinent time, 1991, Czarine Hope James was a 55-year-old naturalized United States citizen who had completed the equivalent of the 12th grade in Jamaica. She had done computer data entry work, but in 1991 was employed as a clerk in a public storage facility earning about $6 per hour. She had minimal prior investment experience. She desired to purchase a condominium and was looking for an investment for her life savings of $68,000.[5] James's friend, Johnnie Maxey, had invested earlier with respondent and recommended him to James.

In addition to being an attorney, respondent owned Bolden Group and Bolden Realty. As he conceded, Bolden Group was the same as respondent in identity. Respondent used Bolden Realty to do business with equity holders in real estate who could not qualify for conventional bank loans. Respondent testified that none of his investors lost money in 12 to 15 years until the recession of 1992 to 1993, when he experienced problems with trust deeds. His own home of 17 years was foreclosed and sold in 1994.

In late November 1991, James met respondent in his law office. He gave James his law office's business card, mentioned he was an attorney but did not mention his ownership of Bolden Realty. At this time, James had asked respondent for legal advice about the tax consequences of her family law settlement. Respondent advised her at a later time after reviewing her documents.

Also, at this November 1991 meeting, respondent offered James an investment in a trust deed in Moro Landis Studios, commercial property in Studio City, which was principally used as a dance studio. At the time, respondent had no written appraisal of the property. However, he had invested in this property earlier, raising $600,000 from investors. He was aware that the property needed considerable improvements and that it was encumbered with first and second trust deed balances totaling $895,000. Together with the third trust deed balance held by respondent's realty group, the encumbrances on Moro Landis Studios totaled nearly $1.5 million. In contrast, the annual income of the property was $70,000 and the annual debt service on just the first and second trust deeds was $100,000.

In 1990 respondent listed Moro Landis Studios for $1.95 million but only received one offer below $1 million. He tried unsuccessfully to refinance the property in 1990 and 1991.

To obtain funds to service the debt on Moro Landis Studios, in March 1990 respondent issued a new third trust deed for $450,000. When the $450,000 note became due, and respondent was unable to refinance or sell the property for an adequate amount, he extended the note's due date to March 1993 and increased the note's amount to $550,000. To finance this note, he sought James's investment. A month before James's first meeting with respondent, the holder of the first trust deed on Moro Landis Studios,

5. James also had retirement accounts totaling about $12,000.

Pacific Lighting Company, filed a notice of default on the property.

Between 1991 and 1993, respondent earned at least $244,000 in commissions and management fees from the Moro Landis Studios.

When respondent offered James an investment in the Moro Landis Studios in November 1991, he told her that it would pay 14 percent interest, that there would be monthly payments and that her principal would be repaid in 3 to 4 months. Although respondent told James that anything can happen, he also assured her that the Moro Landis Studios investment was a good one and that she could not lose money. Respondent did not consider James a sophisticated investor when he met her. Respondent did not inform James that the debt service on the Moro Landis Studios exceeded its income and that he had no current written appraisal on the property.[6] At this meeting, respondent did not give James any writing concerning her investment, nor did he inform her that she could seek the advice of independent counsel.

Within a week of her meeting respondent, James sent him $61,000 for her investment in the Moro Landis Studios. At respondent's request, James made the funds payable to Bolden Realty, but respondent did not inform James that he was Bolden Realty.

By early January 1992, respondent had sent James her first monthly payment, and on January 9, he sent her a trust declaration and beneficiary agreement to sign and return. These papers failed to mention that James's investment was in a third trust deed, did not recite the risks of the transaction and misstated that the note amount was $450,000 rather than $550,000. They also set the due date for return of James's principal as March 1, 1993, rather than the March 1992 date James had understood. When James called respondent about this, he assured her that she would have her funds back in April or May of 1992, and that the 1993 date was for convenience in case she wanted to reinvest her funds. Relying on respondent's statements, James signed the agreement; but she did not fully understand the nature of her investment or with whom it was placed.

By late February 1992, James had decided to purchase a condominium. Respondent told her that she would have her funds soon and James opened an escrow to buy the condominium. However, respondent did not return James's funds and her intended purchase of the condominium fell out of escrow. Again, relying on respondent's promise that he would return her investment soon, James opened a second escrow in summer 1992. Again, James's purchase was frustrated when respondent failed to return her funds and escrow had to be cancelled. The same thing happened a third time in fall 1992 when James opened an escrow to buy a home in a senior citizen community. By this time, respondent had ceased making interest payments to James. Respondent made 11 interest payments to James totaling $7,333.

Because of the three failed escrows, James spent $2,300 on escrow fees and had to pay storage charges for her personal property. The experience also caused James stress. As a result of losing her investment, James was forced to rent a room in a friend's home.

In April 1993, James sued respondent in Superior Court, Orange County, for several causes of action, including breach of fiduciary duty and fraud. After jury verdict, the court awarded James compensatory damages of $217,235, plus interest and costs and exemplary damages of $61,000. The verdict found by clear and convincing evidence that respondent's conduct toward James involved malice, oppression or fraud. The judgment on the verdict was affirmed by the Court of Appeal, Fourth Appellate District, in an unpublished opinion. (*James v. Kittrell* (Oct. 16, 1996, G017179).)[7]

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6. At the time he met with James, respondent had two appraisals on Moro Landis Studios. One was four years old ($2.2 million appraised value) and the other three years old ($2.25 million appraised value). Based on an appraiser's testimony, the hearing judge found that as of November 1991, the property's fair market value was $725,000.

7. Although the opinion of the Court of Appeal is not for publication, it may be cited in this disciplinary proceeding. (Cal. Rules of Court, rule 977(b)(2).)

On appeal, the only issue respondent raised was the sufficiency of evidence to support the judgment. The appellate court found substantial evidence to support the judgment. Supporting the award of exemplary damages was evidence showing that respondent had sizeable personal assets.[8]

The Supreme Courts of California and of the United States each denied respondent's requests to file late petitions for review.

Respondent told the attorney who represented James in the civil litigation, Evan Borges, that he had no intention of paying James the judgment. Borges served pro bono for James, both defending respondent's attempts to defeat the judgment in bankruptcy proceedings and attempting unsuccessfully to collect for James on the judgment. When Borges tried to reach respondent's Arizona ranch, respondent transferred it to an entity owned by his wife. Borges did not have funds to continue to collect on the judgment.

Despite Borges's pro bono help to James, she was required to pay about $10,000 for the costs of the superior court and other actions. In 1994 James received about $27,000 from respondent's former law partners and $31,000 from the State Bar's Client Security Fund (CSF). In addition to the financial burdens, James's health suffered from her loss of funds. She broke out in a severe rash, and suffered dental problems which she could not afford to remedy. This caused gum problems and loss of several teeth. She also suffered from varying blood pressure, hair loss and depression.

Respondent contended that his assets have been foreclosed or sold in bankruptcy and his lifestyle is far more modest than before. His only income is from his law practice which had yielded about $100,000 in both 1996 and 1997. He claims that he had paid James $18,200 and offered to pay her an additional $17,400 but did not have those funds available. He also contends that his insurer had paid James. Respondent believed that he did not owe James any additional sums since she has recovered more than her original investment from him and from CSF.

From these findings, the hearing judge concluded that respondent wilfully violated rule 3-300(A) and (B), by, respectively, entering into a business transaction with James which was not fair and reasonable and was not fully disclosed to James and failing to advise James in writing that she could consult independent counsel of her choice. In so concluding, the hearing judge determined that an attorney-client relationship existed between respondent and James in order to trigger rule 3-300 requirements and that the Moro Landis Studios transaction placed respondent in a position adverse to James.

The hearing judge also concluded that the moral turpitude which we had previously determined in *Kittrell I* respondent had committed, was evident in respondent's concealment to James, whom he knew to be an unsophisticated investor, of the risks of her investment in the Moro Landis Studios and in his self-dealing with that investment and failing to honor his commitment to repay James within three to four months.

Finally, the hearing judge incorporated in his decision our earlier dismissal in *Kittrell I* of the charge that respondent violated section 6068, subdivision (o)(1) and our earlier conclusion that respondent violated section 6068, subdivision (o)(2) by failing to report to the State Bar the judgment for fraud obtained by James.

8. As the Court of Appeal, in its opinion, summarized respondent's testimony in the punitive damage phase of the civil trial, respondent owned and lived in an eight-acre equestrian estate in Rolling Hills which included a "main house, one bedroom guest house, swimming pool, tennis court, a six-stall barn and groom's quarters." This estate had been appraised at $2.9 million as of June, 1992. He also owned an airplane worth $125,000, owned an Arizona ranch worth $700,000, and leased 1991 Mercedes and Lincoln cars. During the three years prior to the civil trial, respondent conceded that he had made several hundred thousand dollars of deposits into his bank account. Respondent testified that his assets were encumbered for more than their value and he invested his deposits in other property. (*James v. Kittrell*, *supra*, (typescript opn.), p. 4.)

III. EVIDENCE IN AGGRAVATION AND MITIGATION AND HEARING JUDGE'S RECOMMENDATION.

Respondent had been admitted to practice for 24 years before the start of misconduct. The hearing judge gave this factor weight in mitigation.

Respondent presented testimony of two character witnesses. Gary W. Stephens, the acting director of corporate security of Sempra Energy, a large public utility, knew respondent for about 50 years in a business and personal relationship and considered him one of his closest friends. Stephens had a favorable opinion of respondent's character and considered him honest, generous and a person of integrity. Stephens had not heard of any State Bar proceedings concerning respondent but, based on information from respondent, was generally familiar with the civil law suit brought against respondent by James. Stephens's mother had invested in the Moro Landis Studios and had lost money in that investment. Stephens and respondent loaned each other money over the years and respondent owed Stephens about $15,000.

Alex Dugally, retired at the time of his testimony, had been a deputy clerk of the Los Angeles Superior Court for 30 years and had known respondent as a friend and an attorney for between 25 and 30 years. As did Stephens, Dugally enjoyed a close social relationship with respondent. Dugally had a favorable opinion of respondent's character, terming respondent a person of high integrity.

The hearing judge gave this character evidence little weight for failing to meet the element in standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct,[9] that the evidence show an extraordinary demonstration of positive character by a wide range of legal and general references.

The hearing judge found many factors to be aggravating on the issue of degree of discipline. These included the multiple acts of wrongdoing toward his client (std. 1.2(b)(ii)), his significant harm to James (std. 1.2(b)(iv)), his indifference to remedying the consequences of his misconduct (std 1.2(b)(v)), his continued assertion of contrary facts to those found by trial and appellate courts and that his misconduct was surrounded by dishonesty and concealment (std. 1.2(b)(iii)).

After weighing factors deemed appropriate and after reviewing other cases of attorneys' involvement with unfair business transactions with their clients, the hearing judge recommended disbarment.

IV. DISCUSSION.

A. Respondent's claims.

Respondent levies a number of attacks on the recommendation and proceedings below, some of them reminiscent of his previous arguments in *Kittrell I.*

We shall group them into two broad categories: claims attacking the procedures utilized and those attacking the substantive findings and the recommendation.

1. Procedural attacks.

[1a] We begin with respondent's attack on the use of collateral estoppel. Our opinion in *Kittrell I*, determined that respondent's culpability of moral turpitude was established by application of the doctrine of collateral estoppel, but that the charged violations of rule 3-300 were not. (4 Cal. State Bar Ct. Rptr. at pp. 208-210.) That opinion has become final and respondent cannot continue to attack our earlier holding regarding the doctrine of collateral estoppel. Moreover, it is clear from the record of this proceeding, that the hearing judge did not rely on that doctrine to establish respondent's misconduct under rule 3-300, but used the evidence in the record to make independent and detailed findings. We have independently reviewed the record and, as we shall discuss *post*, in resolving respondent's attack on the substan-

9. Unless noted otherwise, all references to "standards" are to these Standards for Attorney Sanctions for Professional Misconduct, found in title IV of the Rules of Procedure of the State Bar.

tive findings, those findings rest on clear and convincing evidence. Most of the findings are undisputed and rest on respondent's own testimony.

[1b] Also rendered final in *Kittrell I* is our finding, adopted by the hearing judge in *Kittrell II*, that respondent violated section 6068, subdivision (o)(2), by failing to report timely to the State Bar the entry of the fraud judgment against him in the civil action brought by James. Having failed to challenge this finding in his review of *Kittrell I* and we having sustained that finding on an independent review, respondent cannot now seek to reopen the matter as he urges us to do. (Compare *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 357.)

[2] Respondent argues that he was denied the right to present evidence or cross-examine witnesses in the first and second State Bar Court trials. Although our concern that respondent did not have an opportunity in the hearing below in *Kittrell I* to temper the evidence led to our remand to the hearing department in that first proceeding, there is absolutely no doubt that respondent received every reasonable opportunity to introduce evidence favorable to him in *Kittrell II*. The hearing judge extended repeated invitations to respondent to present his evidence. Except for very brief testimony or argument and the testimony of two character witnesses, respondent deliberately declined to offer further evidence. One of his grounds for declining was his incredulous assertion that any new evidence he offered would be redundant. His other reason for declining was also unmeritorious, that the United States Supreme Court was considering a pending appeal. In sum, having given respondent the express opportunity to present his evidence, his unpersuasive reasons for failing to do so cannot now be the basis of any claim of error.[10]

2. Substantive attacks.

We have carefully reviewed respondent's substantive attacks on the findings and conclude that they are without merit.

[1c] Respondent's contention that the finding that he engaged in moral turpitude in violation of section 6106 is impermissibly vague echoes the belatedness of some of his procedural claims. Our decision in *Kittrell I* noted that respondent had made the same claim on review in that case. We resolved it against respondent (4 Cal. State Bar Ct. Rptr. at p. 209) and that determination has long since become final.[11]

Respondent argues that the civil action brought by James did not establish or present the issue of whether respondent wilfully violated rule 3-300. We agree that the purpose of the James civil action was to resolve civil causes of action, and not to decide whether the California Rules of Professional Conduct were violated to warrant discipline. But that does not serve to exonerate respondent, as the evidence introduced in that civil action, together with other evidence, did serve to establish clearly and convincingly that respondent wilfully violated the rule. A related claim by respondent, that the findings of the hearing judge are not supported by clear and convincing evidence, also is not meritorious.

B. Evidence and culpability conclusions.

[3a] There was ample clear and convincing evidence that respondent knew of the limited sophistication and educational level of his client, James, that he knew of her goal to use the principal invested to secure her own residence, that he knew of the distressed financial history of the Moro Landis Studios and still respondent recommended that James invest in a third trust deed as a "can't lose" investment maturing in just a few months. Respondent's admitted conduct proved clearly that he violated the provisions

10. Respondent's claim that he was not given sufficiently timely information as to whether the State Bar would call certain witnesses and the location of those witnesses, even if established, did not obviate respondent from calling these witnesses on his own based on his own investigation of their whereabouts, if he wished to elicit their testimony.

11. In *Kittrell I*, we cited eight decisions defining the term "moral turpitude" or applying it to specific alleged conduct. (4 Cal. State Bar Ct. Rptr. at p. 208.)

of rule 3-300. There is no dispute that respondent failed to give James an adequate written description of the transaction and its essential terms necessary for her to be informed of the risks inherent in the junior trust deed in which she was investing. By his own testimony, respondent never informed James that she had an opportunity to seek the advice of independent counsel. James relied on respondent as her attorney and she first consulted him as her attorney.[12]

In addition to respondent's utter failure to present James with a writing of the basic terms of the transaction, the transaction was neither fair nor reasonable to James.

Cases of business transactions between attorney and client which failed to comply with rule 3-300 or its predecessor, rule 5-101 are regrettably abundant. (See, e.g., *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 494-495; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.) From these cases, it is clear that, among the purposes the rule serves, it is designed to recognize the very high level of trust a client reposes in his or her attorney and to ensure that that trust is not misplaced. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 662; *Beery v. State Bar*, *supra*, 43 Cal.3d 802, 812-813).

[3b] Sadly, this case stands with too many others as an example of an attorney's preference of his personal interests in manifest disregard of the interests of his client. (E.g., *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830.) Without doubt, respondent's wilful violations of rule 3-300 were multiple and significant and we uphold the hearing judge's findings and conclusions as to rule 3-300.

[3c] Although our conclusion that respondent engaged in acts of moral turpitude is final, the record on remand shows two bases for that conclusion: first, respondent concealed material facts and known risks from James about the Moro Landis Studios investment. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) Specifically, respondent concealed that encumbrances on the property were greater than its market value, that respondent had no current appraisal on the property, that the property's debt service exceeded its income, that recent attempts to refinance or sell the property were unavailing and that the property had a history of defaults and foreclosure actions. Additionally respondent overreached James, knowing that James was respondent's client; had limited income, education and experience in investing; and was depending on the promised prompt return of her principal to use for housing. (Compare *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. 233, 242-244.) Given the financially distressed history of the Moro Landis property, there was no reasonable way that the investment offered James was appropriate for either a sophisticated investor seeking to preserve principal, or for James who expected her funds to be returned shortly so that she could purchase a home. (See *Rose v. State Bar*, *supra*, 49 Cal.3d 646, 662-663.) We cannot escape the conclusion that these aspects of the transaction represent moral turpitude in violation of section 6106, under any of the definitions of moral turpitude adopted by the Supreme Court. (See *Kittrell I*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 208.)

C. Degree of discipline.

Past cases which involved centrally the entry into a business transaction with a client which either failed to comply with the applicable rule of professional conduct or breached the attorney's fiduciary duty to the client have ranged widely from disbarment (*In the Matter of Priamos*, *supra*, 3 Cal. State Bar Ct. Rptr. 824) to reproval. (See cases discussed in *Rodgers v. State Bar*, *supra*, 48 Cal.3d at p. 318, and *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 308.)

[3d] Here respondent's misconduct extended beyond rule 3-300 offenses and into statutory violations, including moral turpitude. Accordingly, we must look to cases that reflect misconduct beyond violations of the Rules of Professional Conduct for fair guidance.

12. Although the existence of an attorney-client relationship is not disputed, one clearly existed in order to invoke the rule's requirements. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812 (attorney-client relationship existed when client consulted attorney about preparation of a will at the same time that attorney induced client's entry into business transaction).)

In that light, we see as more comparable, *Rose v. State Bar*, *supra*, 49 Cal.3d 646; *Beery v. State Bar*, *supra*, 43 Cal.3d 802; *In the Matter of Peavey*, *supra*, 4 Cal. State Bar Ct. Rptr. 483; and *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. 233.

Rose induced a widow with two children to invest $70,000 in a restaurant equipment business in which Rose was involved financially. The client had almost no business experience and limited resources, except for settlement funds which Rose had obtained for this client. Rose was found to have failed to disclose the significant risks of this investment with his client and failed to advise her to seek the advice of independent counsel. The Supreme Court found Rose culpable of misconduct in four other matters but also considered mitigating evidence in Rose's favor. It ordered a two-year actual suspension as a condition of probation.

Beery persuaded a severely injured client for whom he had recovered damages to invest $35,000 in a venture that would provide satellite television service to hotels and businesses. Beery failed to disclose his financial condition or his connection with the satellite venture; nor did he advise his client to seek the advice of independent counsel on the investment. When the satellite business became unsuccessful, Beery defaulted on his personal guarantee to repay the loan. The Supreme Court found that Beery had concealed material facts and had abused the trust placed in him by his client. As in *Rose*, the Supreme Court suspended Beery for two years actual as a condition of probation.

A two-year actual suspension was also imposed in *Peavey*. There, the attorney solicited $25,000 loans or investments from each of two different clients in order to publish a book Peavey was writing. Peavey failed to disclose known risks and facts about the book venture and we found that he wilfully violated rule 3-300 in several respects in these transactions. Moreover, he failed to honor any part of civil judgments obtained by both clients against him; and similar to the present case, failed to report timely to the State Bar that one of the judgments was for fraud or intentional breach of fiduciary duty.

Finally, in *Johnson*, we found the attorney culpable of breaching her fiduciary duty to her sister-in-law who was also a client, represented by Johnson in recovering damages for personal injuries. We found that Johnson's unsecured loan of $20,000 was neither fair nor reasonable to her client who was in fragile health and unsophisticated in business matters, and we also found that Johnson had engaged in acts of moral turpitude by overreaching her client.

In their briefs on review, neither party cites cases guiding on the degree of discipline to recommend. However, at oral argument the State Bar suggested that the cases of *In the Matter of Priamos*, *supra*, 3 Cal. State Bar Ct. Rptr. 824, and *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, should guide us to recommend disbarment. We disagree as both cases involve decidedly more serious misconduct than presented here. *Wyshak* involved serious misconduct in a total of four matters including two acts of defrauding sellers of real estate of hundreds of thousands of dollars in consideration in escrows Wyshak was administering. *Priamos* involved an attorney's repeated acts of self-dealing over a seven-year period in over $500,000 of the client's property coupled with Priamos's unilateral appropriation of $450,000 of his client's property for management fees.

[3e] We must also weigh mitigating and aggravating circumstances to achieve a balanced recommendation. (E.g, *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) We assign more weight in mitigation than the hearing judge to respondent's long years of practice without prior discipline (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225; *Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090-1091) and we note with favor respondent's community service activities (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521). However, we agree with the hearing judge that respondent's character evidence is entitled to little weight as the two witnesses were social friends who hardly represented a broad showing contemplated by standard 1.2(e)(vi). (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.)

[3f] We agree with the hearing judge's assessment of aggravating circumstances. We are most concerned with the multiple offenses; and, as the

hearing judge observed in his decision, with respondent's "lack of insight, recognition or remorse for any of his wrongdoing." Respondent has still failed to reimburse the CSF for its payment to James on account of respondent's dishonest acts. We also share the judge's concern over respondent's litigation of this matter. Having won a remand from us to allow him an opportunity to present the evidence he claimed he was precluded from presenting in *Kittrell I*, respondent refused to present any evidence in *Kittrell II*. On review after remand, he insists on relitigating some claims which were, long ago, finally resolved against him. On this record, it is difficult to avoid concluding that respondent's strategy has not been in good faith but primarily for delay.

[3g] Despite our sharing so many of the concerns of the hearing judge regarding respondent's offenses and its surrounding circumstances, we have concluded that disbarment is excessive, although we can appreciate many of the considerations which led the hearing judge to recommend it. At bottom, this transaction involved a single client. It appears most comparable to *Beery* and *Peavey*. Yet the confluence of aggravating circumstances we have cited, which we deem more serious than in either *Beery* or *Peavey*, particularly respondent's protracted indifference to making amends and his abiding lack of appreciation for his wrongdoing, cause us to conclude that the appropriate degree of discipline is suspension for five years, stayed, on conditions including a three-year actual suspension and until restitution is made[13] and proof of rehabilitation, fitness to practice and present learning and ability are established (see std. 1.4 (c)(ii)).

V. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Bolden Bruce Kittrell, be suspended from the practice of law in California for five (5) years, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the following conditions:

1. That respondent be actually suspended from the practice of law for the first three (3) years of probation and until he has: a) made restitution to the State Bar's Client Security Fund in the sum of $31,000, plus interest thereon at the rate of 10 percent simple interest per annum from the date of the payment by the Fund until repayment by respondent and statutory processing costs, representing the Fund's reimbursement of Czarine Hope James on account of the losses caused dishonestly by respondent; b) made restitution to Czarine Hope James in the sum of $221,516.41, plus interest thereon at the rate of 10 percent simple interest per annum from November 21, 1994, until paid in full and provides satisfactory proof of payment of such restitution to the State Bar's Office of Probation in Los Angeles and c) shown proof satisfactory to the State Bar Court of his 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 conditions of this probation.

3. Subject to the proper assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Office of Probation 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 proba-

13. As to our recommendation to award restitution of the civil judgment won by respondent's client, as a condition of probation, see, e.g., *In the Matter of Peavey*, *supra*, 4 Cal. State Bar Ct. Rptr. at page 495.

tion. 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.

5. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

6. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for five years shall be satisfied, and the suspension shall terminate.

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 his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period.

In addition, we 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 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs incurred by the State Bar in this matter be awarded to the State Bar 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.

We concur:
WATAI, J.
McELROY, J.*

*Hon. Patrice McElroy, Hearing Department Judge, sitting by designation, pursuant to the provisions of rule 305(e), Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MONICA MALEK-YONAN

A Member of the State Bar

No. 97-O-14777

Filed December 26, 2003

SUMMARY

The hearing judge found that respondent abdicated her responsibility as an attorney to properly supervise her client trust account, which consequently enabled her non-attorney office staff to steal $1.7 million from the trust account over a period of approximately one and one-half years. The hearing judge also found that respondent failed to render a timely accounting to three clients and failed to pay those three clients promptly their share of a settlement; and in a final matter, that respondent threatened to present criminal charges to obtain an advantage in a civil dispute. The hearing judge recommended that respondent be disbarred. (Hon. Stanford E. Reichert, Hearing Judge.)

Respondent requested review, arguing that the State Bar did not prove any of the charges by clear and convincing evidence and that, even if the review department concluded that she was culpable, the hearing judge's disbarment recommendation was excessive. The review department adopted some, but not all, of the hearing judge's factual findings and culpability conclusions. The review department agreed with the hearing judge that respondent's gross inattention to one of the most fundamental duties of an attorney, safeguarding client funds, along with her other misconduct, was serious and required significant discipline. However, the review department concluded that the very limited record in the proceeding and analogous case law did not support disbarment, and instead recommended that respondent be suspended from the practice of law for five years, that execution of that suspension be stayed, and that she be placed on probation for five years on conditions, including that she be actually suspended from the practice of law for eighteen months.

COUNSEL FOR PARTIES

For State Bar: Larry DeSha

For Respondent: Edward O. Lear; Robert N. Treiman

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)]**
Rule 3-110(A) of the Rules of Professional Conduct includes the duty to supervise the work of attorney and non-attorney staff. Respondent operated a high volume personal injury practice with multiple financial transactions occurring on a regular basis and that the office procedures she had in place were so lax that she could not possibly ensure the integrity of her clients' funds. Respondent did not sign checks drawn on her business or trust accounts. Instead, she authorized her staff to do so using a rubber stamp of her signature. Having delegated this significant authority to her staff, respondent had no procedures in place to ensure that client funds were protected. She did not regularly review these accounts, she did not review any trust account bank statement herself, she never compared the settlement checks she received with the deposits in the trust account, she never reconciled the trust account, nor did she review any of the cancelled checks for any of her accounts. The review department concluded that clear and convincing evidence was presented showing that respondent failed to supervise her non-attorney staff and thereby wilfully violated rule 3-110(A).

[2a, b] **221.00 State Bar Act–Section 6106**
An attorney has a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. This duty is nondelegable. The law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support a charge of violating section 6106 of the Business and Professions Code. Respondent gave control of her trust account to her bookkeeper and then failed to supervise the management of the account or to examine the bank statements or other records. The result was the theft of $1.7 million. Any procedure so lax as to produce that result was grossly negligent.

[3] **147 Evidence–Presumptions**
162.11 Proof–State Bar's Burden–Clear and Convincing
280.00 Rule 4-100(A) [former 8-101(A)]
The review department found no merit to the State Bar's argument that money in a client trust account is presumed to belong to the clients and that it was respondent's burden to prove otherwise. The State Bar alleged in the notice of disciplinary charges that client money was stolen and it had the burden to present clear and convincing evidence proving that allegation.

[4] **159 Evidence–Miscellaneous**
162.11 Proof–State Bar's Burden–Clear and Convincing
Regardless of what inferences that may be drawn from an attorney's failure to keep proper books of account or records in an appropriate case, the review department must ultimately recognize that the State Bar's burden requires it to present proof in the form of stipulated facts or admissible evidence to support each of the elements of its disciplinary case. Considering that the State Bar alleged that $1.7 million of trust funds was lost, the State Bar failed to present expected probative testimonial or documentary evidence, choosing to rest solely on respondent's testimony and then criticizing respondent for not having presented records listing her clients and detailing payments to them.

[5a-e] **162.11 Proof–State Bar's Burden–Clear and Convincing**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Rule 4-100(B)(4) of the Rules of Professional Conduct requires that an attorney promptly pay or deliver client money in possession of the member. By its terms, the important date for purposes of

this rule is when respondent received the settlement money, not the date that clients signed releases or the date cases settled. Where no evidence was presented showing when respondent received settlement money, the review department, resolving all reasonable doubts in respondent's favor, concluded that the rule 4-100(B)(4) charges were not sustained by convincing proof to a reasonable certainty.

[6a, b] **300.00 Rule 5-100 (former 7-104)**

In response to a debt collector's collection efforts, respondent wrote him a letter stating that the collector's clients were under criminal investigation and that if collector attempted to damage respondent's credit or garnish her wages, she would make the collector's conduct part of the investigation hy the District Attorney and the Federal Bureau of Investigation. Respondent also stated that if the collector did not cease further action, she would turn over the collector's name and company information to the Federal Bureau of Investigation. The letter indicated that a copy of the letter was sent to various state and federal agencies. The review department concluded that viewed from the perspective of the collection agent and in context, respondent's letter, with the notations that copies were being sent to the various agencies, was quite reasonably construed as a threat to present criminal, administrative, or disciplinary charges against the collection agent in order to gain an advantage in a civil dispute in violation of rule 5-100(A) of the Rules of Professional Conduct.

[7] **521 Aggravation–Multiple Acts–Found**
531 Aggravation–Pattern–Found

The review department agreed with the hearing judge that respondents multiple acts of wrongdoing were an aggravating circumstance. The review department also viewed respondent's continuous disregard of her trust account duties over the approximately one and one-half years as demonstrating a pattern of misconduct. However, for the purposes of determining aggravation the result is the same whether respondent's conduct is characterized as multiple acts of wrongdoing or as a pattern of misconduct.

ADDITIONAL ANALYSIS

Mitigation
- Found
  - 710.10 No Prior Record
  - 740.10 Good Character
  - 745.10 Remorse/Restitution
  - 791 Other

Discipline
- 1013.11 Stayed Suspension–5 Years
- 1015.07 Actual Suspension–18 Months
- 1017.11 Probation–5 Years
- Probation Conditions
  - 1024 Ethics Exam/School
  - 1026 Trust Account Auditing

OPINION

STOVITZ, P. J.:

Respondent Monica Malek–Yonan requests our review of the hearing judge's decision recommending that she be disbarred from the practice of law in California. The hearing judge found that respondent abdicated her responsibility as an attorney to properly supervise her client trust account, which consequently enabled her non–attorney office staff to steal $1.7 million from the trust account over a period of approximately one and one–half years. The hearing judge also found that respondent failed to render a timely accounting to three clients and failed to pay those three clients promptly their share of a settlement; and in a final matter, that respondent threatened to present criminal charges to obtain an advantage in a civil dispute.

Upon independently reviewing the record (Cal. Rules of Court, rule 951.5; *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt some, but not all, of the hearing judge's factual findings and culpability conclusions. While we agree with the hearing judge that respondent's gross inattention to one of the most fundamental duties of an attorney, safeguarding client funds, along with her other misconduct, is serious and requires significant discipline, the very limited record in this proceeding and analogous case law do not support disbarment. We shall instead recommend that respondent be suspended from the practice of law for five years, that execution of that suspension be stayed, and that she be placed on probation for five years on conditions, including that she be actually suspended from the practice of law for eighteen months.

I. FINDINGS AND CONCLUSIONS[1]

The notice of disciplinary charges in this matter charged 25 counts of misconduct. At trial, but prior to the presentation of evidence, the State Bar moved to dismiss 19 of the counts based on insufficient evidence. The hearing judge granted the motion. The hearing judge found respondent culpable of all of the charged misconduct in five of the remaining six counts and not culpable in one (count 21). Little evidence was presented at trial regarding count 21 and the State Bar does not contest and has not briefed the hearing judge's conclusion regarding this count. Accordingly, the record before us contains evidence relating to five of the counts in the notice of disciplinary charges and our review is necessarily limited to those counts.

As indicated above, we have independently reviewed the record, and we adopt the following findings of fact regarding culpability.

A. Counts 1 and 2.

Respondent was admitted to the practice of law in California in December 1986 and has no prior record of discipline. She has always been a solo practitioner and the majority of her experience has been in personal injury cases. The events in question in this proceeding occurred in 1997 through 1999. During this time respondent had an office in her home in Glendale, where she resides with her parents, and an office in Orange County, which she opened in 1997 and closed in 1999. While open, the Orange County office handled a large number of personal injury cases, about 500 files which represented between 1,800 and 1,900 individuals. Respondent would normally spend three days a week in her Orange County office and the remainder of the week either in her Glendale office, appearing in court, or attending depositions. The misconduct in this proceeding occurred as a result of the activities that occurred in the Orange County office.

The employees in the Orange County office were Ali Hashemi ("Ali"), the bookkeeper; Ken

1. Respondent was the only witness to testify in the culpability portion of this matter. The hearing judge found her testimony to be "self–serving and inconsistent." Yet, respondent's testimony was the only evidence supporting many of the hearing judge's factual findings. The hearing judge implicitly found respondent's testimony to be credible at least in part. In addition, some of the hearing judge's "findings" are a recital of witness testimony. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968–969, fn. 2.) Further, upon our independent review of the record, we have not found clear and convincing evidence supporting some of the hearing judge's factual findings.

Taghizadeh ("Ken"); respondent's assistant (and Ken's wife), Veronica Perez–Taghizadeh ("Veronica"); the office manager; and two secretaries and a receptionist. Although the circumstances surrounding the formation of the Orange County office are not very clear, it appears that respondent hired all of the employees. Ali and Ken were recommended to respondent, by a distant cousin. Respondent found out after the events in question here that Ken had served two terms in prison, one for 18 months for drug trafficking. Prior to being hired by respondent Ali and Ken worked for a personal injury attorney who was moving out of state. Respondent agreed to review the cases he was leaving behind and ended up taking some, but not all, of them.

Respondent would pay herself from her Orange County practice whenever she needed money. She had no need for a regular salary or "draw" because she did not have regular bills as she was living at home. If she wanted to get paid, she would ask Ali if she could take out a certain sum from the general business account. Ali would then issue her a check. She did not know the maximum amount of money that she had in the general business account during 1997 and 1998.

Respondent did not sign the checks on her general business account or client trust account. Instead, she authorized Ali to sign the checks using a rubber stamp of her signature. Respondent did not personally review any of the bank statements from her Orange County client trust account. She never compared the settlement checks she received with the deposits in the trust account nor did she look at any of the cancelled checks for any of her accounts. She never checked or reconciled the trust account. Respondent asked Ali for the bank statements for the trust account, but Ali would make excuses such as that they were at the accountant's. Another time, respondent was scheduled to go over the bank statements with Ali when her office was burglarized and the bank statements were stolen. Respondent did nothing more to obtain or review the bank statements.

Respondent personally negotiated the settlements with the insurance adjusters for all her clients and negotiated reductions in medical provider lien claims in some of the cases. In other cases, Ken and Ali negotiated the reduction of medical provider liens. When a case settled and the settlement money was received, respondent would determine the amounts to be disbursed and direct Ali to prepare disbursement checks in the appropriate amounts. She would then review the file and the actual disbursement checks before she authorized her staff to send the checks out. Only later did she learn that the checks she reviewed were not actually sent as she had instructed.

Around the second week of August 1998, respondent was in her Orange County office. Veronica usually opened the mail, but on this occasion respondent happened to do so. One letter was from an attorney of a former client and it indicated that the client did not receive all of the settlement money that she should have. Respondent knew she had authorized the disbursement of the settlement checks in this case and she became suspicious. She asked Ken and Ali about the matter and was told that they delayed sending the checks to the client because they had negotiated reductions of the medical liens and the client was going to get more money. Respondent found this explanation reasonable but nevertheless was suspicious, so she instructed the bank manager to call her in the future whenever someone attempted to cash checks drawn on her trust account.

On Friday, August 28, 1998, respondent received a call from the bank manager informing her that there were three people who were trying to cash settlement checks drawn on her trust account. Respondent did not recognize the names of the payees on the checks as her clients, and her secretary confirmed that they were not her clients. Respondent called the bank manager and told him not to cash the checks. While respondent was on the phone with the bank and her secretary, Ali paged respondent repeatedly. When respondent called Ali back, he told her that they had several clients at the bank trying to cash settlement checks and the bank refused to do so. Ali asked respondent to call the bank and instruct them to cash the checks. Respondent told him she was in court and would have to handle the matter later.

The next day respondent called the Glendale Police Department. Respondent was told that she needed to talk to a detective in Orange County during

business hours on Monday. On Sunday, respondent's secretary called respondent and told her that Ali had called and had instructed her (the secretary) not to go into the office on Monday because the office would be closed. Respondent went to her Orange County office early that Monday morning and found that the office was empty, and almost all of her client files were gone. She left the office and called the police. When the police arrived they went back to the office and found Ali and Veronica gathering up the last of the files. Over the next several hours respondent was able to retrieve, with police help, some, but not all, of her files back from Ken, Ali and Veronica.

In Ali's briefcase respondent found about $4,000 in cash, a number of settlement checks, checks payable to doctors, and her rubber signature stamp. The brief case also contained some documents to make wire transfers to Swiss bank accounts. Respondent also asked Ali for her laptop computer, which contained a back–up list of all of her clients. When Ali returned the laptop to her, the hard drive was smashed. Respondent fired Ali, Veronica, and Ken that Monday.

Respondent first saw the monthly statements for her client trust account after she fired the three. By then a number of checks and bank statements were missing so she obtained them from her bank. Respondent believes that Ali, Ken and Veronica took money from her client trust account and general account and transferred it to Swiss bank accounts. She believes that the three accomplished this by issuing checks to bogus clients, who would cash the checks and return the money to Ali, Ken and Veronica. Respondent attempted to freeze the Swiss accounts but was unable to do so for more than three months. Respondent thinks that Ali's father–in–law was involved because Ali transferred money from a Swiss bank account to the father–in–law's account in England.

According to respondent, there were more than 200 bogus checks generated and the total amount of the money taken by respondent's employees was about $1.7 million. Respondent arrived at this figure by totaling all of the checks written to bogus clients. Respondent does not know when her employees started to embezzle the money. She does not know how much was actually deposited into her trust account during this period of time. She does not know what percentage of the deposits were stolen from her. She does not know how much of the stolen $1.7 million belonged to her for fees, how much belonged to her clients, or how much belonged to medical care providers.

Respondent filed for bankruptcy in July 1999. In January 2000, respondent's bankruptcy case was converted from a Chapter 7 to a Chapter 11 bankruptcy. The bankruptcy case was still pending at the time of her State Bar Court trial. Respondent filed lawsuits against Ali, Veronica, and Ken in the United States as well as in Switzerland and England attempting to recover the embezzled money. It is not clear how much money respondent was eventually able to recover.

Respondent went through all of the client files she was able to recover to make sure the clients, medical providers and others were paid. If they had not been, she paid them. Most of respondent's clients were Spanish speaking and she placed advertisements regarding her bankruptcy in Spanish language magazines and newspapers, but she had very few clients file claims. Respondent was named as a defendant in approximately 185 small claims actions filed by medical providers. Those actions were all resolved through respondent's bankruptcy, either by payments or dismissals.

The hearing judge found respondent culpable of failing to perform legal services competently in violation of rule 3–110(A) of the Rules of Professional Conduct[2] in that respondent abrogated her responsibility to manage her office and her trust account and thereby cheated her clients; and culpable of engaging in conduct involving moral turpitude in violation of section 6106 of the Business and Professions Code[3] in that respondent breached her fiduciary duty by abdicating her responsibility to manage her office and

2. All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

3. All further statutory references are to the Business and Professions Code unless otherwise indicated.

her client trust account which caused the loss of $1.7 million in client funds.

B. Counts 17 and 18.

In September 1997, Porfirio Antonio, Ramon Antonio and Araceli Figueroa hired respondent to prosecute their claims for damages payable under the uninsured motorist provisions of an automobile insurance policy. The claims of these three clients were later settled. At that time respondent reviewed the files for the clients; determined the amounts that were to be distributed to the clients, the medical care providers and herself; and instructed her staff to issue checks in those amounts.

Some time after respondent found out that her employees had embezzled money from her she went through the files of these three clients (as well as the files of other clients) and determined that despite her instructions, the clients had been paid less than they should have been. In October 1998, respondent wrote a letter to each of the three clients in which she informed them that they had been paid less than they were owed, provided them an accounting of the settlement money she received for their claims, and enclosed checks for the difference between what she had previously paid them and the correct amount that they were owed ($975 to Porfirio, $911 for Ramon, and $1,175 for Araceli). She also informed the clients in these letters that she would pay them additional sums if she was able to negotiate a reduction of the medical provider claims. The record does not indicate whether respondent negotiated a reduction in the medical liens or paid the clients any additional sums as a result.

The three clients were apparently advised by their new attorney not to cash the October 1998 checks. The clients eventually filed claims in respondent's bankruptcy. The claims were settled with the approval of the bankruptcy court and respondent sent the clients' new attorney a check for $5,248 in July 2001, which sum included the amounts of the three earlier uncashed checks plus an additional amount.

The hearing judge found respondent culpable of failing to render an accounting of client funds to the three clients in violation of rule 4–100(B)(3) in that the accounting was not furnished until October 1998 and should have been provided in March 1998; and culpable of failing to pay client funds promptly in violation of rule 4–100(B)(4) in that respondent failed to pay the three clients their share of the settlement proceeds until October 1998 and failed to pay them their full share of the settlement money until July 2001, and failed to pay the medical liens.

C. Count 24.

John Leland was employed by several medical lienholders to collect money from respondent. In response to Leland's collection efforts, respondent wrote him a letter in February 1999 stating that Leland's clients were under criminal investigation and that if Leland attempted to damage her credit or garnish her wages, she would make Leland's conduct "part of the investigation by the District Attorney and the F.B.I." She also stated that if Leland did not cease further action, she would turn over Leland's name and company information to the "F.B.I." The letter indicated that a copy of the letter was sent to the Federal Bureau of Investigation, the District Attorney's Fraud Investigation Unit, the U.S. Attorney's Office, the Department of Insurance, the Board of Chiropractic Examiners, the California Chiropractic Association, and the Chiropractic Board of California.

The hearing judge found that by sending the letter respondent threatened to present criminal charges to obtain an advantage in a civil dispute in violation of rule 5–100(A).

D. Aggravating and mitigating circumstances.

The hearing judge found in aggravation that respondent committed multiple acts of wrongdoing and that her violations demonstrated a pattern of misconduct (std. 1.2(b)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (stds.)); respondent was unable to account to the clients for their stolen trust funds (std. 1.2(b)(iii)); respondent's misconduct harmed significantly a large and undeterminable number of clients, the public and the administration of justice (std. 1.2(b)(iv)); respondent demonstrated indifference toward rectification

of or atonement for the consequences of her misconduct in that she failed to identify all the clients she harmed, failed to account for the funds stolen and failed to repay the clients' losses (std. 1.2(b)(v)); and respondent displayed a lack of cooperation to the State Bar during its investigation by not identifying the clients and their losses (std. 1.2(b)(vi)).

The hearing judge found in mitigation that respondent did not have a record of discipline in her 10 years of practice before the present misconduct. (Std. 1.2(e)(i).) Six character witnesses testified on respondent's behalf. (Std. 1.2(e)(vi).) They were an environmental consultant and his wife, a minister, a dental assistant/lab technician, a car dealer, and respondent's sister. All of the witnesses had known respondent for many years and believed that she was honest. In addition, the witnesses testified that respondent performed significant pro bono services for them and for the Assyrian community. The hearing judge concluded that the character witnesses "did not provide an extraordinary demonstration of good character, other than [for respondent's] pro bono work."

II. DISCUSSION

As indicated above, respondent requested review. She argues that the State Bar did not prove any of the charges by clear and convincing evidence and that, even if the review department concludes that she is culpable, the hearing judge's disbarment recommendation is excessive. The State Bar asserts that the hearing judge's culpability conclusions and disbarment recommendation are supported by the record.[4]

A. Counts 1 and 2.

Respondent advances several arguments in support of her claim that the charges in counts 1 and 2 were not proven. Central to many of these assertions is respondent's claim that rule 3–110(A) "is intended to address the incompetent performance of legal services" and not the failure to prevent employee misuse of the attorney's client trust account. Respondent cites no authority for this proposition.

We first note that this argument misapprehends the nature of the charges in this case. Respondent was not charged with, nor found culpable of, failing to prevent her employees' theft of trust account money. Rather, the gravamen of this case is respondent's complete failure to have adequate office procedures in place to protect client funds and to adequately supervise her subordinate staff to ensure that those procedures were followed. The misconduct here involves respondent's actions and inactions, not those of her staff.

[1] The comments in the Discussion of rule 3–110(A) make clear that the rule is intended to include the duty to supervise the work of attorney and non–attorney staff. The Supreme Court has recognized this duty in numerous cases. (See e.g., *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795–796.) Respondent's own testimony establishes that she operated a high volume personal injury practice with multiple financial transactions occurring on a regular basis and that the office procedures she had in place were so lax that she could not possibly ensure the integrity of her clients' funds. Respondent did not sign checks drawn on her business or trust accounts. Instead, she authorized her staff to do so using a rubber stamp of her signature. Having delegated this significant authority to her staff, respondent had no procedures in place to ensure that client funds were protected. She did not regularly review these accounts, she did not review any trust account bank statement herself, she never compared the settlement checks she received with the deposits in the trust account, she never reconciled the trust account, nor did she review any of the cancelled checks for any of her accounts. She does not know to this day how much was actually deposited into her trust account. We conclude that clear and convincing evidence was presented showing that respondent failed to supervise her non–attorney staff and thereby wilfully violated rule 3–110(A).

4. The State Bar argued before the hearing judge that respondent should be suspended for three years, stayed, with three years' probation and two years' actual suspension.

[2a] The only argument offered by respondent in support of her claim that she is not also culpable of violating section 6106 is that the cases cited by the hearing judge are distinguishable from hers.[5] We need not address this contention. An attorney 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*, *supra*, 36 Cal.3d at p. 795.) This duty is nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) As we noted in *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410, "the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support" a charge of violating section 6106. (See also *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475.)

[2b] In the present case, respondent gave control of her trust account to her bookkeeper and then failed to supervise the management of the account or to examine the bank statements or other records. The result was the theft of $1.7 million. "Any procedure so lax as to produce that result was grossly negligent." (*Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 796, fn. 8.) We conclude based on the above that respondent is culpable of engaging in acts of moral turpitude in violation of section 6106 by breaching her fiduciary duty to safeguard client funds.

Although we find that respondent is culpable of the above violations, we agree with her argument that there is no clear and convincing evidence establishing how much of the stolen money belonged to clients. As we noted, respondent was the only live witness. Her testimony was equivocal and contradictory. She testified that she does not know how much of the $1.7 million belonged to her for fees, how much belonged to her clients, or how much belonged to medical care providers. She also testified that she believed that the money was taken from attorney fees that she was owed or from amounts that resulted from negotiated reductions in medical liens. Respondent told the three clients involved in counts 17 and 18 that her ex-employees had stolen money "belonging to me and to my clients." Respondent also testified that the trustee in her bankruptcy was unable to determine the owners of the stolen money after an extensive and expensive investigation.

[3] We find no merit to the State Bar's argument that money in a client trust account is presumed to belong to the clients and that it was respondent's burden to prove otherwise. The State Bar cites no authority for this proposition and we are aware of none. The State Bar alleged in the notice of disciplinary charges that client money was stolen and it had the burden to present clear and convincing evidence proving that allegation. (Rule 213, Rules Proc. of State Bar; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794.) The State Bar failed to do so.

[4] Underlying much of the State Bar's position in this case is its possible confusion between the duty of an attorney to keep proper books and records of client funds in the attorney's possession (e.g., *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 332), and its own duty to prove its case by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) Regardless of what inferences we may draw from an attorney's failure to keep proper books of account or records in an appropriate case, we must ultimately recognize that the State Bar's burden requires it to present proof in the form of stipulated facts or admissible evidence to support each of the elements of its disciplinary case. (Cf. *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) In this case, there is no stipulation of facts obviating proof. Moreover, considering that the State Bar has alleged respondent's $1.7 million loss of trust funds, the State Bar has failed to present expected probative testimonial or documentary evidence,[6] choosing to rest solely on respondent's testimony and then criticizing respondent for not

5. The hearing judge cited *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, and *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411.

6. The State Bar's failure to offer important evidence is most glaring when, in this case alleging such significant trust account losses, the record contains not a single trust account bank statement or records of any items deposited into or paid out of respondent's trust account. Although the State Bar has discretion to prove its case by its choice of relevant evidence, it cannot prevail by advocating a view of the record unsupported by evidence fundamental to a case such as this.

having presented records listing her clients and detailing payments to them.

On the other hand, we also do not find clear and convincing evidence supporting respondent's claim that the stolen money belonged to her for her attorney's fees. The record before us simply does not clearly and convincingly permit us to allocate the stolen money between respondent, her clients or their medical providers.

Finally, respondent claims, again without citation to any legal authority, that she should not be found culpable because the notice of disciplinary charges alleged that specific consequences resulted from her failure to supervise her client trust account and none of those specific consequences were proven. We find no merit to this argument. The notice charged that respondent failed to supervise her non–attorney staff and the State Bar proved that charge.

B. Counts 17 and 18.

The hearing judge found that the three clients (Porfirio Antonio, Ramon Antonio and Araceli Figueroa) signed releases in settlement of their cases in March 1998 and that respondent did not provide the clients with an accounting until October 1998, did not pay them their initial share of the settlement money until October 1998, did not pay them their full share of the settlement money until July 2001, and did not pay the outstanding medical liens. The hearing judge concluded that in failing to provide an accounting to her clients until October 1998, respondent failed to render appropriate accounts in violation of rule 4–100(B)(3); and that in failing to pay her clients promptly their share of settlement money and failing to pay the medical liens, respondent violated rule 4–100(B)(4).

The evidence introduced in connection with these counts consisted of respondent's October 1998 letters to the three clients, copies of the checks sent to the clients, and respondent's brief testimony. Contrary to the hearing judge's finding, there was no evidence introduced indicating that the clients signed releases in March 1998 or any other time, nor was there any other evidence introduced showing when the cases settled.

The State Bar argues that respondent did not provide the clients with an accounting when she first sent them money. The State Bar's brief does not include record references to support this factual claim. Respondent testified that her practice was to prepare an accounting and have the client approve it prior to settlement of a case; but there is no evidence indicating whether or not that practice was followed with regard to the three clients involved in these counts. Respondent's October 1998 letters to the three clients informed them that they had been paid less than they were owed, provided them an accounting of the settlement money she received for their claims, and enclosed checks for the difference between what she had previously paid them and the correct amount that they were owed. The letters thus indicated that settlement money had been previously paid to the clients, but did not indicate whether or not an accounting had been previously provided. We find no direct factual support for the State Bar's claim.

[5a] Rule 4–100(B)(4) requires that an attorney promptly pay or deliver client money "in possession of the member." By its terms, the important date for purposes of this rule is when respondent received the settlement money, not the date the clients signed releases or the date the cases settled. No evidence was presented showing when respondent received the settlement money. At most, the record shows that respondent received the settlement money at some point in time, paid the clients, and then in October 1998 paid the clients an additional sum because she had determined after reviewing their files that they had been paid less than they should have.

[5b] Although not entirely clear, the State Bar seems to argue that the October 1998 accounting and payment of additional sums inferentially shows that any original accounting provided was inaccurate and that the original payment was insufficient. However, in view of respondent's testimony that there may have been ongoing negotiations to reduce the medical liens, it is entirely plausible that more money was owed to the clients because medical liens were reduced after the initial payment. Thus, any initial accounting may have been accurate at the time it was provided, and the initial sum paid to the clients may have been payment of all the client funds in respondent's possession at the time of the disburse-

ment. Because of the lack of evidence presented on this issue, we are left to speculate as to when respondent received the settlement money and why additional amounts were paid to the clients.

[5c] We also do not know whether the additional amounts paid in July 2001 represented client funds in possession of respondent that should have been paid previously. This payment was made as the result of a negotiated settlement of claims filed in respondent's bankruptcy. Respondent testified that the clients' bankruptcy claims were made for the full amount of the settlement, which would have included the amounts respondent was owed for her fees, and that the extra amount paid in July 2001 "would have come from [her] attorney's fees." The State Bar did not present any contrary evidence. (Cf. *In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 54.)

[5d] The evidence presented regarding whether the medical liens had been paid was equally unclear. First, we do not know when respondent received the settlement money. In addition, respondent stated in her October 1998 letters to the clients that she would "return any sums to you that I am able to negotiate with the doctor." Respondent testified at trial that she did not know if the medical providers had been paid and that she would "imagine" that this statement in the letters indicated that she was "still negotiating with the doctors." No evidence was presented showing whether respondent paid the medical providers after October 1998. Thus, the record shows that respondent received settlement money at some point in time and was possibly still negotiating with the medical providers in October 1998. We do not find this evidence to clearly and convincingly establish that respondent did not pay the medical liens.

[5e] Resolving all reasonable doubts in respondent's favor, as we must, we conclude that the charges in counts 17 and 18 are not "sustained by convincing proof to a reasonable certainty." (*McCray v. State Bar* (1985) 38 Cal.3d 257, 263.)

C. Count 24.

[6a] Respondent asserts on review that she is not culpable of threatening to present a criminal charge to gain an advantage in a civil dispute in violation of rule 5–100(A) because she did not threaten to file a criminal complaint in her February 1999 letter; she merely stated her intention to bring the conduct of the collection agent to the attention of various prosecuting agencies. In *Crane v. State Bar* (1981) 30 Cal.3d 117, the attorney wrote a letter demanding that the recipients pay money that the attorney believed was owed in a civil dispute and the attorney stated in the letter that if the money was not received within five days, the attorney would commence an action to recover the money and would "request" a specified state regulatory agency and the state attorney general to "'assist us in solution.'" The letter also indicated that copies were sent to the director of the regulatory agency and to a named deputy attorney general. The Supreme Court concluded that viewed from the perspective of the recipients and in context, the letter with the notations that it was being sent to official agencies, "could quite reasonably be construed as violative of [the rule.]" (*Id.* at p. 123.)

[6b] The letter respondent sent in the present case asserted that the collection agent's clients were engaging in criminal activity and threatened to make the collection agent's conduct "part of an ongoing investigation by the District Attorney and the F.B.I." Further, the letter indicated that copies were sent to the Federal Bureau of Investigation, the United States Attorney's Office and the District Attorney as well as several state regulatory agencies. There is little qualitative difference between the letter respondent sent and the letter sent in *Crane*. Neither letter specifically stated that the author was going to file criminal charges. If anything, respondent's threat to make the collection agent's conduct "part of" an ongoing criminal investigation is a more direct threat to present criminal charges. We conclude that viewed from the perspective of the collection agent and in context, respondent's letter, with the notations that copies were being sent to the various agencies, is quite reasonably construed as a threat to present criminal, administrative, or disciplinary charges against the collection agent in order to gain an advantage in a civil dispute in violation of rule 5–100(A). We agree with and adopt the hearing judge's conclusion to this effect.

D. Aggravating and mitigating circumstances.

Although the parties do not contest the aggravating circumstances found by the hearing judge, we note that many of them are based on the hearing judge's conclusion that client funds were stolen. As indicated above, we find no clear and convincing evidence to support this conclusion and therefore do not find clear and convincing evidence supporting the aggravating circumstances based on it.

[7] We agree with the hearing judge that respondent committed multiple acts of wrongdoing. However, we also view respondent's continuous disregard of her trust account duties over the approximately one and one-half years as demonstrating a pattern of misconduct. Yet, we note that "for the purposes of determining aggravation the result is the same whether [respondent's] conduct is characterized as multiple acts of wrongdoing or as a pattern of misconduct." (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149–1150, fn. 14.)

We agree with the mitigating circumstances found by the hearing judge. We also agree that the good character evidence does not meet the standard which requires an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities. (Std. 1.2(e)(vi).) Nevertheless, the witnesses had known respondent for many years and attested to her honesty, and we give some weight in mitigation to this evidence. We also consider mitigating the evidence of respondent's pro bono work for her church and community. Although not found by the hearing judge, we note that respondent testified regarding her pro bono activities, which included her volunteer work as a settlement judge for one week a year for several years. We consider this a mitigating circumstance as well.

Respondent argues that her prompt reporting of her employees to the police and the significant expense she incurred in pursuing them in order to recover the stolen money should be considered mitigating. We do accord some weight in mitigation to respondent's prompt action once she learned of evidence that her employees were engaged in wrongdoing. We also credit the steps she has taken to make amends to clients she was able to identify.

III. DISCIPLINE

In summary, we have found respondent culpable of failing to perform legal services competently in violation of rule 3–110(A) in that respondent abrogated her responsibility for one and one–half years to manage her office and her trust account; of engaging in conduct involving moral turpitude in violation of section 6106 in that respondent breached her fiduciary duty to safeguard client funds; and of threatening to present criminal, administrative, or disciplinary charges in order to gain an advantage in a civil dispute in violation of rule 5–100(A). In mitigation, we find that respondent does not have a record of prior discipline. We also give some mitigating weight to respondent's good character evidence, her pro bono activities and remedial steps.

The appropriate discipline to be imposed in a given case is not derived from any fixed formula; rather it is determined from a balanced consideration of all relevant factors. (*McCray v. State Bar*, *supra*, 38 Cal.3d at p. 273.) The discipline imposed in past similar cases provides guidance but is not binding. (*Levin v. State Bar*, *supra*, 47 Cal.3d at p. 1150.) The hearing judge considered *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. 119, *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, and *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708. The parties also cite to these cases to support their respective positions regarding discipline.

Sampson involved an attorney who failed to supervise his personal injury practice and recklessly disregarded his trust account duties for almost a year. The resulting chaos led to shortfalls in his trust account which in turn led to misappropriation of client funds and to the failure to pay medical providers. Sampson also failed to perform services competently in other matters and failed to notify a client of the receipt of settlement money. In aggravation, Sampson committed multiple acts of misconduct and significantly harmed a medical provider. In mitigation, Sampson had no record of discipline in 15 years of practice. Sampson was suspended for three years, stayed, with three years' probation and 18 months' actual suspension.

Jones involved an attorney who allowed a non–attorney to conduct a large scale personal injury practice involving capping, forgery and other fraudulent practices in the attorney's name. The non–attorney handled all aspects of the personal injury practice without any supervision from Jones. Nearly $60,000 withheld from client settlements was misused. In mitigation, Jones turned the non–attorney in to the police and cooperated with the authorities, established his good character and community activities and paid nearly $57,000 of his own money to medical providers to remedy the non–attorney's misconduct. In aggravation, Jones committed multiple acts of misconduct and caused considerable harm to medical providers. Jones was suspended for three years, stayed, with three years' probation and two years' actual suspension.

Steele involved an attorney who for more than two years allowed his office manager, a non–lawyer, to run his practice, sign client trust account checks and handle all financial transactions without supervision. Despite evidence that the non–attorney was telling clients that he was Steele's partner and evidence that the non–attorney was embezzling funds, Steele did nothing to prevent further theft of client funds. Steele also personally committed other acts of dishonesty. In aggravation, Steele lacked candor during the disciplinary proceeding and committed multiple acts of misconduct. Very little mitigation was found. Steele was disbarred.

In *Palomo v. State Bar*, *supra*, 36 Cal.3d 785, the attorney gave control of his client trust account to his office manager and then failed to examine the records or bank statements, which permitted a $3,000 client check to be deposited into the attorney's payroll account. Palomo made restitution to the client with interest before any State Bar involvement. He was suspended for one year, stayed, with one year probation and no actual suspension.

In *In the Matter of Blum*, *supra*, 4 Cal. State Bar Ct. Rptr. 403, the attorney and her then attorney husband were partners and both were signatories on the client trust account. Because of her work load, Blum's husband managed the day to day operations of the law office, including the trust account. The husband grossly mismanaged the financial aspects of the practice, which resulted in the misappropriation of client funds in two matters. Blum also was found culpable of charging an illegal fee. In mitigation, Blum had no record of prior discipline in 14 years of practice, suffered from extreme emotional difficulties, was candid and cooperative in the disciplinary proceeding, changed her office procedures to take full charge of all aspects of her practice including the handling of the finances and her trust account, and established her good character. In aggravation, Blum engaged in multiple acts of misconduct and significantly harmed her clients. She was suspended for three years, stayed, with two years' probation and 30 days' actual suspension.

In *Coppock v. State Bar*, *supra*, 44 Cal.3d 665, the attorney opened a client trust account for the purpose of sheltering a client's assets from creditors and thereafter relinquished all control of the account to the client, which allowed the client to use the account to defraud a business partner out of $10,000. In mitigation, the attorney cooperated with the State Bar and was remorseful. Coppock was suspended for two years, stayed, with two years' probation and 90 days' actual suspension.

In *Gassman v. State Bar* (1976) 18 Cal.3d 125, the attorney delegated responsibility to manage his trust account to his secretary and then failed to supervise the secretary. Client funds in a single matter were deposited into a commercial account and were used to pay Gassman's office expenses. Gassman also failed to perform services competently in two other matters and entered into an illegal fee splitting agreement with the secretary. The Supreme Court imposed one year actual suspension.

We see the present case as less serious than *Steele*, more serious than *Gassman*, and as reasonably comparable to *Jones*. Both respondent and Jones engaged in prolonged and gross neglect of the most fundamental duties of an attorney and thereby created situations that permitted non–attorneys to have virtually unlimited control over the financial aspects of their law practices. As in *Jones*, the full extent of the harm that resulted from respondent's extreme neglect of her trust account duties may never be known. A key factor in this case, as in *Jones*, is the magnitude of the potential harm to

clients. Even if a relatively small portion of the $1.7 million stolen by respondent's employees was trust funds, the risk created by respondent's inattention was enormous. That all of the stolen money was not client money was simply fortuitous.

Most troubling in this case, as in *Jones*, is the lack of evidence showing respondent's belated understanding of her trust account duties and showing what changes, if any, respondent has made to her office procedures. Based on the record before us, we have little confidence that respondent knows and understands the importance of her strict adherence to her nondelagable trust account obligations, and knows and understands the many trust account related tasks, such as maintaining client ledgers and reconciling the trust account, that must be performed on a routine basis in order to safeguard client funds. Absent this understanding, there is a risk of future misconduct.

As we noted in *Jones*, the "protection of the public is the key reason for imposing attorney discipline." (*In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 421.) We conclude based on a balanced consideration of the seriousness of the misconduct as well as the mitigating and aggravating circumstances, that eighteen months' actual suspension retroactive to the date of respondent's inactive enrollment is adequate to protect the public. We shall accordingly terminate, effective upon the filing of this opinion, the order of inactive enrollment filed in this case pursuant to section, subdivision 6007(c)(4).

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent Monica Malek–Yonan be suspended from the practice of law for a period of five years, that execution of suspension be stayed and that respondent 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 for eighteen months retroactive to May 26, 2002, the date of respondent's inactive enrollment.

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 conditions of this probation.

3. Subject to the proper assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Office of Probation 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.

5. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and a certified public accountant or other financial professional approved by the State Bar's Office of Probation in Los Angeles, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and respondent has kept and maintained the following:

i. a written ledger for each client on whose behalf funds are held that sets forth:

1. the name of such client,

2. the date, amount, and source of all funds received on behalf of such client,

3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and

4. the current balance for such client;

ii. a written journal for each client trust fund account that sets forth:

1. the name of such account,

2. the date, amount, and client affected by each debit and credit, and

3. the current balance in such account.

iii. all bank statements and canceled checks for each client trust account; and

iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:

1. each item of security and property held;

2. the person on whose behalf the security or property is held;

3. the date of receipt of the security or property;

4. the date of distribution of the security or property; and

5. the person to whom the security or property was distributed.

If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the State Bar's Office of Probation for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

The requirements of this condition are in addition to those set forth in rule 4–100, Rules of Professional Conduct.

6. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, her current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Office of Probation in Los Angeles, her current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

7. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent must: (1) attend and satisfactorily complete

the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent shall supply to the State Bar's Office of Probation in Los Angeles satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105–1639, or 1149 South Hill Street, Los Angeles, California, 90015–2212, and passage of the test given at the end of that session. Arrangements to attend Ethics School Client Trust Accounting School must be made in advance by calling (213) 765–1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and Respondent shall not receive MCLE credit for attending Trust Accounting School. (Rule 3201, Rules Proc. of State Bar.)

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if she has complied with the terms and conditions of probation, the Supreme Court order suspending her from the practice of law for five years shall be satisfied, and the suspension shall terminate.

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 (1) year of the after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of her passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period.

As our recommendation provides for no prospective actual suspension, we decline to 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 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

We also recommend that costs incurred by the State Bar in this matter be awarded to the State Bar 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.

Finally, upon the filing of this opinion, we terminate the order of inactive enrollment entered by the hearing judge, pursuant to Business and Professions Code section 6007, subdivision (c)(4).

We concur:

WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RONALD ROBERT SILVERTON

A Member of the State Bar

Nos. 95-O-10829; 99-O-13251

Filed January 6, 2004

[Editor's Note: Supreme Court Review Granted (S123042, filed 9/1/2004). The State Bar Court Review Department opinion previously published at pp. 643 - 667 has been deleted from the *California State Bar Court Reporter*.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROGER M. LINDMARK

A Member of the State Bar

No. 00-O-12736

Filed March 15, 2004

SUMMARY

The hearing judge imposed a public reproval upon determining that respondent failed promptly to refund $5,000 in unearned fees to a client at the termination of respondent's employment. The hearing judge based his determination on the decision of a municipal court judge in a civil case filed by the client to obtain a refund of fees paid in advance. The municipal court judge concluded that, because respondent had not obtained a written modification as required by the contingency fee agreement, respondent was not entitled to, and thus had not earned, an additional $5,000 nonrefundable retainer fee. (Stanford E. Reichert, Hearing Judge.)

The review department adopted the hearing judge's conclusion that becanse respondent had failed to execute a valid modification of the written fee agreement, he had not earned the additional $5,000 fee and had failed to refund unearned fees paid in advance promptly upon termination of employment. The review department also adopted the hearing judge's conclusion that a public reproval was warranted.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: Michael G. Gerner

HEADNOTES

[1] **125 Procedure–Post-Trial Motions**
139 Procedure–Miscellaneous
199 General Issues–Miscellaneous
Once the hearing judge who tried this case left the State Bar Court, he became ineligible to take any further action in the case. Of necessity, that judge was unavailable to consider respondent's post-trial motions.

Editor's note: The summary, headnotes and additioual 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-g] 191 Effect/Relationship of Other Proceedings
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

There was sufficient evidence to find that respondent failed to refund an unearned fee promptly upon the termination of employment where: the fee agreement provided for a fixed nonrefundable retainer fee and a contingent fee and provided that any modifications to the agreement had to be in writing and signed by both parties; respondent orally requested and received another $5,000 from the client above the amount called for in the written fee agreement; there was never a written modification to the fee agreement, such that respondent never earned the additional $5,000 fee; and respondent refused for approximately six months after the client obtained a judgment against him to refund the $5,000. The review department concluded that it could not consider whether the value of respondent's services exceeded the price for which he had agreed to perform them, since respondent would have been entitled to the entire fee set forth in the agreement if the services had been worth less than the price set forth in the fee agreement. Further, because respondent drafted the fee agreement, any ambiguities should be interpreted against him. The fiduciary relationship between an attorney and a client is of the very highest character, and transactions between them which are beneficial to the attorney are closely scrutinized for unfairness.

ADDITIONAL ANALYSIS

Aggravation
Found
691 Aggravation–Other
Mitigation
Found but Discounted
710.33 No Prior Record
740.31 Good Character
Discipline
1041 Public Reproval–With Conditions
Other
102.30 Procedure–Improper Prosecutorial Conduct–Pretrial
102.40 Procedure–Improper Prosecutorial Conduct–During Trial

OPINION

STOVITZ, P. J.:

A State Bar Court hearing judge found respondent Roger M. Lindmark culpable of professional misconduct in failing to promptly return to his former client an unearned fee paid in advance. (Rules Prof. Conduct, rule 3-700(D)(2).)[1] The hearing judge imposed a public reproval and respondent seeks our review, claiming that he is innocent of wrongdoing. Respondent also claims procedural error and complains that the State Bar's Office of Chief Trial Counsel (State Bar) engaged in irresponsible prosecution tactics. Respondent urges that we dismiss the charges or grant him a new trial. At most, he contends that an admonition is warranted.

On our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's findings, reject respondent's claims of error and determine that public reproval is warranted.

I. FACTS AND FINDINGS

Respondent was admitted to practice law in the State of California on June 8, 1992. He has no prior record of State Bar discipline.

The charges against respondent arose in the context of his representation of Walter Baroch ("Baroch") in a wrongful discharge case against Baroch's former employer, Innovative Solutions. Three other lawsuits involving respondent and Baroch as parties are also involved. We examine these suits briefly in order to assess the nature and extent of the charged misconduct. The underlying case giving rise to the relationship between respondent and Baroch was *Baroch v. Crispin et al.*

In May 1998, Baroch employed respondent to represent him in a civil claim against his former employer Innovative Solutions for, among other things, wrongful termination and for monies owed for sales commissions. Baroch signed a retainer and fee agreement that provided that respondent would receive a 50 percent fee of any amount recovered irrespective of the status of the case at the time of recovery. Respondent also received a $2,000 non-refundable retainer, an additional $2,000 in legal fees and $500 for costs pursuant to the retainer and fee agreement.[2] Additionally, the agreement provided that Baroch would deposit $3,000 to cover costs with respondent at least ninety days before the first day set for trial. The relationship between the $500 actually paid for costs and the $3,000 as provided in the retainer agreement to cover costs, is unclear. Finally, paragraph 27 of the agreement stated "this agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both or all parties. Oral modifications of this agreement are void."

In September 1998, respondent wrote to Baroch confirming that Baroch had read the complaint, that the information contained in it was correct and that Baroch would forward a check to respondent for $5,000 for depositions and costs after the defendant responded to the complaint. Baroch agreed to this in writing on October 14, 1998.

On October 19, 1998, respondent filed *Baroch v. Crispin et al.*, against Baroch's former employer. The defendants filed an answer and a cross-complaint against Baroch, alleging contractual violations and tortious conduct.

Through the extensive discovery process, respondent concluded that Baroch and another employee were planning to leave the employer to begin a competing business. Respondent also believed that Baroch had used assets of his employer, without

1. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar.

2. The retainer agreement also provided that should Baroch discharge respondent or prevent the action from being prosecuted or completed, he would be liable to respondent for any fees incurred at a rate of $350 per hour.

authority, and that Baroch's termination from Innovative Solutions was not wrongful.

As a result of the information uncovered during discovery, the relationship between respondent and Baroch deteriorated. Respondent believed that his client had not been forthcoming about his termination from employment. Respondent discussed with Baroch the potential downside to his case, including his liability to the defendant if they were to prevail on their cross-complaint. Respondent further advised Baroch to consider authorizing respondent to negotiate a "walk-away" settlement.

In a letter dated December 12, 1998, respondent wrote to Baroch confirming a meeting of the previous day in which Baroch gave respondent a check for additional non-refundable fees, which they had negotiated at $5,000,[3] for respondent's depositions and ongoing discovery, including the production of documents. The hearing judge found, and we agree, that the $5,000 was for attorney fees. Respondent however, never modified his fee agreement with Baroch to cover the $5,000 in added fees he claimed Baroch agreed to pay.

In the December 12 letter, respondent further explained that the case was not going to be easy or inexpensive and that there were many downside risks that put respondent's contingency fee at risk and that was why he sought the additional non-refundable retainer. Additionally, respondent asked for another $5,000 for the costs of a court reporter for the depositions of the defendants and other witnesses which Baroch promised to send under their original agreement.

On February 17, 1999, respondent again wrote to Baroch confirming that Baroch had either agreed to pay respondent additional money, find a new attorney, or substitute himself in pro. per. In response to Baroch's written request of the previous day that respondent return the $9,000 in advance fees, respondent refused to return any of the $9,000 in fees as he considered them a non-refundable retainer and respondent had invested more than 200 hours in the case. This included the initial $500 advanced for costs because he had incurred $298.63 more in costs than the initial $500. The hearing judge found that respondent conducted substantial discovery in the case.

The relationship between respondent and Baroch became even more strained and on February 22, 1999, respondent moved to be relieved as Baroch's attorney. The court granted the motion in March 1999. Attorney David Cooper (Cooper) ultimately became Baroch's attorney of record in *Baroch v. Crispin*. The case ended when the defendant went bankrupt.

A. Small Claims Case

On June 15, 1999, respondent filed a small claims case against Baroch for costs associated with his representation of Baroch in *Baroch v. Crispin*. Respondent secured a judgment against Baroch for $593.94. After an appeal, the judgment for $614.94, including costs, became final and was paid by Baroch shortly thereafter.

B. Municipal Court Case

On June 14, 1999, Baroch sued respondent in Beverly Hills Municipal Court for the return of the $5,000 that Baroch paid respondent pursuant to their agreement. Baroch's principal contention was that the money was for depositions that were never taken and not for an additional retainer fee.

The case went to trial December 10, 1999. The court issued a written Statement of Decision that the $5,000 check was given in payment for additional retainer fees and not for unused deposition costs. However, the court awarded Baroch judgment because of the lack of a requisite written agreement to modify the original fee agreement. The decision was

3. At about this time, respondent pressed Baroch for an additional $25,000 in advance fees but agreed to accept the additional $5,000 amount.

not based on respondent's failure to demonstrate that he performed sufficient services to justify charging the fee. The court also found that Baroch presented an altered check as evidence in the case. The judge concluded that Baroch had altered the $5,000 check, after it was cleared, so that it read "depo exp." in the memo line.

Respondent appealed the municipal court judgment but later failed to perfect the appeal. The hearing judge found that respondent allowed the appeal to go into default because he did not want to invest any more time in the case and he was disgusted, depressed, and experiencing severe financial problems which would only be made worse by devoting more time to the appeal of the municipal court case.

On June 19, 2000 Baroch, listing himself in pro. per. obtained from the clerk of the court an Order of Appearance of Judgment Debtor ("ORAP") to be held July 20, 2000. On July 10, 2000, respondent filed an objection to the ORAP on the basis that Baroch's request for the ORAP was improper because it listed Baroch as being in pro. per. when Cooper was listed as his attorney of record.

On July 20, 2000, the court continued the ORAP to August 3, 2000, and issued a bench warrant against respondent for his failure to appear. The bench warrant was issued as a result of the court overlooking respondent's objection to the ORAP. On August 3, 2000, Baroch substituted himself in pro. per. On the same day, respondent again failed to appear for the ORAP and the court issued a bench warrant.

On September 6, 2000, while respondent was in another division of the Beverly Hills Court on an unrelated matter, he discovered the issuance of the bench warrant. He then went to the court that issued the warrant and, after explaining that he filed his objection July 10, 2000, the commissioner recalled and quashed the bench warrant and ordered Baroch to obtain a new ORAP date. Later on that same day, Baroch went to the courtroom of the presiding judge and tried, unsuccessfully, to have the ruling reversed.

Between June 9, 2000, when respondent's appeal was dismissed, and December 2000, respondent failed to pay the judgment to Baroch or to Baroch's attorney David Cooper. Nonetheless, respondent sent a letter to Cooper with an acknowledgment of full satisfaction of the judgment. Cooper informed respondent that he would not sign the acknowledgment until he received the money.

In December 2000, Baroch caused to be served a Writ of Execution in the amount of $5,104 on respondent's personal bank account. Respondent had just made a deposit into this bank account from a credit card cash advance, thus providing sufficient funds to satisfy the writ. Respondent allowed the judgment to be satisfied by his bank thereby enabling Baroch to collect on his judgment.

C. Superior Court Case

Respondent provided Baroch with a Notice of Client's Right to Arbitrate dated October 13, 1999. (Bus. & Prof. Code, §6201, subd. (a).) In a complaint filed November 9, 1999, respondent sued Baroch for respondent's $63,000 unrecovered fees in the *Baroch v. Crispin* matter. The matter was designated *Lindmark v. Baroch*. The complaint alleged the following causes of action: 1) breach of written contract; 2) reasonable value of services rendered (quantum meruit); 3) wilful misconduct; and 4) enforcement of equitable lien for fees.

On January 11, 2000, respondent filed a Request to Enter Default, which the clerk accepted, since Baroch did not file an answer to the complaint. On January 14, 2000, respondent lodged the required documents with the default clerk to have the judgment entered by the court. Respondent waited for the court to enter judgment and send him a conformed copy.

When respondent did not hear from the court as to the status of the default judgment, he telephoned the clerk in the assigned courtroom, the court's research attorney, and the calendar clerk in an attempt to discern the status of the entry of default. After the court personnel searched the computerized records, they discovered, and informed respondent, that Baroch had reserved February 22, 2000 for a motion to strike, but the court never received any moving papers for filing from Baroch.

Given the lack of information surrounding the status of the default judgment, respondent continued to inquire about his entry of judgment against Baroch from late February through April of 2000. Respondent wrote to the research attorney and called her as well as the clerks in an effort to ascertain the status of his request for entry of judgment after default.

In the interim and unknown to respondent, Baroch's motion to strike was filed January 7, 2000, and a hearing was set for February 22, 2000. On the date set for the hearing, the matter was continued. On March 17, 2000, the date set for the continuance, the court vacated Baroch's default and continued the motion to strike to April 10, 2000, because the default was entered in error by the clerk's office since Baroch had timely filed a motion to strike. On April 10, 2000, Baroch's motion to strike was heard and granted and respondent's complaint was dismissed due to his failure to file an opposition or to appear at the hearing.

On May 9, 2000, respondent went to the court and examined the court file. At that time respondent discovered that on January 7, 2000, Baroch filed a Motion to Strike the Complaint which was granted April 10, 2000, dismissing the complaint since respondent failed to file an opposition.

On May 18, 2000, respondent filed a motion to set aside dismissal based on inadvertence, surprise, or excusable neglect, claiming that he had no notice of the hearing on the motion to strike or the court's order dismissing the complaint. On June 14, 2000, the court denied respondent's motion to set aside the dismissal of his complaint. After respondent's motion was denied, he took no further action with respect to the complaint against Baroch.

D. Proceedings in the State Bar Court

1. Culpability

A four-day trial was held between April 29, 2002, and May 7, 2002. The hearing judge filed his decision on May 22, 2002, finding that respondent wilfully violated rule 3-700(D)(2) by failing to promptly refund unearned fees once the municipal court action against respondent became final.

The hearing judge based his predicate finding, that the fee was unearned, on the decision of the judge in the municipal court proceeding of *Baroch v. Lindmark*. The municipal court found that pursuant to the contingency fee agreement, respondent was not entitled to, and thus had not earned, the additional $5,000 attorney fee paid by Baroch. From that finding, the hearing judge concluded that there was no other basis to support a finding that the $5,000 attorney fee was earned by respondent. The hearing judge further found that it was unreasonable for respondent to delay in returning Baroch's $5,000 from June 8, 2000 (the date of the dismissal of the municipal court judgment appeal), until December 2000 (when Baroch levied the funds from respondent's bank account). While the hearing judge sympathized with respondent's belief that he was entitled to the fees and that, based on the unique circumstances of the matter, respondent may not have had sufficient funds available to return the unearned fees immediately, it was nonetheless his duty to arrive at some arrangement for payment.

The hearing judge found respondent not culpable of three additional charges and granted respondent's motion to dismiss the other three counts charged:[4] communication with a represented party (rule 2-100);[5] failure to maintain respect for the court (Bus.

4. The State Bar has not appealed from the dismissal of these charges.

5. The State Bar's evidence was a letter from respondent to Cooper and Baroch, one copy of which was sent directly to Baroch, concerning a global settlement of respondent's superior court suit for attorney fees and Baroch's municipal court suit for the return of the $5,000 fee retainer. At the time of the letter, Baroch represented himself in the superior court case and was represented by Cooper in the municipal court case. The hearing judge found that respondent wrote to Baroch in Baroch's capacity as both party and attorney and wrote to Cooper in his capacity as Baroch's attorney. Therefore, the hearing judge concluded that respondent did not improperly communicate with a represented party and dismissed the count with prejudice.

& Prof. Code, §6068, subd. (b));[6] and improper communication with a judge (rule 5-300(B)).[7] Upon our independent review (see *ante*, p. 1) we uphold the hearing judge's dismissals.

After the hearing judge issued his decision, respondent sought reconsideration. Since at the time of reconsideration the hearing judge who tried the case no longer sat on the State Bar Court, respondent's motion was ruled on by another hearing judge. That judge denied respondent's motion and this review followed.

2. Mitigating and Aggravating Circumstances

The hearing judge found, as some evidence in mitigation, that respondent had practiced law for eight years without being disciplined. However, the judge noted that this period of practice was not entitled to significant weight. Four witnesses testified on respondent's behalf in support of his good character, including a physician and three attorneys. All of the witnesses were reasonably familiar with the charges brought against respondent and all believed him to be a truthful, honest and ethical individual in addition to being a very capable attorney. The hearing judge noted that this character evidence was less weighty, given the few witnesses. (Cf. Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(vi).)

The hearing judge also found evidence in aggravation. Specifically, the judge found that respondent impeded Baroch's efforts to obtain the money that he was awarded after the judgment entered in Baroch's favor became final. He also sent a letter to Cooper with an acknowledgment of full satisfaction of the judgment despite failing to pay any portion of the judgment. Furthermore, respondent made it clear that he was unwilling to return the money because of the circumstances surrounding the case.

II. DISCUSSION

A. Procedural claims

[1] Respondent advances two claims of procedural error. Citing no legal authority, except for a general point as to the required standard of evidence, he first argues that it was error to deny his motion for reconsideration or to reopen the record and for a judge other than the one who heard the evidence to rule on those motions. We disagree with respondent's claim. Once the hearing judge who tried this case left this court, he became ineligible to take any further action in the case. Of necessity, that judge was unavailable to consider respondent's motions. (See *International Ins. Co. v. Superior Court* (1998) 62 Cal.App. 4th 784, 786, fn. 2.) Moreover, respondent has made no showing persuading us that the judge who ruled on his motions committed error.

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6. There were several events cited by the State Bar to support the charge. First was respondent's failure to file a mandatory cross-complaint in the municipal court case and then filing suit against Baroch for attorneys' fees in superior court. The hearing judge found that the retainer and fee agreement provided that the proper venue for any dispute was within the jurisdiction of the Los Angeles Superior Court so that the suit for attorneys' fees was properly within the superior court's jurisdiction. The second action which the State Bar alleged demonstrated disrespect for the court was when respondent stated that he did not receive notice of Baroch's motion to strike in his motion to set aside the dismissal of his complaint in the superior court case. The hearing judge found that the superior court was merely unconvinced that respondent did not receive the notices, and made no mention that the motion was frivolous. The third act which the State Bar alleged demonstrated disrespect for the court was when respondent failed to appear for the judgment debtor exam. The court found that respondent's written objection filed with the court constituted a sufficient response as evidenced by the municipal court quashing the bench warrant after the objection was discovered by the court. The final act which the State Bar alleged demonstrated disrespect for the court were the letters which respondent wrote to the research attorney and the clerks of the court inquiring about his notice of entry of default. The hearing judge found these letters to be both courteous and polite and therefore showed no disrespect for the court.

7. The basis of this allegation was respondent's communications with the superior court judge's research attorney. The hearing judge found that the communications were proper under the circumstances because respondent had a default entered. With the entry of default, Baroch had not appeared; therefore, no notice needed to be served on him. As a result, respondent's ex parte contact with the court was permissible.

Respondent also contends that the State Bar's prosecution of the case against him was irresponsible and vexatious. To explain his claim, respondent argues that he was deprived of an opportunity to respond to the State Bar's investigation. Finally, respondent argues that the State Bar never corrected the charges in light of evidence presented at trial that showed that respondent engaged in substantial discovery for Baroch. Respondent's claims are without merit as it appears that respondent was notified by the State Bar in writing about the nature of the complaint before formal charges were filed and that respondent had a year and four months from that notice to marshal any evidence he wished to introduce in his defense. We see no evidence of procedural unfairness.

B. Culpability

Respondent contends that there is insufficient evidence in the record to support a finding of a wilful violation of rule 3-700(D)(2). Specifically, respondent claims that the hearing judge incorrectly relied on the municipal court ruling, holding Baroch was entitled to the $5,000 due to respondent's failure to properly modify the retainer agreement, to conclude that respondent failed to earn the fee. He argues that, although he was not entitled to the fee pursuant to the retainer agreement because it was not modified in writing, he nonetheless earned the fee on a quantum meruit basis due to all of the time and work he put into the case. Respondent requests dismissal. The State Bar contends that the hearing judge's findings, conclusions, and discipline recommendation are supported by the record and should be adopted.

[2a] We first address respondent's argument that there is insufficient evidence to support finding a violation of rule 3-700(D)(2). Given the significance of the fee agreement in this case, we are guided by previous decisions that deal with the effect of a failure to modify a fee agreement. *Grossman v. State Bar* (1983) 34 Cal.3d 73, is guiding although it is factually distinct and deals with misappropriation of client funds. In *Grossman*, the respondent negotiated a fee agreement with a client which provided that Grossman would receive 33 1/3 percent of all amounts received if the action was settled at least 30 days prior to the original trial date and 40 percent of all amounts received thereafter. After settlement was reached, more than 30 days before the original trial date, respondent unilaterally decided that a 40 percent fee was more appropriate than the 33 1/3 percent fee originally agreed upon. In finding against respondent, the Supreme Court held that "under a fixed fee contract, an attorney may not take compensation over the fixed fee without the client's consent to a renegotiated fee agreement . . . even if the work becomes more onerous than originally anticipated. [Citations.]" (*Grossman v. State Bar*, *supra*, 34 Cal.3d at p. 78.)

[2b] As noted above, respondent drafted a very specific and detailed fee agreement which set forth the duties of the parties and which contained a significant fixed-fee component. Specifically, it provided that respondent would receive a 50 percent contingency fee, a $2,000 non-refundable retainer, an additional $2,000 upon filing the complaint and a $3,000 cost advance. Moreover, the agreement provided that any modifications to the agreement had to be in writing and signed by both parties and the agreement was never so modified. Nowhere in the agreement did it provide that respondent is entitled to an additional $5,000 non-refundable retainer nor was there any evidence of a subsequent written agreement to that effect. Cases cited by respondent not involving fees charged under a written fee agreement are inapposite.

[2c] Accordingly, wholly apart from the policy reasons for not allowing recovery of a fee absent a modification of the retainer agreement, as the court observed in *Reynolds v. Sorosis Fruit Co.* (1901) 133 Cal. 625, 628, "the fact that the services performed by plaintiff [attorney] were reasonably worth more than the price for which he agreed to perform them cannot be considered. If the services had proven to be much less than the parties had in mind, and had only been worth ten dollars, the defendant [client] would have been bound by its contract, and would have been liable for the four hundred dollars. The fact that plaintiff [attorney] made a bad bargain, and was compelled to do more than four hundred dollars' worth of labor, cannot relieve him of his contract. He is in precisely the same position that any

other party would be, who, having made a contract for a certain sum to do a certain thing, finds by experience that the sum is not adequate compensation."

We have also considered, sua sponte, the opinion of the Supreme Court in *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, which did not preclude quantum meruit recovery to a law firm in the division of fees among lawyers which did not comply with the applicable rule of professional conduct. We consider *Huskinson & Brown* distinguishable from the case before us for several reasons. First, the Supreme Court was dealing with apportionment of compensation between attorneys in a civil case and not the determination of culpability in a disciplinary context for failure to return to the client unearned fees paid in advance. Second, the court in *Huskinson & Brown* made clear that its decision did not increase the attorney fees paid or owed by the client. Third, in our case, the fee issue was actually litigated in civil court and became final on appeal.

[2d] Furthermore, it is well established that any ambiguities in attorney-client fee agreements are construed in the client's favor and against the attorney. (*Hollingsworth v. Lewis* (1928) 93 Cal.App. 526, 528.) In addition, the rule that ambiguities in a contract should be interpreted against the drafter applies with extra force when the contract has been drafted by the attorney. (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370.) This is because, as occurred here, the attorney as the drafter of the fee agreement, is deemed to have superior knowledge in such matters.

[2e] It is also true that the relationship between the attorney and the client is a fiduciary relationship of the very highest character. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189.) As such, any attorney-client transactions that are "'beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness.'" (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372, citing *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) Moreover, when there is a transaction between the attorney and the client, it is the attorney who has the burden of demonstrating that the dealings between the parties were "fair and reasonable and were fully known and understood by the client. [Citation.]" (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d at pp. 372-373.)

[2f] Respondent had a duty to execute the modification as prescribed by the agreement if he wished to earn extra sums as fees. Proper modification would have avoided any ambiguity and perhaps even the litigation surrounding the fee agreement and this disciplinary proceeding.

[2g] Accordingly, respondent was not legally or ethically entitled to retain the additional $5,000 paid by Baroch. As the hearing judge correctly noted, respondent had not earned the additional fee. We find that respondent invested a significant amount of time and effort into the case and acted competently in his representation of his client. We nonetheless find that in the absence of a valid modification of the fee agreement, respondent did not earn the $5,000 fee. Therefore, we uphold the hearing judge's conclusion that respondent willfully violated Rule 3-700(D)(2) by failing to promptly return unearned fees paid in advance.

C. Degree of Discipline

The hearing judge saw *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703 as instructive. We agree and also believe that it represents a typical case revealing culpability of failure to return promptly unearned fees and also in the same client matter of failing to avoid prejudice to his client after discharge. Hanson refunded the unearned advanced fees about 15 months after he was discharged and after the State Bar intervened. We found no mitigating circumstances in that case. We found that Hanson had been privately reproved but it was remote in time and did not therefore weigh significantly as aggravation. In *Hanson*, we reviewed a number of other cases involving generally similar types of misconduct and found the discipline in those cases ranging between private reproval and stayed suspension. (*In the Matter of Hanson*, *supra*, 2 Cal. State Bar Ct. Rptr. 703, 713.)

Looking at the few cases involving discipline solely for offenses involving attorney fees, *Hulland*

v. State Bar (1972) 8 Cal.3d 440 offers some guidance. There, the attorney wilfully failed to render legal services for which his client hired him and used a confession of judgment in an "overreaching attempt" to collect unearned fees. (*Id.* at p. 448.) The Supreme Court imposed public reproval.

We are mindful that, as to degree of discipline, each case must be assessed on its own facts as well as on the balance of aggravating and mitigating evidence. (E.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.) We determine that, despite the differences among cases, the public reproval imposed in *Hanson* and *Hulland* guide us that public reproval is appropriate as discipline here.

III. DISPOSITION

For the foregoing reasons, respondent Roger M. Lindmark is hereby publicly reproved. Pursuant to the provisions of California Rules of Court, rule 956, we adopt and attach to this reproval the conditions recommended by the hearing judge in his decision and also include the notice as required by rule 956(a), California Rules of Court as to compliance with the conditions.

We also adopt the order of the hearing judge that the State Bar be awarded costs in accordance with the provisions of section 6086.10 and that such costs be payable in accordance with section 6140.7.

We concur:
WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD MICHAEL LADEN

A Member of the State Bar

No. 01-PM-05232

Filed April 14, 2004

SUMMARY

The hearing judge in this probation revocation proceeding recommended that respondent be actually suspended for 90 days for his numerous untimely restitution payments to a single client and several delinquent quarterly probation reports. (Hon. Richard A. Honn, Hearing Judge.)

Respondent sought review arguing that the late restitution payments were the result of financial hardship rather than his failure to appreciate the importance of his probation conditions. He urged reduction of the discipline to 30 days' suspension. The review department adopted the hearing judge's recommendation of 90 days' actual suspension, but added the condition that the suspension will remain in place until restitution is paid in full to respondent's client.

COUNSEL FOR PARTIES

For State Bar: Monique Miller

For Respondent: Edward O. Lear

Headnotes

[1] **511 Aggravation–Prior Record–Found**
1714 Probation Cases–Degree of Discipline
The hearing judge gave little weight to respondent's prior discipline because he found that the nature of the violations in this matter did not raise a serious concern about public protection or demonstrate that respondent had failed to undertake steps towards rehabilitation. The review department disagreed. This was the third matter that had been brought by the State Bar as the result of respondent's failure to make timely restitution to his client. At this point, respondent should have had a heightened awareness of his need for strict compliance with his reporting and payment obligations. The fact that his present probation violations were closely related to his past disciplinary infractions raised concerns about respondent's rehabilitation. Ordinarily, when there is a close nexus between

previous misconduct and the present probation violation, a substantially greater degree of discipline is needed than would otherwise be necessary. The review department assigned significant weight in aggravation because of respondent's prior disciplinary record.

[2] **582.50 Aggravation–Harm to Client–Declined to Find**
586.50 Aggravation–Harm to Administration of Justice–Declined to Find
The State Bar's argument that respondent significantly harmed his client each time he failed to make timely restitution payments and caused harm to the administration of justice each time he violated his probation was rejected. Although respondent's failures to timely make restitution were numerous, they should not be considered as separate and independent bases of aggravation since, to a great extent, the harm was inherent in the probation violations and therefore would be duplicative.

[3] **171 Discipline–Restitution**
1714 Probation Cases–Degree of Discipline
Although the review department was sympathetic with respondent's claim that if he was actually suspended from practice for an extended period he would be unable to make timely restitution payments, it could not excuse a degree of discipline that was otherwise warranted. If avoidance of actual suspension were a prerequisite for respondent's continued restitution payments, it would have been more appropriate for respondent to have resolved his restitution obligation, thereby obviating this very proceeding.

[4 a, b] **171 Discipline–Restitution**
1714 Probation Cases–Degree of Discipline
Protection of the public and rehabilitation of the attorney are the primary aims of disciplinary probation. It is for this reason that discipline imposed for the wilful violation of probation often calls for substantial discipline as a reflection of the seriousness with which compliance with probationary duties is held. An attorney who wilfully violates a significant condition of probation, such as restitution, can anticipate actual suspension as the expected result, absent compelling mitigating circumstances. Here, respondent should have recognized the serious consequences of his failures to timely pay restitution and file quarterly reports because of his previous encounters with the State Bar disciplinary system. Furthermore, when, as here, an attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases, resulting in more severe discipline. Balancing all relevant facts and circumstances, the review department determined that the 90-day actual suspension recommended by the hearing judge was sufficient to achieve the goals of attorney disciplinary probation, but that an additional condition should be added that requires respondent's continued actual suspension until restitution was fully paid to his client. This was intended as an incentive to respondent to be pro-active in his efforts to satisfy his restitution obligations and bring to a conclusion this 10-year saga with the State Bar, and was necessary to ensure respondent's timely and full compliance. In reaching this conclusion, the review department took into account respondent's belated but complete satisfaction of his restitution and reporting conditions in the face of ongoing financial difficulties, the fact that all of the violations related to one client matter, and that the client testified that respondent had shown concern about his inability to pay and exhibited courteousness towards her. The need to protect the public by imposing a significantly longer period of stayed suspension was therefore diminished.

ADDITIONAL ANALYSIS

Other

1751 Probation Cases–Probation Revoked
1815.03 Actual Suspension–3 Months

OPINION

EPSTEIN, J.:

In this probation revocation proceeding, respondent Richard M. Laden seeks review of the hearing judge's decision recommending a 90-day actual suspension for his numerous untimely restitution payments to a single client and several delinquent quarterly probation reports. Respondent argues that the late restitution payments were the result of financial hardship rather than his failure to appreciate the importance of his probation conditions. He urges reduction of the discipline to 30 days' suspension. The State Bar allows that the 90-day actual suspension from practice is the minimum appropriate discipline to ensure protection of the public and the profession, but asks that we consider increasing the actual suspension.

Having independently reviewed the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the hearing judge's recommendation of 90 days' actual suspension, but add the condition that the suspension will remain in place until restitution is paid in full to respondent's client, June Allen (Allen). In our view, it is necessary to add this condition because of respondent's extensive prior record of discipline, which is closely related to his current misconduct, together with the number of late payments and untimely probation reports. Were it not for respondent's mitigation evidence, including his belated full and complete compliance with the conditions of his probation (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150), we would find warranted a greater level of discipline.

I. FACTUAL AND PROCEDURAL BACKGROUND

The key facts underlying the hearing judge's finding of culpability for probation violations are subject either to stipulation by the parties or are not here disputed. Respondent has been a sole practitioner in the area of personal injury and workers' compensation law since he was admitted to practice in California on November 29, 1978. Until recently, his sole source of legal fees has been contingency arrangements, with attendant uneven cash flow.[1] His law practice has provided respondent with only a modest income, and at times he has had difficulty making rent payments for his residence and meeting his daughter's college expenses. His wife occasionally works for him in his office, which is in their home. Because of their limited financial resources, respondent and his wife have not taken a vacation in several years.

Respondent's disciplinary history began with his mishandling of a wrongful death lawsuit on behalf of his client, Allen (Case No. 91-O-02467), arising from the death of her husband. Upon stipulation, which became effective May 1992 by Supreme Court order, respondent was privately reproved and agreed to submit to binding arbitration of Allen's malpractice claim, and within two years of the effective date, provide proof of compliance with the arbitration award. Ms. Allen obtained an award of $21,349.90 in December of 1993. Thereafter, respondent sought and obtained from the State Bar a modification of the conditions of his reproval to allow an additional two years, until May 1996, to complete restitution to Allen and submit proof thereof.

A second case (Case No. 91-O-09064), involving a different client, arose as the result of respondent's failure to pay a medical provider and trust account violations. In this second matter, respondent stipulated to culpability and discipline, including actual suspension for 75 days.

Respondent did not timely satisfy his restitution obligations to Allen, and, accordingly, he was disciplined for failure to comply with conditions of probation in 1998 (Case No. 97-O-11079) including 30 days' actual suspension, and again in 2000 (Case No. 99-O-10434), including two years' suspension and until he provided proof of his fitness to practice in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct,[2] which was stayed. Respondent also agreed, inter alia, to make

1. Recently, respondent has undertaken defense work on an hourly fee basis to help alleviate his cash flow problems.

2. The Standards for Attorney Sanctions for Professional Misconduct are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

restitution to Allen in the amount of $9,910.07 in monthly payments of $300, plus 10 percent interest per year from August 12, 1996, and to submit quarterly reports to the Probation Unit of the State Bar. In both of these matters, respondent admitted to his probation violations and stipulated to the additional discipline. The parties further stipulated to mitigating circumstances including respondent's candor and cooperation with the State Bar and his severe financial distress.

In Case No. 99-O-10434, the Supreme Court's order (No. SO89894) was filed on September 20, 2000, imposing the agreed-upon discipline. During the two-year period after the court's order, respondent was late with his monthly restitution payments on 19 of 27 occasions.[3] The payments were between 3 and 160 days late with the majority being about 30 days late. Many were untimely because respondent would make a lump sum payment for two to three months as he was able to accrue enough cash to bring himself current. In addition, he was delinquent with his quarterly reports 7 out of 9 times.[4] Respondent delayed the filing of many of his probation reports until he brought himself current with his restitution payments. Even though he was having difficulty complying with his payment schedule, respondent did not seek a modification of the conditions of his discipline; yet, he had previously done so in a prior disciplinary matter.

On September 23, 2002, the State Bar filed a Motion to Revoke Probation pursuant to Business and Professions Code section 6093, subdivisions (b) and (c) and Rules of Procedure of the State Bar, rules 560 et seq. Respondent filed his response on November 15, 2002. A Partial Stipulation As to Facts was filed on January 24, 2003, prior to the probation revocation hearing, which was held on January 28, 2003. In his testimony in the hearing below, respondent admitted that many of his payments and quarterly reports were late. Respondent further testified about his understanding of the importance of making timely restitution payments, but explained he simply did not have the funds to do so on a regular basis. On occasion, respondent telephoned Allen to explain why his payments were late, and Allen, by way of a declaration admitted into evidence, confirmed these conversations.[5] Respondent's wife presented testimony corroborating their ongoing financial difficulties. At the time of the hearing below, respondent was current with his restitution payments and quarterly reports and had timely passed the professional responsibility examination.

The State Bar presented no evidence to controvert respondent's showing of financial hardship. The Bar submitted a declaration in lieu of testimony of Shuntinee Brinson, a probation deputy, authenticating numerous exhibits, which confirmed that the State Bar had properly notified respondent of his probation duties and that it made numerous contacts with respondent to obtain his compliance with his payment obligations.

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3. The State Bar's Motion To Revoke Probation charged respondent with five late payments, from May through September 2002. The hearing judge, without explanation, did not find that the May 2002 payment was late as charged. Upon our independent review of the record we find the State Bar proved by a preponderance of the evidence that the payment was not timely. In addition, the hearing judge found that the June 2002 payment was uncharged but proven to be untimely. Our review of the record indicates the untimely June payment was charged in the State Bar's Motion to Revoke and therefore we consider it as part of our culpability determination. The remaining 14 late payments were properly considered as uncharged but proven misconduct by the hearing judge. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) Our recommendation of discipline, *post*, is not materially affected by these discrepancies.

4. The hearing judge found only one late quarterly report, which was due July 2002, for purposes of determining culpability because it was identified in the Motion to Revoke Probation. The judge found seven late filings in aggravation as proven but uncharged misconduct. Our independent review of the record confirms that there were only six other late reports in addition to the one charged in the State Bar's Motion to Revoke.

5. Allen stated that respondent was always courteous when he called to explain his financial difficulties, and she requested leniency for respondent because she believed a prolonged suspension would interfere with her ability to receive her payments. She confirmed that as of January 29, 2003, respondent still owed her $7,600.

The hearing judge found that the State Bar proved by a preponderance of the evidence[6] that respondent wilfully violated the conditions of his probation in that he failed to make timely restitution payments on three occasions and failed to timely file one quarterly report.[7] The judge also found the following factors in aggravation: respondent's prior record of discipline (std. 1.2(b)(i)); multiple acts of misconduct (std. 1.2(b)(ii); and uncharged misconduct arising from the additional late restitution payments and quarterly reports not identified in the Motion to Revoke Probation (std. 1.2(b)(iii)). The judge found the following factors in mitigation: respondent's financial hardship; his remorse and recognition of his wrongdoing; his candor and cooperation with Allen; and the absence of any bad faith, coupled with his good faith efforts to make restitution.

The hearing judge deemed the discipline requested by the State Bar to be unduly harsh,[8] after considering the mitigating factors. He recommended that respondent's probation imposed by Supreme Court order (No. SO89894) dated September 20, 2000, be revoked, that the stay of execution of suspension be lifted, and that in its place, respondent be suspended for two years and until he provided proof of his rehabilitation and fitness to practice in accordance with standard 1.4(c)(ii) and until he completed restitution to Allen in accordance with the order of the Supreme Court in Case No. 99-O-10434 and continued to submit quarterly reports to the State Bar. The court further recommended, inter alia, that the two-year suspension be stayed and respondent be placed on four years' probation on conditions including 90 days' actual suspension. Respondent requested review, seeking a reduction of the recommended 90 days to 30 days' actual suspension.

II. DISCUSSION

A. Culpability

On appeal, respondent does not dispute that there were many late payments and delinquent probation reports, nor does he deny that he was aware of his obligations to timely pay restitution and submit the quarterly reports. He asserts that in good faith he intended to timely make payments and file his reports, but he simply could not do so because of his financial difficulties resulting from his contingency fee cases. In the past few years he has made an effort to achieve greater financial stability by attracting more clients on an hourly fee basis.

We cannot emphasize enough the importance of timely restitution payments as central to the rehabilitative process. As we said in *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 312: "Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct. [Citations.] Thus, a probationer's attitude toward the restitution is a significant factor to be weighed." We consider in mitigation, *post*, respondent's successful, albeit untimely, efforts to keep current with his restitution and reporting obligations as evidence of good faith. However, the law does not require a bad purpose or evil intent to support a wilful violation of probation conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Indeed, "[w]ilfulness for purposes of probation revocation (and other disciplinary) proceedings is simply a general purpose or willingness to commit an act or to make an omission; it does not require any intent to violate . . . the probation condition and does not necessarily involve bad faith." (*In the Matter of Taggart, supra,* 4 Cal. State Bar Ct. Rptr. at p. 309.) Respondent admits his

6. The "preponderance" standard is what is required for probation revocation. (See Bus. & Prof. Code, § 6093, subd. (c); Rules Proc. of State Bar, rule 561.)

7. See, footnotes 2 and 3 ante, pages 3 and 4.

8. The State Bar requested in its Motion to Revoke Probation that respondent be actually suspended from the practice of law for two years, which equaled the entire suspension stayed by the September 20, 2000 Supreme Court order, and that he be placed on involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (d).

untimely payments and probation reports and the evidence in the record supports these were purposeful acts. Accordingly, we affirm the hearing judge's culpability finding that respondent wilfully breached the terms of his probation.

B. Aggravation

In analyzing aggravating circumstances, we take into account the Standards for Attorney Sanctions for Professional Misconduct, recognizing that they are to be considered as guidelines and construed in light of the decisional law. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30.)

1. Prior Record of Discipline

[1] The hearing judge gave little weight to respondent's prior discipline because he found that "the nature of the violations in this matter do not raise a serious concern about public protection or demonstrate that Respondent has failed to undertake steps towards rehabilitation." We disagree. This is the third matter that has been brought by the State Bar as the result of respondent's failure to make timely restitution to Allen.[9] At this point, respondent should have a heightened awareness of his need for strict compliance with his reporting and payment obligations. The fact that his present probation violations are closely related to his past disciplinary infractions raises concerns about respondent's rehabilitation. (*In the Matter of Broderick, supra*, 3 Cal. State Bar Ct. Rptr. 138, 151.) Ordinarily, when there is a close nexus between previous misconduct and the present probation violation, a substantially greater degree of discipline is needed than would otherwise be necessary. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 528.) Moreover, respondent's failure to seek a modification of his restitution obligations when his financial difficulties continued to plague him is inexplicable, since he previously sought a modification of the payment terms in an earlier proceeding. We assign significant weight in aggravation because of respondent's prior disciplinary record. (Std. 1.2(b)(i).)

2. Multiple Acts of Misconduct, Including Uncharged Misconduct

We agree with the hearing judge's finding in aggravation that respondent committed multiple acts of charged and uncharged misconduct. (Std. 1.2(b)(ii).) We simply cannot ignore the proven charges that he was late in his payments on five occasions and with one of his probation reports. In addition, we consider in aggravation the 14 late payments and 6 untimely quarterly reports, which were proven by a preponderance of the evidence below as uncharged probation violations. (*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 35-36.) As a consequence of these multiple violations, the State Bar was required on at least seven occasions to contact respondent. The repeated need of the State Bar to intervene in order "to seek respondent's compliance with duties he voluntarily undertook was inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney disciplinary system." (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

3. Additional Aggravating Circumstances

We agree with the hearing judge, who rejected the State Bar's claim as aggravation the uncharged misconduct of a trust account violation arising from a trust account check issued to Allen for $600 for a restitution payment. The State Bar offered no evidence to rebut respondent's testimony that the funds that were withdrawn to pay Allen were his fees and not funds owed to clients.

We also do not give any weight in aggravation to the State Bar's claim of acts of moral turpitude when respondent signed under penalty of perjury nine quarterly reports attesting to the timely payment of

9. This is the fifth disciplinary matter involving respondent, taking into account the original proceedings involving Allen and the other client matter involving trust account violations.

restitution when he knew the payments had been paid late. At the time he signed the reports, respondent was current with his payments and he therefore believed he could attest to his compliance with his probation conditions. **[2]** The State Bar also asserts as aggravation that pursuant to standard 1.2(b)(iv) respondent significantly harmed his client each time he failed to make timely restitution payments and caused harm to the administration of justice each time he violated his probation and required additional efforts by the State Bar to obtain his compliance. While we agree that respondent's failures to timely make restitution were numerous, we do not believe that these failures should be considered as separate and independent bases of aggravation since, to a great extent, the harm was inherent in the probation violations and therefore is duplicative. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76.) The appropriate level of discipline should not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal State Bar Ct. Rptr. 576, 594; *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

Finally, the State Bar asserts as an aggravating circumstance that respondent lacked candor in accordance with standard 1.2(b)(vi), when he testified that he believed he had to be in full compliance before he could file a probation report. Although the hearing judge stated that "the Court is not convinced as to the accuracy of Respondent's statements in this regard," he did not make a finding that respondent lacked candor. We are not inclined to substitute our own credibility determination on this record. (See Rules Proc. of State Bar, rule 305(a).)

C. Mitigation

1. Financial Hardship and Good Faith Efforts

We agree that the hearing judge properly considered in mitigation respondent's prolonged financial problems, which interfered with his ability to make timely payments. We further adopt the judge's finding that respondent made a good faith effort to meet his restitution obligations when he was able. (Std. 1.2(e)(ii); *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 304; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 13.) As evidence of his good faith effort to comply with his restitution obligations, we consider that respondent in fact brought himself current with all of his probation conditions. (*In the Matter of Broderick*, *supra*, 3 Cal. State Bar Ct. Rptr. 138,150.) We find his successful struggle to ultimately meet his obligations in spite of substantial financial hardship reflects a positive attitude toward his probation and demonstrates his understanding of the rehabilitative and public policy goals of disciplinary probation. (*In the Matter of Taggart, supra,* 4 Cal. State Bar Ct. Rptr. 302, 312.) We therefore assign weight in mitigation to respondent's belated, but complete compliance with his probation conditions. Nevertheless, we discount this additional evidence in mitigation to some extent because on several occasions respondent brought himself current only after being notified by the probation unit of his delinquencies. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 659; *In the Matter of Tiernan*, *supra*, 3 Cal. State Bar Ct. Rptr. 523, 530)

2. Candor and Cooperation with Victim

The hearing judge also found as mitigating circumstances that respondent kept in contact with Allen and displayed cooperation and candor with her about his repayment difficulties. (Std. 1.2(e)(v).) Ms. Allen stated that she was aware of the financial constraints respondent faced because he had called her "a few times over that past several years" about his inability to make a payment and that he always was courteous when he called. But the record also shows that there were times when Allen called the State Bar to enlist assistance with timely payments. We accordingly give only slight mitigation for respondent's sporadic cooperation and candor with the victim.

3. Recognition of the Seriousness of Wrongdoing

The hearing judge found in mitigation that respondent recognized his wrongdoing and was remorseful. (Std. 1.2(e)(vii).) We question the depth of respondent's understanding of the seriousness of

his misconduct. When asked if it was important to him if he kept current with his restitution payments, he testified: "[O]ften I am confronted with a difficult decision about where to allocate the available resources. And sometimes I've had to make a very difficult choice. And June Allen has unfortunately had to wait a couple of – *a few times*." [Emphasis added.] There is an element of denial in this testimony. In contrast to his characterization of a "*few*" late payments, the evidence in this probation revocation proceeding disclosed respondent was late at least 19 times. Counterbalancing our concern is evidence that in spite of numerous lapses in respondent's timely compliance, in no instance did respondent ignore or disavow his obligations, and indeed in each and every instance of the 27 payments due to Allen and the various late probation reports, respondent ultimately brought himself current once he was able to do so. Additional evidence of respondent's recognition of his problems was his affirmative efforts to remedy his "roller coaster" financial situation by actively seeking clients who will retain him on an hourly basis. On balance, there is sufficient evidence to find slight mitigation because of his appreciation of the nature of his misconduct.

4. Community Service

The hearing judge also gave respondent mitigative credit for his contributions to the community in the form of volunteer work at a veteran's center and his assistance to an elderly widow. He also noted respondent's regular attendance at his synagogue. We also give some weight to his community contributions in mitigation. (Std. 1.2(e)(vi).)

D. Level of Discipline

[3] As sympathetic as we can be with respondent's claim that if he is actually suspended from practice for an extended period, he will be unable to make timely restitution payments, we cannot excuse a degree of discipline that is otherwise warranted. If avoidance of actual suspension were a prerequisite for respondent's continued payment, it would have been more appropriate for respondent to have resolved his restitution obligation at a time when the State Bar gave him ample opportunity to do so, thereby obviating this very proceeding.

According to the State Bar, comparable probation cases warrant more than a 90-day actual suspension. In the absence of the mitigation evidence, we would agree. "[T]here has been a wide range of discipline imposed for probation violations from merely extending probation . . . to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension." (*In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. 567, 573.) In determining the appropriate level of discipline, we look to the decisional law for guidance. (*In re Morse, supra*, 11 Cal.4th 184, 207.) At one end of the disciplinary spectrum is our recent decision in *In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. 567. In that case, Gorman was two months late in making his restitution payment of the principal which amounted to a total of $620, and he was nine months late in making the 10 percent interest payment. He also did not timely attend the State Bar's Ethics School. We recommended that 30 days' actual suspension be added as a condition to the hearing judge's recommendation of a two- year probation period, because we found additional aggravation in the fact that repeated reminders and pressure from the State Bar were necessary to ensure completion of restitution and also that the attorney improperly listed the Yolo County District Attorney's Office in the pleadings' caption (where Gorman was a deputy district attorney) when that office was not a party to the proceedings. (*Id.* at pp. 573-574.)

In the Matter of Howard (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, another probation revocation matter, also is instructive. In that case the hearing judge imposed 90 days' actual suspension because the respondent failed to submit quarterly probation reports and to timely deliver certain financial records pertaining to a former client to her accountant. Howard failed to answer the notice to show cause and his default was entered. We found culpability based on the failure to deliver the client's financial records and the failure to file two quarterly reports, and we concluded that one year actual suspension was appropriate and imposed a standard 1.4(c)(ii) requirement before his resumption of practice. (*Id.* at pp. 451-453.) An important concern to us in *Howard* –not present in the instant case– was the attorney's utter lack of cooperation with the State Bar, as evidenced by his default and his failure to turn

over financial records, which prevented the accountant from assessing whether disciplinary restitution was appropriate. (*Id.* at pp. 451-452.)

In the Matter of Tiernan, supra, 3 Cal. State Bar Ct. Rptr. 523, is illustrative of the cases that have imposed one year actual suspension. In *Tiernan*, the attorney was on disciplinary probation and the State Bar sought revocation on the grounds that he wilfully failed to cooperate with his probation monitor and failed to submit two quarterly reports. The hearing judge recommended, inter alia, the attorney be actually suspended for six months. We found as aggravation Tiernan's record of four prior discipline matters, including an earlier probation revocation matter because of his failure to file his probation reports. (*Id.* at p. 528.) We also found as aggravation six multiple acts of misconduct: four untimely probation reports (including two late probation reports that were not charged but were proven at the hearing); one act of failing to cooperate with his probation monitor; and the filing of a quarterly report that was defective. (*Id.* at pp. 529-530.) We concluded that six months actual suspension was inadequate and instead recommended one year actual suspension (including the time spent on involuntary inactive enrollment) because of the aggravating circumstances and lack of mitigation. (*Id.* at pp. 527, 531.) The violations in *Tiernan* are similar to the ones we have in the instant case and similar aggravation was present (i.e., multiple violations of the same probations conditions, and prior misconduct that was the same or similar to the present misconduct). A major distinction, however, is there was no mitigation evidence in *Tiernan* (*Id.* at p. 527), where as there is some mitigation in this matter.

The case of *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, is distinguishable from this case because Hunter failed to make about $1,166.50 of required restitution in the total amount of $1,766. He also failed to timely submit a quarterly report. Further defects in his probation reports were considered aggravating as was his uncooperative conduct in the hearing below. We considered the aggravating circumstances to outweigh the few mitigating ones, which consisted of emotional difficulties experienced by Hunter and favorable character evidence. We recommended, and the Supreme Court imposed, actual suspension of one year and until Hunter provided proof of restitution.

In the Matter of Broderick, supra, 3 Cal. State Bar Ct. Rptr. 138 is also more serious than the present case. Broderick failed to make any of the required restitution of $4,466.50 plus interest and filed no quarterly reports. We also found Broderick culpable of misconduct in an original disciplinary proceeding as well. We gave several mitigating circumstances considerable weight but also considered three aggravating ones, including the failure to obtain required psychological counseling. For the probation violations, the Supreme Court imposed a one-year actual suspension.

Finally, *In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. 302 is a more serious probation revocation case. Attorney Taggart had two previous suspensions and was required to pay $1,528 plus interest arising from discovery sanctions the attorney was ordered to pay. The attorney failed to make any of the restitution payments over a three-year period. Indeed, four days before the Supreme Court's disciplinary order became effective, Taggart filed a chapter 7 bankruptcy petition and sought to have the restitution obligation discharged. We were unwilling to consider his financial difficulties as mitigation because the evidence did not satisfy the evidentiary standard. (*Id.* at p. 311.) In aggravation, we considered his prior record of discipline. (*Ibid.*) We recommended six months' actual suspension.

III. RECOMMENDATION.

[4a] Protection of the public and rehabilitation of the attorney are the primary aims of disciplinary probation. (*In the Matter of Broderick, supra*, 3 Cal. State Bar Ct. Rptr. 138, 151.) It is for this reason that discipline imposed for the wilful violation of probation often calls for substantial discipline as a reflection of the seriousness with which compliance with probationary duties is held. An attorney who wilfully violates a significant condition of probation, such as restitution, can anticipate actual suspension as the expected result, absent compelling mitigating circumstances. Here, respondent should have recognized the serious consequences of his failures to timely pay restitution and file quarterly reports be-

cause of his previous encounters with the State Bar disciplinary system. We are thus constrained to assign serious sanctions to respondent's numerous probation violations. (*In the Matter of Tiernan, supra*, 3 Cal. State Bar Ct. Rptr. 523, 530-531.) Furthermore, when, as here, an attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases, resulting in more severe discipline. (*Id.* at p. 531.)

[4b] Balancing all relevant facts and circumstances to reach the appropriate recommendation of degree of discipline (e.g., *Gary v. State Bar* (1988) 44 Cal.3d 820, 828), we find that the 90-day actual suspension recommended by the hearing judge is sufficient to achieve the goals of attorney disciplinary probation, but that the recommendation of the hearing judge should be modified to include an additional condition that requires respondent's continued actual suspension until restitution is fully paid to Allen. This is intended as an incentive to respondent to be proactive in his efforts to satisfy his restitution obligations to Allen and bring to a conclusion this 10-year saga with the State Bar. We also believe the added condition of 90 days' actual suspension and until full restitution is paid is necessary in recognition of the past efforts by the State Bar that were needed to ensure respondent's timely and full compliance. In reaching this conclusion, we take into account respondent's belated but complete satisfaction of his restitution and reporting conditions in the face of ongoing financial difficulties, the fact that all of the violations relate to one client matter, and that the client has represented respondent has shown concern about his inability to pay and exhibited courteousness towards her. The need to protect the public by imposing a significantly longer period of stayed suspension is therefore diminished.

We, accordingly, recommend that the stay of suspension previously ordered in Supreme Court case number SO89894 should be set aside, and in its place a new order should be issued by the Court directing that respondent be suspended for 90 days and until restitution is fully paid as set forth in the Court's order, and further until he furnishes satisfactory proof to the State Bar's Office of Probation of full satisfaction of his restitution obligations. Should respondent's actual suspension exceed two years, he shall provide proof of his rehabilitation and fitness to practice in accordance with standard 1.4(c)(ii). Additionally, 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 that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

In view of respondent's passage of the professional responsibility examination and his ultimate completion of the State Bar's Ethics School, we do not recommend that he be required to again complete those requirements. We do recommend that the State Bar be awarded costs in accordance with the provisions of Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

We concur:
STOVITZ, P. J.
REMKE, J.*

* Hon. Joann Remke, Hearing Department Judge, sitting by designation, pursuant to the provisions of rule 305(c), Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALVIN GILBERT TENNER

A Member of the State Bar

No. 00-O-12253

Filed May 28, 2004

SUMMARY

In this default matter, respondent was found culpable of 21 counts of misconduct involving four client matters. The misconduct included the failure to perform legal services competently, failure to communicate, improper withdrawal, failure to release client files, failure to maintain respect for the courts, failure to report judicial sanctions, failure to cooperate with the State Bar, failure to return unearned fees, and conduct involving moral turpitude. Respondent was admitted to the practice of law in 1965, was disbarred in 1986, and was reinstated to the practice of law in 1992. The misconduct in the present case occurred between 1998 and 2001. The hearing judge recommended that respondent be actually suspended from the practice of law for two years. (Hon. Joann M. Remke, Hearing Judge.) The State Bar requested review arguing that respondent should be disbarred for a second time. The review department agreed.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: No appearance

HEADNOTES

[1] 511 Aggravation–Prior Record–Found
Contrary to the hearing judge's conclusion, the weight to be accorded to respondent's prior discipline should not be diminished. Although the prior discipline was remote in time it was serious in nature, and respondent's prior discipline was properly be considered in circumstances where an attorney has been disbarred, reinstated, and committed further misconduct

[2 a-d] 1010 Disbarment
Even though many years have passed since respondent's first discipline case, it was apparent that the discipline that was administered to him over the course of the many years, which included the ultimate sanction of disbarment, did not succeed in imparting to him an understanding of the duties

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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.

of an attorney to his clients and to the public. Six years after being reinstated to the practice of law following his disbarment, respondent again engaged in serious wrongdoing that caused considerable harm to his clients. He repeatedly failed to file necessary documents for his clients, failed to appear at numerous scheduled hearings, failed to comply with several court orders, failed to return his clients' files and money, avoided his clients' attempts to communicate with him, and then, when he did speak to his clients, misled them as to the status of their affairs. Further, respondent failed to cooperate with the State Bar and failed to participate in the State Bar Court disciplinary proceedings. Under the circumstances, the risk of respondent repeating his misconduct would be considerable if he was merely, once again, suspended from the practice of law. The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of an attorney to continue in that capacity for the protection of the public, the courts and the legal profession. The combined record of respondent's past and present misconduct amply demonstrated his unfitness to continue to practice.

ADDITIONAL ANALYSIS

Culpability

Found	
213.21	Section 6068(b)
213.91	Section 6068(i)
214.31	Section 6068(m)
214.51	Section 6068(o) (comply with reporting requirements)
220.01	Section 6103, clause 1
221.11	Section 6106–Deliberate Dishonesty/Fraud
270.31	Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21	Rule 3-700(A)(2) [former 2-111(A)(2)]
277.51	Rule 3-700(D) [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
611	Lack of Candor–Bar

OPINION

WATAI, J.:

The State Bar requests review of a decision recommending that respondent Alvin Gilbert Tenner be actually suspended from the practice of law for two years. Respondent did not file responses to the notices of disciplinary charges in this proceeding and his default was entered. He was found culpable of 21 counts of misconduct involving four client matters. The misconduct included the failure to perform legal services competently, failure to communicate, improper withdrawal, failure to release client files, failure to maintain respect for the courts, failure to report judicial sanctions, failure to cooperate with the State Bar, failure to return unearned fees, and conduct involving moral turpitude.

Respondent was admitted to the practice of law in 1965, was disbarred in 1986, and was reinstated to the practice of law in 1992. The misconduct in the present case occurred between 1998 and 2001. The State Bar argues on review that respondent should be disbarred for a second time. We have independently reviewed the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), and we agree.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The State Bar does not contest the hearing judge's findings of fact and conclusions of law. Based on our independent review of the record, we adopt them, and briefly summarize them as follows:

A. The Sampo Matter

In November 1997, Tony Sampo employed respondent to represent him in a civil action against an auto dealer and a bank. Respondent received $1,000 as a non-refundable retainer with the remaining fees to be paid out of any settlement or award received in the case. In September 1998, respondent filed a lawsuit on behalf of Sampo against the defendants. A trial date in September 1999 was eventually set.

In July 1999, the defendants filed and served on respondent motions for summary judgment. Respondent did not file any opposition to the motions or appear at the hearing. The motions were granted and the trial date was vacated.

Copies of the proposed summary judgments were served on respondent, but he did not respond. Respondent was served with notices of entry of judgment, but took no action to set aside the judgments within the six-month period permitted by statute.

In September 1999, the defendants filed and served on respondent memoranda of costs and attorney fees. Respondent did not file an opposition or appear at the hearing. The court awarded costs and fees totaling $28,610. Respondent was served with the court's ruling, but took no action.

Respondent did not inform Sampo that summary judgments were granted, that the trial date was vacated and that Sampo was liable to the defendants for the payment of costs and attorney fees. In September 1999, Sampo's son, Robert, telephoned respondent on behalf of Sampo to confirm the trial date. Respondent told Robert that the trial had been continued and a new date had not been set. In October 1999, respondent told Robert that the trial had been rescheduled by the judge to April 2000.

In November 1999, Sampo received notice that an abstract of judgment had been filed against his property. Robert contacted respondent on behalf of his father. Respondent told Robert that he was unaware of a judgment and that he would check into the matter and get back to him. In the following two months, Robert made numerous attempts to contact respondent by telephone and letter. Respondent did not return Robert's calls or otherwise communicate with Sampo or Robert.

When respondent did not respond to Sampo's inquiries, Sampo hired attorney Vic Rodriguez (Rodriguez) to assist him in determining what had occurred. In early February 2000, Rodriguez wrote to respondent, advising him to immediately file a motion to set aside the judgments or else Rodriguez would do so and seek costs and sanctions against respondent.

Respondent delayed until the end of February 2000 to file the motion. The court denied the motion.

Rodriguez thereafter filed a motion to vacate the judgments based upon respondent's misconduct. Rodriguez notified respondent by mail to appear at the hearing on the matter and requested that respondent immediately file oppositions to the summary judgment motions. Respondent did not file the oppositions, nor did he appear at the hearing.

In March 2000, the court granted the motion and set aside the judgments. Due to respondent's failure to appear at the hearing, the court dismissed respondent as Sampo's attorney and substituted Rodriguez in his place. The court also ordered respondent to pay $3,500 to the bank and $1,400 to the auto dealer for their attorneys' fees.

In April 2000, Rodriguez requested that respondent return Sampo's file. Thereafter, Rodriguez made additional requests for the file, but to no avail.

Respondent did not comply with the court's order to pay the attorneys' fees. The auto dealer filed an application for issuance of an order to show cause against respondent, which was set for hearing in August 2000. Respondent did not appear at the hearing nor did he pay the attorneys' fees, resulting in the court's issuance of an order for respondent to appear in September 2000. Respondent was served with the court's order. Respondent did not appear at the hearing and the court ordered respondent to pay the auto dealer's counsel additional fees of $1,103 and sanctions of $1,000. The court also issued an attachment for defaulter. Four days latter respondent appeared in court, the attachment was recalled, and the sanctions were increased to $1,500. At no time did respondent notify the court that he would not appear at the scheduled court hearings. Respondent did not report the sanctions imposed against him to the State Bar of California.

On September 7, October 13, and October 26, 2000, and August 8, 2001, a State Bar investigator wrote to respondent regarding the Sampo matter and requested a written reply. Although respondent contacted the State Bar and sought additional time to respond to the letters, he never did.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) of the Rules of Professional Conduct[1] by failing to respond to the summary judgment motions and cost memoranda or appear at numerous court hearings; (2) failing to communicate with his client in violation of section 6068, subdivision (m), of the Business and Professions Code[2] by failing to inform Sampo that the defendants obtained summary judgments against Sampo, that Sampo's trial had been vacated, and that Sampo was liable for the payment of costs and attorney fees, and by failing to return Robert's numerous telephone calls; (3) improperly withdrawing from employment in violation of rule 3-700(A)(2) by, in effect, withdrawing from Sampo's case in or about July 1999 when he ceased responding to motions filed against his client and attending court hearings in the matter; (4) failing to promptly return his client's file in violation of rule 3-700(D)(1) by failing to return Sampo's file as requested; (5) failing to maintain the respect due to the courts in violation of section 6068, subdivision (b), by repeatedly failing to appear at numerous court hearings and by failing to comply with various court orders requiring respondent to reimburse the defendants' fees; (6) failing to obey a court order in violation of section 6103 by failing to comply with the court orders to pay fees to the defendants and by failing to appear at the order to show cause hearings; (7) engaging in acts of moral turpitude in violation of section 6106 by misrepresenting to Sampo and Robert that the trial in the matter had been continued when in fact it was vacated, and by denying that he had any knowledge of the summary judgments against Sampo; (8) failing to report sanctions in violation of section 6068, subdivision (o)(3), by failing

1. All further references to rules are to these Rules unless otherwise noted.

2. All further references to sections are to this Code unless otherwise noted.

to report to the State Bar the $1,500 sanctions imposed against him; and (9) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's four letters or participate in the investigation of the Sampo matter.

B. The Simey Matter

In March 1997, Jon and Nancy Simey hired respondent to prepare an action in a civil case. Respondent filed a complaint in July 1998, but did not perform discovery or prosecute the matter further. In November 1998, the court issued an order to show cause for the failure to prosecute the case. Respondent did not appear at the hearing and the court dismissed the case. Respondent was later able to have the case reinstated. In December 1998, the defendant filed a motion to strike and a demurrer to the complaint. Respondent filed an opposition to the demurrer, but did not cite any case law or authorities. The demurrer was granted with prejudice in April 1999.

During the time he represented the Simeys, respondent communicated with them on only two occasions. In February and June 1998, respondent sent the Simeys drafts of the complaint he proposed to file. Respondent never advised the Simeys that the demurrer was granted or that their complaint was dismissed.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to conduct discovery or pursue the Simeys' case and by failing to cite any case law or authorities to support his opposition to the demurrer; and (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to advise his clients of the demurrer and dismissal.

C. The Baker Matter

In April 1998, Eugenia Baker hired respondent to represent her in a civil matter. Baker paid Respondent $1,000 as a non-refundable retainer. In April 1999, respondent filed a complaint and continued to perform services for Baker until October 1999, when the defendants filed cross-complaints against Baker. Respondent did not file any response to the cross-complaints and did not cooperate with the discovery proceedings. In February 2000, the court issued an order compelling discovery. Respondent did not comply with the discovery order nor inform Baker of the order. The court dismissed Baker's complaint and entered default judgments against Baker in the sum of $61,512 in June and July 2000.

In March 2001, respondent advised Baker that the complaint had been dismissed and that he would take action to set aside the default judgments; but he did not do so, nor did he ever tell her the amount of the default judgments that had been entered against her. In March 2001, Baker requested the return of her file, but respondent failed to do so.

In July and August 2001, a State Bar investigator wrote to respondent regarding the Baker matter and requested a written reply. The State Bar requested the same during telephone conversations with respondent on four separate occasions in August and November 2001, and March 2002. Respondent acknowledged receiving the State Bar's letters and promised that he would send a response, but he never did.

The hearing judge found respondent culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to respond to the cross-complaints, failing to cooperate with discovery and failing to set aside the default judgments; (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to inform his client that discovery was ordered, that the complaint was dismissed and that default judgments had been entered against her; (3) failing to promptly return his client's file in violation of rule 3-700(D)(1) by failing to return Baker's file as requested by Baker; and (4) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to reply to the State Bar's investigatory letters or participate in the investigation of the matter.

D. The Chapin Matter

In June 1998, Kathleen Chapin hired respondent to represent her in a civil action. Chapin paid respondent $300 as a retainer. Respondent did not perform any services on her behalf. Chapin telephoned respon-

dent on numerous occasions to inquire about the status of her case. Respondent did not return her telephone calls. In March 2000, Chapin requested the return of the unearned fees and her file so that she could hire new counsel. She repeated her request in August 2000. Respondent did not return her file or fees.

In June and August 2000, a State Bar investigator requested that respondent file a written response to Chapin's complaint. In September 2000, respondent contacted the State Bar, acknowledged receipt of the letters and promised to respond within a week. The State Bar requested that respondent file a reply on three separate occasions. Finally, in May 2001, respondent filed a response.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to perform any services for which he was employed; (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to respond to Chapin's numerous calls; (3) improperly withdrawing from employment in violation of rule 3-700(A)(2) by, in effect, withdrawing from the case when he ceased to provide services to Chapin; (4) failing to return unearned fees in violation of rule 3-700(D)(2) by failing to return Chapin's retainer; (5) failing to return his client's file in violation of rule 3-700(D)(1) by failing to return Chapin's file upon her request; and (6) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to timely reply to State Bar's investigatory inquiries.

E. Mitigating and Aggravating Circumstances

No mitigating factors were found in this default proceeding. In aggravation, the hearing judge found that respondent had a record of prior discipline. (Std. 1.2(b)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct [hereafter "stds."].) In *Tenner v. State Bar* (1978) 20 Cal.3d 878, respondent was suspended for three years, stayed, and placed on probation for three years, for client abandonment and misrepresentation. In *Tenner v. State Bar* (1980) 28 Cal.3d 202, respondent was suspended for four years, stayed, and placed on probation for four years for misappropriation, misrepresentation and forgery. In Bar Misc. 4835, filed December 19, 1984, respondent was suspended for five years, stayed, and placed on probation for five years with three years actual suspension for failure to pay client funds and commingling in 1982. In Bar Misc. 5104, filed April 16,1986, respondent was disbarred for endorsement of checks without consent and acts of moral turpitude.

The hearing judge concluded, however, that the aggravating weight of this prior discipline should be diminished because the misconduct underlying the prior discipline occurred in the 1970's and early 1980's and therefore was remote in time, and because the prior discipline had already been considered as aggravation in respondent's prior discipline cases.

Other aggravating circumstances found by the hearing judge were that respondent committed multiple acts of wrongdoing (std. 1.2(b)(ii)); significantly harmed his clients (std. 1.2(b)(iv)); demonstrated indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)); and failed to participate in this disciplinary matter before the entry of his default (std. 1.2(b)(vi)).

DISCUSSION

The State Bar advances several arguments on review in support of its assertion that respondent should be disbarred. Chief among them is its argument that, in view of respondent's past and present misconduct, disbarment is warranted. We agree.[3]

3. [1] As we find this issue dispositive, we do not address the State Bar's remaining contentions. We note, however, that we find no support for the hearing judge's conclusion that the weight of respondent's prior discipline should be diminished. Although the prior discipline was remote in time it was serious in nature (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 713), and respondent's prior discipline may properly be considered in circumstances such as the present where an attorney has been disbarred, reinstated, and committed further misconduct (*Eschwig v. State Bar* (1969) 1 Cal.3d 8, 18-19; *Pearlin v. State Bar* (1963) 59 Cal.2d 834, 834-835).

Respondent's first prior disciplinary matter involved misconduct in three client matters. In each matter, respondent was hired to represent the client in a civil matter and then failed to perform the services for which he was hired. In one of the cases, respondent failed to appear at numerous court hearings, which resulted in the dismissal of the case, and in another, respondent failed to file an answer for his client which resulted in a default judgment against his client. Further, respondent failed to communicate in all three matters and made misrepresentations to the clients in two of the cases and to the State Bar regarding one. The misconduct occurred between 1972 and 1975. Effective in April 1978, respondent was suspended for three years, stayed, and placed on probation for three years. Respondent asserted that his alcoholism affected him and the Supreme Court imposed probation conditions to address that condition. (*Tenner v. State Bar, supra,* 20 Cal.3d 878.)

In his second prior disciplinary matter, respondent settled his clients' tort case in one matter, received a settlement draft of $8,000, forged his clients' signatures, negotiated the draft, and thereafter misappropriated a substantial part of the money. For four years thereafter, respondent misrepresented the status of the case to the clients, and after the clients found out that the case had settled, falsely accused another attorney of forging the check. In another group of matters, respondent represented six clients in civil matters, each of whom had executed medical liens, exceeding $3,000 in the aggregate. Respondent settled the cases, withheld sums to pay the liens, failed to pay them, and misappropriated the money for his own use. The misconduct occurred in 1972-1976. Effective in November 1980, respondent was suspended for four years, stayed, and placed on probation for four years. Respondent's alcoholism was again found to be a factor. The Supreme Court observed that the misconduct "would readily warrant his disbarment" but that respondent had demonstrated strenuous rehabilitative efforts over a substantial period of time, including that he had stopped drinking. (*Tenner v. State Bar, supra,* 28 Cal.3d at p. 207.)

In his third prior disciplinary matter, respondent again settled a case, received the settlement funds, withheld $2,840 to pay a medical lien, failed to pay the medical provider, and misappropriated the money to his own use. Respondent also misled the medical provider regarding the payment. The misconduct occurred in 1980-1982. Effective in January 1985, respondent was suspended for five years, stayed, and placed on probation for five years with three years' actual suspension. (Bar Misc. 4835, filed December 19, 1984.)

In his fourth prior disciplinary matter, respondent received five checks totaling $2,393 which were made payable to himself and a non-client payee, signed the name of the other payee without his consent, and cashed the checks. The misconduct occurred in 1981. During oral argument to the review department in this proceeding in November 1995, respondent admitted that he had earlier misled the review department as to his rehabilitation from alcohol abuse and admitted facts showing clear violations of the terms and conditions of his prior discipline. Effective in May 1986, respondent was disbarred. (Bar Misc. 5104, filed April 16, 1986.)

In 1992, during the trial of respondent's petition for reinstatement, he admitted that he continued to drink alcohol until 1985, which was in violation of the terms of his prior disciplinary probation, and that he had failed to comply timely with rule 955 of the California Rules of Court, which was in violation of the Supreme Court's order in his prior disciplinary matter. The rule 955 compliance was due in 1985 and not completed until 1990.[4]

Respondent was reinstated to the practice of law in July 1992. Approximately six years latter he began committing the misconduct involved in the present case.

4. By request of the State Bar, we take judicial notice under Evidence Code sections 452, subdivision (d), and 459 of the State Bar Court's decision in respondent's reinstatement case, *In the Matter of Alvin G. Tenner*, case number 91-R-03842, filed April 6, 1992. We direct our Clerk to make that decision a part of the record of this proceeding.

[2a] Thus, respondent's past and present disciplinary record shows that while acting as an attorney respondent failed to perform the legal services for which he was hired in at least seven client matters, which resulted in the dismissals of his clients' cases and judgments against his clients; failed to appear on behalf of his clients at numerous court hearings; failed to communicate with his clients; misrepresented the status of his clients' cases to his clients and to the State Bar; abandoned his clients; forged signatures on checks; falsely accused another attorney of misconduct; misappropriated money belonging to his clients and to medical providers; failed to return client files; failed to return unearned fees; failed to comply with numerous court orders, including Supreme Court disciplinary orders; failed to report sanctions to the State Bar; and failed to cooperate with the State Bar.

In *Twohy v. State Bar* (1989) 48 Cal.3d 502, the attorney's past and then present record of misconduct showed that he had failed to perform services for his clients; made false representations to his clients regarding settlement of their cases; failed to communicate with his clients; failed to return unearned fees; commingled client funds; failed to return client files; failed to appear in court, which resulted in prejudice to his client; failed to comply with a court order; and failed to cooperate and participate in the State Bar disciplinary proceeding. The court found that Twohy's record showed a serious pattern of misconduct involving recurring types of wrongdoing which clearly warranted disbarment in the absence of compelling mitigating circumstances. (*Id.* at p. 513.) No such circumstances were found and Twohy was disbarred.

Other cases in which an attorney's combined record of past and then present misconduct showed a similarly wide range of misdeeds involving recurring types of wrongdoing have also resulted in disbarment. (See e.g., *McMorris v. State Bar* (1983) 35 Cal.3d 77 [failure to perform legal services and failure to communicate with the clients in five client matters; four prior suspensions, which included four instances of failure to perform legal services, failure to return an advanced fee, misappropriation of $40, and failure to comply with the Supreme Court's disciplinary order to take and pass the Professional Responsibility Examination]; *Marcus v. State Bar* (1980) 27 Cal.3d 199 [failure to use reasonable diligence on behalf of a client in one matter, and failure to perform legal services for another, with 12 similar prior acts or courses of misconduct; two suspensions from practice for other types of misconduct]; *Grove* v. *State Bar* (1967) 66 Cal.2d 680 [ten counts of unprofessional conduct over a period of four years, including failure to file or defend suits, retaining fees for services not performed, failure to report money collected for clients, false representation, and purposeful evasion of communication with clients; failure to appear at local administrative committee hearing; one prior suspension for nonpayment of dues and one prior reprimand]; *Schullman* v. *State Bar* (1976) 16 Cal.3d 631 [abandonment of clients in two instances; five prior suspensions over an eleven-year period, three for abandoning clients, one for misappropriating clients' funds, and one for appearing at legal proceedings while under suspension]; *Ridley* v. *State Bar* (1972) 6 Cal.3d 551 [over a four-year period, four instances of failure to perform services or return fees, two instances of failure to file or prosecute actions, and making false statements to clients and to the State Bar]; *Simmons* v. *State Bar* (1970) 2 Cal.3d 719 [three instances of wilful abandonment of clients resulting in harm to them; two prior suspensions for misappropriating clients' funds].)

[2b] The Supreme Court has repeatedly held that the habitual disregard by an attorney of the interests of his clients combined with the failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. (*McMorris v. State Bar*, *supra*, 35 Cal.3d at p. 85, and cases cited therein.) Respondent's past and present misconduct shows an extensive and broad range of misdeeds involving recurring types of misconduct, which we conclude demonstrate his habitual disregard for the interests of his clients and which warrant disbarment in the absence of compelling mitigating circumstances. Respondent did not participate in this proceeding and no mitigating circumstances were presented or are evident from the record before us.

[2c] We recognize that many years have passed since respondent's first discipline case. Nevertheless, it is apparent that the discipline that has been administered to respondent over the course of these many years, which included the ultimate sanction of

disbarment, "did not succeed in iinparting to him an understanding of the duties of an attorney to his clients and to the public." (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 673; see also *Eschwig v. State Bar*, *supra*, 1 Cal.3d at p. 19.) Six years after being reinstated to the practice of law following his disbarment, respondent again engaged in serious wrongdoing that caused considerable harm to his clients. He repeatedly failed to file necessary documents for his clients, failed to appear at numerous scheduled hearings, failed to comply with several court orders, failed to return his clients' files and money, avoided his clients' attempts to communicate with him, and then, when he did speak to his clients, misled them as to the status of their affairs. Further, respondent failed to cooperate with the State Bar in its investigation of the present matters and failed to participate in the State Bar Court disciplinary proceedings. Under the circumstances, we believe that the risk of respondent repeating his misconduct would be considerable if he was merely, once again, suspended from the practice of law.

[2d] As the Supreme Court has held, the "purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of an attorney to continue in that capacity for the protection of the public, the courts and the legal profession." (*Marcus v. State Bar*, *supra*, 27 Cal.3d at p. 202.) The combined record before us of respondent's past and present misconduct amply demonstrates his unfitness to continue to practice.

DISCIPLINE

We therefore recommend that respondent Alvin Gilbert Tenner 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 pursuant to 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.

ORDER OF INACTIVE ENROLLMENT

In view of our disbarment recommendation, it is ordered that respondent be enrolled as an inactive member of the State Bar. (Bus. & Prof. Code, § 6007, subd. (c)(4).) The inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 220(c).)

We concur:
EPSTEIN, J.
HONN, J.*

* Hon. Richard A. Honn, Hearing Judge, sitting by designation pursuant to rule 305(e), Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TAMIR OHEB

A Member of the State Bar

No. 99-C-11161

Filed July 16, 2004; modified and corrected September 3, 2004

[Editor's Note: The Supreme Court remanded this case to the Review Department with directions to vacate its recommendation and reconsider. (S129298, filed 6/15/05.) The State Bar Court Review Department opinion previously published at pp. 697-720 has been deleted from the *California State Bar Court Reporter* pending further action of the Review Department on remand.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT AA

A Member of the State Bar

No. 02-O-10193

Filed October 15, 2004

SUMMARY

Respondent cooperated with the State Bar's investigation of a complaint that one of his clients filed against him, but the matter was not resolved. Thereafter, the State Bar sent respondent a letter notice of intent to file notice of disciplinary charges, which respondent did not receive because his staff made a typographical error in the address change notice that he sent to the State Bar when he moved his office earlier that same year. Then, the State Bar initiated this original disciplinary proceeding by filing and serving a notice of disciplinary charges (NDC). Even though the copy of the NDC that the State Bar served on respondent by mail was incorrectly addressed, it was somehow delivered to respondent's new office.

After retaining counsel, respondent learned that the State Bar had mailed the letter notice of intent to file notice of disciplinary charges and that the letter identified two opportunities for him to meet with the State Bar in an attempt to resolve the matter before the filing of the NDC. First, he could have meet with the State Bar prosecutor 20 days before the filing of NDC. Second, he could have requested an early neutral evaluation conference before a State Bar Court judge. Respondent testified that, if he had timely learned of these two opportunities, he would have availed himself of them both, and because the State Bar would not recall the NDC to provide him with the opportunities to do so, respondent filed a motion to dismiss the proceeding. Later, the case was ultimately dismissed without prejudice in the furtherance of justice on the motion of the hearing judge. (Hon. Patrice E. McElroy, State Bar Court Judge.)

The State Bar sought interlocutory review, contending that the hearing judge erred in dismissing the proceeding. The review department denied the State Bar's petition seeking review of the hearing judge's dismissal order because it held that the hearing judge did not abuse her discretion or commit legal error.

COUNSEL FOR PARTIES

For State Bar: Maria Oropeza

For Respondent: Michael E. Wine

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-f] 119 Procedure–Other Pretrial Matters
139 Procedure–Miscellaneous

When significant procedural opportunities are denied a litigant by steps taken during investigation before the filing of disciplinary charges, which place a litigant at a substantive disadvantage in the ensuing disciplinary proceeding, it is appropriate for State Bar Court to exercise its jurisdiction to review those steps after the proceeding is filed. The deprivation of the opportunities (1) for respondent to meet with the State Bar prosecuting attorney 20 days before disciplinary charges were filed against respondent, which opportunity the State Bar routinely extends as a matter of policy, and (2) for respondent to request, in accordance with State Bar Rule of Procedure 75, an early neutral evaluation conference with a State Bar Court judge before disciplinary charges were filed are both significant procedural opportunities that the State Bar Court may review upon the filing of the formal notice of disciplinary charges. Accordingly, the State Bar Court had the authority to assess whether respondent was deprived of these pre-filing opportunities and, if so, to fashion an appropriate remedy.

[2 a-c] 117 Procedure–Dismissal
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs
139 Procedure–Miscellaneous
165 Adequacy of Hearing Decision

Rule of Procedure of State Bar 262, which authorizes proceedings to be dismissed in the furtherance of justice, is construed in the State Bar Court in the same manner as its analog Penal Code section 1385 is construed in criminal proceedings. State Bar rule does not permit respondents to make motions. Motions may be made only by the State Bar as the prosecutor or a dismissal may be entered on State Bar Court's own motion after taking required steps. Hearing judge's dismissal of proceeding comported with those required pre-dismissal steps because she issued an order to show cause to the parties, allowed for responses from them, considered all appropriate interests, and stated in detail her reason for dismissal, and since the hearing judge acted promptly after the proceeding was filed and since the dismissal was expressly without prejudice to refiling, review department saw no prejudice to the State Bar.

[3 a-e] 117 Procedure–Dismissal
135.60 Procedure–Revised Rules of Procedure–Dispositions and Costs
167 Abuse of Discretion

Hearing judge did not abuse her discretion in ordering the dismissal of proceeding without prejudice in furtherance of justice on her own motion under Rule of Procedure of State Bar 262 as an appropriate remedy for the deprivation of the opportunities (1) for respondent to meet and attempt to resolve the matter with the State Bar prosecuting attorney 20 days before any disciplinary charges were filed and (2) for respondent to request an early neutral evaluation conference with a State Bar Court judge before disciplinary charges were filed because the deprivation of the opportunities occurred when, as a consequence of respondent's prior incorrect change of address submission to the State Bar, respondent did not receive State Bar's letter notice of intent to file notice of disciplinary charges informing him of these pre-filing opportunities. Once the hearing judge contemplated dismissal under rule 262 and once the uncontroverted evidence emerged as to how respondent's change of address was mistakenly composed on the change of address form and mistakenly approved by respondent (essentially a typographical error), the hearing judge was justified in considering the mistake to come within the ambit of rule 262 and did not abuse her discretion in ordering dismissal.

[4] **119 Procedure–Other Pretrial Matters**
139 Procedure–Miscellaneous
194 Statutes Outside State Bar Act
In absence of specific statute or rule of procedure directing a specified mode of proceeding, it is not unreasonable or arbitrary for a hearing judge to utilize analogous civil procedures to resolve motions.

OPINION

STOVITZ, P.J.:

This interlocutory review "arises out of a typo." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 252.) Shortly after the filing of this formal disciplinary proceeding by the State Bar's Office of Chief Trial Counsel (State Bar), respondent AA[1] moved to dismiss it on the ground that, due to an inadvertent error made by his paralegal and respondent in informing the State Bar of his change of address, respondent did not receive notices from the State Bar that he could participate in certain procedures that could have obviated the filing of formal charges. After notice to the parties and an opportunity to brief the issues, the hearing judge dismissed the proceeding in the furtherance of justice, without prejudice to the proceeding being refiled. (Rules Proc. of State Bar, rule 262(e)(2).)[2] The State Bar has sought our review, claiming that the hearing judge erred by dismissing the proceeding.

We hold that the hearing judge did not abuse her discretion nor did she commit legal error. The procedural opportunities denied respondent prior to the filing of the formal charges were significant, including the right to request an "Early Neutral Evaluation Conference" (ENE) conducted by a State Bar Court judge, pursuant to rule 75. Accordingly, we apply our decision in *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18 to warrant oversight of the State Bar's actions in denying respondent the opportunity to request an early neutral evaluation in this case where the State Bar had invoked our Court's jurisdiction by filing formal charges. We also hold that the hearing judge neither erred nor abused her discretion in dismissing the proceeding without prejudice in the furtherance of justice as a remedy for what the undisputed evidence showed was a typographical error by respondent and his staff in the course of reporting his address change.

I. STATEMENT OF THE CASE

The essential facts important to this proceeding are undisputed, although the parties see the effect of some of those facts differently.

Respondent was admitted to practice over 30 years ago and has no record of prior discipline. Prior to December 2001, the State Bar commenced a disciplinary investigation as to whether in a one-client matter, respondent wilfully failed to act with the ethically required standard of competence or wilfully failed to follow legal duties in communicating with his client. Between December 2001 and April 2002, respondent communicated with a State Bar complaint analyst and a State Bar investigator about the matter but it was not resolved at that time.

According to respondent, in about April 2003, he moved offices to a different city in Northern California. He directed his paralegal to prepare address change notices to his clients and to the State Bar.[3] This paralegal mistakenly listed the name of respondent's *city* in place of the name of the *street* on which his law office was sited.[4] Although respondent

1. Because there might not be a pending public proceeding involving respondent should our opinion become final, we follow our practice in similar matters of omitting respondent's name in this published opinion. (E.g., *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 444, fn. 1.)

2. Unless noted otherwise, all future references to "rules" are to the Rules of Procedure of the State Bar.

3. Business and Professions Code section 6002.1, subdivision (a) requires that members of the State Bar maintain on the official records of the State Bar a current office address, in addition to other information, and that changes to the office address be reported to the State Bar within 30 days of the change. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

4. Moreover, the first letter of respondent's office's city matched the first letter of the name of the street on which the office was located and the city contained a street bearing the city's name. By way of example, if respondent's office were located at 9903 Charles St., Cupertino, California, the change of address notice to the State Bar incorrectly reported the address as "9903 Cupertino St., Cupertino, California."

signed the change of address notice to the State Bar, he did not detect the error.[5] He heard nothing more about the Bar's investigation until in December 2003, when he received a notice of disciplinary charges (NDC)[6] which, though addressed certified mail to the incorrect street listed on the State Bar's records, found its way to respondent's office. As soon as respondent received the misaddressed NDC, he contacted the State Bar attorney assigned to the case and on December 15, 2003, corrected his office address on the State Bar's official records. That same day, he hired his current counsel who advised him of two opportunities in a disciplinary case prior to the filing of the NDC, a "20–day meeting" with the State Bar and an ENE under rule 75. Before that time, respondent did not receive notice of either of these opportunities, but he alleged that he cooperated fully in the investigation process and would have participated in both the 20–day meeting and the ENE if he had received timely notice of those opportunities.

The record shows that on September 30, 2003, the State Bar sent a letter "Notice of Intent to File Notice of Disciplinary Charges" to respondent at his incorrectly–entered address of record summarizing the disciplinary investigation to date, including respondent's previous reply to the nature of the investigation and stating that, "unless a pre-filing settlement" was reached, the State Bar intended to file a NDC. This letter stated that the Bar was "interested in resolving this matter before filing" the NDC and invited respondent to meet within 20 days with the State Bar attorney assigned to prosecute the case. The letter further stated that, if the planned meeting were unsuccessful in reaching a settlement, either party may request an ENE conducted by a State Bar Court judge per rule 75. This letter notice was returned undelivered to the State Bar because of the incorrect address.

Since the State Bar was unwilling to recall the NDC and afford respondent the opportunities of a 20–day meeting and an ENE based on what respondent claimed was a purely inadvertent error in changing his address of record, he moved to dismiss under rule 262(d)[7] on the ground that the proceeding was barred by other rules.

The State Bar opposed this motion on two primary grounds: that our court had no power to require a 20–day meeting or ENE as those steps exist only prior to the filing of an NDC and thus prior to the start of our jurisdiction over State Bar Court proceedings; and that rule 262(d) did not apply as no rule barred the bringing of the NDC in this matter and that respondent had a duty to maintain a correct address of record on the State Bar's official records. The State Bar offered to reconsider its position if it could be shown that respondent was not responsible for the incorrect address. When the State Bar researched the change of address filed by respondent in April 2003, it determined that respondent had signed the form showing the incorrect address. The State Bar accordingly deemed that respondent was responsible for the error and refused to afford him an opportunity to participate in a 20–day meeting or an ENE.

On January 30, 2004, the State Bar Court hearing judge assigned to this proceeding issued an order to show cause stating her intent to dismiss the NDC, under rule 262(e)(2), in the furtherance of justice without prejudice to its refiling, based on the inadvertence, mistake or excusable neglect of respondent as to the reasons he did not receive his pre–NDC opportunities. Per rule 262(e)(3), the hearing judge invited responses from the parties. The State Bar replied that the principles of mistake, inadvertence and excusable neglect did not apply to the relief sought by respondent. Respondent reiterated why he

5. The record includes a declaration by respondent stating in part that his paralegal mistakenly completed his change of address form to the State Bar and that, although respondent signed the incorrect form, he did so inadvertently due to his failure to review the form carefully. The record also includes a declaration by the paralegal attesting to his incorrect completion of this change of address form, to his presentation of it to respondent for signature and to respondent's signature of it without any mention of any error.

6. The NDC is the initial pleading which starts most public State Bar Court disciplinary proceedings. (Rules 2.64, 20, 101(a).)

7. Rule 262(d) provides: "A proceeding may be dismissed on the ground that it is barred by any applicable statute or rule."

believed that he was entitled to an opportunity to a 20-day meeting and an ENE.

On February 25, 2004, the hearing judge dismissed this proceeding without prejudice in the furtherance of justice. She gave as her reasons that, solely due to respondent's mistake, surprise, excusable neglect or inadvertence, he did not learn of his prefiling opportunities and was unable to seek to resolve the proceeding before the NDC was filed. The judge stated that she had considered the provisions of section 473 of the Code of Civil Procedure, the facts set forth by respondent and that no prejudice would result to the State Bar from a dismissal without prejudice. According to the hearing judge, her dismissal would allow respondent the possibility of an opportunity to resolve this matter before the filing of formal proceedings; however, her order did not require that the parties engage in such proceedings. This interlocutory review followed.

On review, the State Bar repeats its contentions made below, especially that inadvertence and mistake do not support this dismissal in the furtherance of justice.

We invited the respondent's reply to the State Bar's position, and because of the importance of deciding several issues, including the scope of our decision in *In the Matter of Respondent Q, supra*, 3 Cal. State Bar Ct. Rptr. 18, we set this matter for oral argument.

II. DISCUSSION

A. The State Bar Court's oversight authority over pre–NDC steps.

We review the hearing judge's order under interlocutory review. (Rule 300.) Accordingly, our review is limited to deciding whether the hearing judge committed legal error or abused her discretion. (Rule 300(k); *In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 94, citing former rule 300(j), now rule 300(k).)

In *In the Matter of Respondent Q, supra*, 3 Cal. State Bar Ct. Rptr. at pages 22 to 23 we held that, except for our adjudication of a motion to quash an investigation subpoena under section 6051.1, our court had no jurisdiction over the State Bar's actions taken during an investigation prior to the commencement of formal charges. However, *Respondent Q* arose much differently than did the present case. In *Respondent Q*, there were no formal disciplinary proceedings pending before our court. Rather, the attorney under State Bar investigation sought a protective order from a State Bar Court judge. When the judge granted one aspect of the relief sought by that attorney, the State Bar filed a motion for emergency relief before us. We concluded that the State Bar's motion warranted our review, and we also concluded that, except for the judging of a motion to quash a subpoena issued during investigation, no legal authority gave us jurisdiction "over State Bar disciplinary complaints *prior* to the filing of formal charges by the" State Bar. (*Id.* at pp. 21-22, italics added.)

[1a] The current case arose after the State Bar filed its NDC starting this proceeding in our court. As has been the well–established rule in other proceedings, "When the jurisdiction of a court has been properly invoked by the filing of a . . . charge, the disposition of that charge becomes a judicial responsibility. [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517; *People v. Roman* (2001) 92 Cal.App.4th 141, 145.) The important policy of separation between prosecution and adjudication functions, consistent with our decision in *Respondent Q*, would advise us to eschew reviewing the particular steps by which the State Bar chose to conduct its investigation, such as the number, type and nature of witnesses interviewed or documents examined. Nevertheless, we also conclude that when significant procedural opportunities are deprived a litigant by steps taken during investigation, which placed the litigant at a substantive disadvantage in the ensuing disciplinary proceeding, that is an appropriate subject for our exercise of jurisdiction, once a proceeding has been filed. Since the State Bar invoked our Court's jurisdiction by filing the NDC in this matter in November 2003, our court's hearing department had the jurisdiction to review those steps taken in the investigation which involved deprivation of significant procedural opportunities, thereby placing the attorney litigant in this proceeding at a substantive disadvantage in the ensuing proceeding.

[1b] In our view and for the reasons we shall discuss *post*, both the deprivation of the opportunity for a 20–day meeting and an ENE are significant procedural opportunities which our court may review in an appropriate way, upon the filing of formal charges.

[1c] The opportunity of respondent to meet with the State Bar's prosecuting attorney 20 days prior to the issuance of the NDC in order to explore resolution of the matter in lieu of issuance of an NDC is not contained in the Rules of Procedure of the State Bar. However, it is considered a significant step by the State Bar and at oral argument we were advised that it is extended routinely, as a matter of policy, in State Bar disciplinary cases. The State Bar's September 2003 letter to respondent expressly offered this meeting based on the State Bar's claim that it was interested in resolving this matter before filing. Of course, there is no guarantee that a prefiling resolution would succeed, but it is enough of a significant procedural opportunity in an appropriate case and has become an ordinary step utilized by the State Bar, that it warranted the hearing judge's scrutiny when respondent was deprived of the opportunity in a case identified by the State Bar as eligible for the meeting.

[1d] Respondent was deprived of an even greater opportunity when not afforded an opportunity to request an ENE before our court. Rule 75, in effect since February 1999, applies when a resolution between the State Bar and the respondent does not occur prior to filing of the NDC. In that case, either party may request an ENE before a State Bar Court judge which will result in an oral neutral evaluation of the alleged facts, charges and possibilities for a degree of discipline. The rule clearly contemplates that a resolution of the matter may occur before the NDC is filed, for it is titled "Pre–Filing, Early Neutral Evaluation Conference"[8] and provides that, if court approval is required of an agreed-upon resolution, it shall be documented by the State Bar and submitted to the Early Neutral Evaluation judge before whom the matter is pending for approval or rejection. (Rule 75(b).)

In recent practice, State Bar Court ENE's have resolved ultimately half of pending matters.[9] A fundamental difference between the 20–day meeting and the ENE is that the latter is conducted by this court and the conference and any resolution calling for discipline is subject to this court's express oversight. (Rule 75(b).) Further, ENE's generally are seen as important tools of effective court administration.[10]

However, the ENE's conducted by our hearing department operate differently from those conducted by federal and state courts. Our ENE's occur *before* formal charges are issued, as one of the key aims of this process is to offer both sides an objective view of the consequences of filing those charges. Because no formal charges have issued, our court is unaware of the cases which are eligible for the ENE until one is requested by one or both of the litigants. For practical purposes, therefore, the State Bar provides the notice to the respondent of the ENE to be conducted by our court.

[1e] Collectively, the 20–day meeting and the ENE offer several significant benefits to the litigants should a resolution be reached at either of those stages. First, they permit appropriate resolutions of a case before the matter becomes public by the filing of formal charges. This, itself, is often a key motivator propelling resolution. Next, they permit the litigants to avoid the extra work and expense of drafting and defending, respectively, the NDC; and they save the State Bar Court time otherwise needed to conduct a series of status and pretrial conferences and oversee discovery and related matters. Finally, even if public

8. Even though the title of a rule is ordinarily not part of the rule, we consider it relevant in the present situation.

9. Our research shows that for the years 2002 and 2003 combined, ENE conferences were conducted by this Court's hearing judges in a total of 248 cases. A resolution was reached in the State Bar Court, or outside of the court, in 128 of the cases – representing just over a 50 percent resolution rate.

10. As a magistrate judge of the United States District Court, Northern District of California noted, in part, ENE's importantly position a case "as efficiently as possible for fair disposition by settlement or trial." (*GTE Directories Services, Corp. v. Pacific Bell Directory* (N.D.Cal. 1991) 135 F.R.D. 187, 190, fn.1.)

discipline is reached as a resolution, the costs to be paid by respondent under section 6086.10 are more than $300 lower contrasted to such results reached after an NDC issues.[11]

[1f] Any deprivation of the opportunity of either party to request a 20–day meeting or an ENE should be subject to the court's scrutiny in an appropriate manner. For the foregoing reasons, the State Bar Court did have the authority to assess whether respondent was deprived of these prefiling opportunities and, if so, to fashion an appropriate remedy.

B. Propriety of the order of dismissal in the furtherance of justice.

[2a] Since the September 1, 2002, effective date of subdivision (e)(2) of rule 262(e) authorizing proceedings to be dismissed in the furtherance of justice on the motion of the court, this is the first appeal raising questions about the subdivision's use. It is clear from the history of the adoption of rule 262(e) that it is designed to be construed in our court in the same manner as its analog, Penal Code section 1385, is construed in criminal proceedings.[12] Parallel to Penal Code section 1385, rule 262(e) does not permit a motion to dismiss in furtherance of justice to be made by the respondent. The motion may be made only by the State Bar, as the prosecutor, or a dismissal may be entered on the court's own motion. (Rule 262(e)(1), (2); see, as to Pen. Code, § 1385, *People v. Hernandez* (2000) 22 Cal.4th 512, 521-522.)

[2b] As the Supreme Court has observed in the criminal law, there has been a "long history in this state of dismissals in furtherance of justice, which have been authorized since 1850" and construed in many decisions. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 520, and cases there cited.) As the many cases show, a court has broad power to dismiss in the furtherance of justice, but that power is not absolute or limitless. (E.g., *People v. Orin* (1975) 13 Cal.3d 937, 945.) Under case law, a court considering a dismissal in the "furtherance of justice" must consider the rights both of the defendant and the prosecution, representing society. (*Ibid.*) Actions may not be dismissed under Penal Code section 1385 solely for the benefit of "judicial convenience or for reasons external to the case." (*People v. Hernandez*, *supra*, 22 Cal.4th at p. 525.) The liberality in favor of the power to dismiss must be tempered in cases where probable cause exists that a conviction under the charges is warranted. (*People v. Orin*, *supra*, 13 Cal.3d at p. 947.) Yet, it is also clear that dismissals under Penal Code section 1385 may be ordered before, during or after trial. (*People v. Hatch* (2000) 22 Cal.4th 260, 268, quoting *People v. Orin*, *supra*, at p. 946.)[13] Prior to ordering dismissal the judge must comply with the Penal Code duties to set forth the reason for the dismissal. (Pen. Code, § 1385(a); *People v. Orin*, *supra*, 13 Cal.3d at pp. 943–944.) The State Bar Court analog, rule 262(e)(2), (3), requires a judge to take added steps before ordering dismissal on her own motion, including invoking an order–to–show–cause procedure.

[2c] Viewing the criminal law principles surrounding Penal Code section 1385, and the terms of rule 262(e)(2), (3), we hold that the judge's action here comported fully with applicable requirements. She issued an order to show cause to the parties, allowed for responses from them, considered all appropriate interests and stated in detail her reason for dismissal. (Rule 262(e)(2), (3).) Since she acted promptly after the proceeding was filed and since the dismissal was expressly without prejudice to refiling, we see no prejudice to the State Bar.

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11. According to the costs formula adopted by the State Bar Board of Governors effective January 1, 2003, the costs for an original proceeding imposing public discipline are $1,983 plus a charge per investigation matter if the case is resolved before filing in the State Bar Court and $2,296, plus the investigation matter charge, if the case is resolved within four months after filing in the State Bar Court.

12. However, this comparison is not meant to suggest that State Bar Court proceedings are themselves comparable to criminal proceedings. (E.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301-302.)

13. *People v. Orin*, *supra*, 13 Cal.3d at page 946, notes that pretrial dismissals have been upheld for specified reasons, but we do not view such reasons as exhaustive of the permissible grounds of dismissals in the furtherance of justice.

[3a] Finally, we must decide whether the hearing judge abused her discretion in concluding that the circumstances surrounding respondent's mistaken substitution of his city for the street name on his change of address form warranted the dismissal, without prejudice. We conclude that no abuse of discretion is shown.

[3b] By citing generally our decision in *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, the State Bar claims that it "indicates" that the application of Code of Civil Procedure section 473 is limited to cases in which a respondent seeks to set aside the entry of his default. However the State Bar does not direct our attention to any specific language in *Navarro* and nothing in our reading of *Navarro* supports the State Bar's claimed limit. Indeed the legislature has not limited Code of Civil Procedure section 473 to setting aside defaults, for the plain text of the law allows a court to relieve a party from "a judgment, order, or *other proceeding taken against him* through his mistake, inadvertence, surprise or excusable neglect." (Italics added.) (See also *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at pp. 254–255.) **[4]** Moreover, in the absence of a specific statute or rule of procedure directing a specified mode of proceeding, it is not unreasonable or arbitrary for a hearing judge to utilize analogous civil procedures to resolve motions.[14] In *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214–215, we reviewed some of the key legal authorities construing Code of Civil Procedure section 473, noting that inexcusable neglect bars relief but that, in general, the law is construed liberally in favor of the party seeking relief. (See also *Pearson v. Continental Airlines* (1970) 11 Cal.App.3d 613, 618–619.)

[3c] In *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th 249, in preparing an offer to compromise a civil action (Code Civ. Proc., § 998), an attorney's legal assistant mistyped the word "against" instead of the words "in favor of." Consequently, the offer sent to the opposing counsel purported to agree to entry of a judgment *against*, rather than *in favor of* the propounding party. The Supreme Court determined that a party propounding an offer to compromise could avail itself of Code of Civil Procedure section 473 relief. In affirming the Court of Appeal's agreement with the trial court's granting of relief under Code of Civil Procedure section 473, the Supreme Court noted that the moving party was diligent in seeking relief and that the opponent suffered no apparent prejudice. Further, the court concluded that the mistaken word usage was the type of mistake eligible for relief under Code of Civil Procedure section 473. The key factors existing in *Zamora* are also found in this case: respondent's diligence in seeking relief, the lack of prejudice to the opposing party and the nature of the mistake.

[3d] The State Bar may have concluded reasonably at the time it issued the NDC that respondent had no reason to be excused from the consequences of an incorrect change of address submission. However, once the hearing judge contemplated dismissal under rule 262(e)(2) and once the uncontroverted evidence emerged as to how respondent's change of address was mistakenly composed on the change of address form, and mistakenly approved by respondent–essentially a typographical error–the hearing judge was justified in considering the mistake to come within the ambit of rule 262(e).

[3e] Indeed, given the uncontroverted evidence before the hearing judge, and the type of mistake made–confusing the actual city of respondent's law office for the name of its street address when both start with the same letter–we cannot conclude that the hearing judge abused her discretion. This is hardly

14. In addition to default procedures, several other significant procedures used in State Bar Court proceedings follow applicable California civil procedure, including disqualification of State Bar Court judges (rule 106), discovery (rule 150, et. seq.) and rules of evidence (rule 214).

the case of a respondent's deliberate inattention to investigative steps or requirements, or even, in our view, inattention rising to gross negligence.[15] We conclude that the hearing judge did not abuse her discretion in ordering the dismissal based on the evidence before her.

III. CONCLUSION

For the foregoing reasons, we deny the petition seeking review of the hearing judge's order dismissing this matter, without prejudice, in the furtherance of justice.

We concur:

WATAI, J.
EPSTEIN, J.

15. At oral argument, the State Bar urged that upholding of the hearing judge's decision would place an administrative burden on the State Bar to take extra steps to communicate with attorneys under investigation, given the many investigations it conducts annually. However, the case before us is surely atypical. As we have noted, the attorney participated in the early stage of the investigation and promptly participated when he received the NDC. There is no evidence that, but for the mistaken address change, respondent would not have responded promptly to the Bar's September 30, 2003, letter notice.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

APPLICANT B

A Member of the State Bar

No. 03-S-02904

Filed November 29, 2004

SUMMARY

The California Board of Legal Specialization denied re-certification to Applicant B as a specialist in taxation and estate planning, based in part on applicant's previous disciplinary record. Applicant appealed the Board's denial to the hearing department. The hearing judge granted the Board's motion to dismiss these proceedings for lack of jurisdiction pursuant to rule 15.2 of the Rules Governing the State Bar Program for Certifying Legal Specialists. (Hon. Robert M. Talcott, Hearing Judge.)

Applicant sought review, asserting that his prior discipline was void on its face and that he was denied his due process rights by the Board. The review department held that it did not have the authority to set the Supreme Court's order disciplining applicant and that the Rules Governing the State Bar Program for Certifying Legal Specialists expressly deprives the State Bar Court of jurisdiction to consider applicant's procedural due process challenge to the decision of the Board denying him re-certification.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal
Robert A. Henderson

For Respondent: Applicant B

HEADNOTES

[1] **101 Procedure–Jurisdiction**
130 Procedure–Procedure on Review
192 Due Process/Procedural Rights
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The review department declined to consider applicant's argument that the Supreme Court's order in his previous disciplinary matter, filed in 1998, was void on its face because of numerous

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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.

constitutional infirmities. The review department simply does not have the authority to set aside the Supreme Court's order. Once the record in applicant's previous disciplinary cases was transmitted to the Supreme Court, the review department no longer retained jurisdiction over the matter. Accordingly, the review department declined to consider applicant's collateral attack on his prior discipline.

[2a-f] **101 Procedure–Jurisdiction**
117 Procedure–Dismissal
2901 Legal Specialization Proceedings–Procedural Issues
2990 Legal Specialization Proceedings–Miscellaneous

Rule 15.2 of the Rules Governing the State Bar Program for Certifying Legal Specialists provides that a denial, suspension, or revocation of certification or re-certification by the Board of Legal Specialization based on a final disciplinary action by the Supreme Court, the State Bar Court, or any body authorized to impose professional discipline, shall be final and shall not be subject to further review. The legislative history of rule 15.2 made it abundantly clear that the State Bar proposed the adoption of this rule to the Supreme Court with the specific intent of divesting previously disciplined applicants of their right of appeal to the State Bar Court. Thus, the rule expressly deprived the State Bar Court of jurisdiction to consider applicant's procedural due process challenge. Accordingly, the review department was compelled to agree with the hearing judge, who correctly dismissed the matter for lack of jurisdiction. Although the State Bar Court lacked jurisdiction in this case, the review department construed rule 15.2 to mean that the decision of the Board denying applicant re-certification was subject to review by the Supreme Court.

OPINION

EPSTEIN, J.:

The California Board of Legal Specialization (Board) denied recertification to Applicant B[1] as a specialist in taxation and estate planning in 2003, based in part on applicant's previous disciplinary record.[2] The Board issued a tentative decision to deny re–certification on February 29, 2003, after it reviewed his application, supplemental materials and considered his responses during an oral interview held on May 17, 2002. On June 10, 2003, the Board affirmed its tentative decision after considering additional written information submitted by applicant, although rejecting his request for an additional interview. In addition to citing his prior discipline as a basis for denial, the Board denied recertification because of applicant's lack of competence in his specialty areas and his lack of candor on his application form.

Applicant appealed the Board's denial to the Hearing Department pursuant to rule 15.1, and on November 3, 2003, the hearing judge granted the Board's Motion to Dismiss these proceedings for lack of jurisdiction pursuant to rule 15.2. The hearing judge denied applicant's motion for reconsideration of the order dismissing the proceedings on November 24, 2003. Applicant here seeks review of the hearing judge's order of dismissal.

[1] Applicant asserts that the Supreme Court's Order in his previous disciplinary matter, filed in 1998, is void on its face because of numerous constitutional infirmities. Indeed, the vast majority of applicant's brief on review is devoted to legal and factual arguments in support of his effort to re–open his previous stipulated discipline. In spite of applicant's herculean efforts to re–litigate his prior discipline,[3] this court simply does not have the authority to set aside the Order of the Supreme Court, which is final. (Cal. Rules of Court, rule 951; *In re Rose* (2000) 22 Cal.4th 430, 441–442; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592; *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11.) Once the record in applicant's previous disciplinary cases was transmitted to the Supreme Court, we no longer retained jurisdiction over the matter. (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83, 85.) Thus, we decline to consider those issues raised by applicant as a collateral attack on his prior discipline.

However, applicant raises an important question that is ancillary to, yet independent of, his attack on his prior discipline, which the Board has put at issue in its brief on review. Applicant complains that the Board's actions in considering his application were "designed to avoid meeting with applicant" so that he was denied a reasonable or meaningful opportunity to

1. Because this case raises important issues of first impression, we have deemed it appropriate for publication. (Rules of Practice of the State Bar Court, rule 1340(b)(3).) However, all hearings on denial of certification and recertification are confidential unless waived by both parties under rule 15.1 of the Rules Governing the State Bar Program for Certifying Legal Specialists, and applicant has not waived confidentiality. To preserve the confidential nature of these proceedings, we have omitted the identification of applicant by name as well as certain specific facts which might disclose applicant's identity. Unless otherwise expressly stated, all references herein to "rule" or "rules" refer to the Rules Governing the State Bar Program for Certifying Legal Specialists.

2. In 1998, applicant stipulated to discipline, including 60 days' actual suspension, based on the failure to perform competently in one client matter in violation of the Rules of Professional Conduct, rule 3–110(A), and in another client matter for the failure to keep complete and accurate trust account records in violation of the former Rules of Professional Conduct, rule 8–101(B)(3) and current Rules of Professional Conduct rule 4–100(B)(3).

3. Applicant filed no less than 18 pleadings in the Hearing Department, the Review Department and the Supreme Court, in support of his effort to set aside the 1998 Stipulation and to re–open his prior disciplinary proceedings. As late as two weeks before oral argument, applicant filed a Brief on Oral Argument, a Motion to Re–open Record and to Present Additional Evidence, and a Joint Application re Stipulated Decision re Dismissal (which was opposed by the Board). We rejected these documents at oral argument as untimely and without good cause shown.

explain the nature of his prior discipline and the mitigating factors involved. Applicant asserts this resulted in a denial of his due process rights by the Board. In response, the Board asserts that rule 15.2 divests this court of jurisdiction to review *any* decision of the Board to deny certification, as long as the denial is based on a final disciplinary order. Indeed, the Board's corollary position is equally unequivocal: pursuant to rule 15.2, "this Court cannot address any claims of due process violations by the rules governing the legal specialization program, including the [Board's] procedures."

Without question, we have jurisdiction to determine the jurisdictional issue here presented. (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 464; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1228.) Moreover, we frequently consider due process challenges to an attorney's discipline. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500–503; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, *Emslie v. State Bar* (1974) 11 Cal.3d 210; *In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. 424; *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302; *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 679–680 & fn. 7.) **[2a]** Although we have serious reservations about rule 15.2, which we discuss below, we ultimately agree with the Board that rule 15.2 expressly deprives the State Bar Court of jurisdiction to consider applicant's procedural due process challenge to the decision of the Board denying him recertification.

[2b] Rule 15.2 provides in relevant part: "[A] denial, suspension, or revocation [of certification or recertification] by the Board based on a final disciplinary action by the Supreme Court, the State Bar Court, or any body authorized to impose professional discipline, shall be final and shall not be subject to further review."[4]

[2c] The legislative history of rule 15.2 makes it abundantly clear that the State Bar proposed the adoption of this rule to the Supreme Court with the specific intent of divesting previously disciplined applicants of their right of appeal to this court.[5] In October 1994, the Office of Certification of the State Bar prepared on behalf of the Board of Governors of the State Bar a detailed document entitled "Request that the Supreme Court of California Adopt Proposed Rule 983.5, California Rules of Court; [Certifying Legal Specialists], and Repeal the State Bar of California Program for Certifying Legal Specialists, and Memorandum and Supporting Documents in Explanation" ("Request"). In the Request, the State Bar explained the many changes to the legal specialization regulatory structure that would accompany the adoption of the implementing statute, proposed rule 983.5 of the California Rules of Court.

[2d] With respect to rule 15.2, the State Bar explained: "Currently, the Rules do not limit an applicant's or specialist's right to appeal a decision of the Board to deny, suspend or revoke [certification] based on a previous discipline. . . . [¶] This amendment is proposed to clarify the longstanding belief of the [Board] that the public expects that *certification as a specialist is not available to a member of the State Bar previously subject to substantial discipline*." (Emphasis added.) (Request, at Enclosure 11, p. 9; see also Request at pp. 15–16.) The Board gave the same explanation of the legislative intent for rule 15.2 in its 8th Annual Report of the California Board of Legal Specialization of the State Bar of California (1995) pages 10–11 ("Report").

[2e] Notwithstanding this legislative history, we may properly interpret the absolute language of rule 15.2 in light of existing law. (*In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at p. 433, fn. 11.) In so doing, we construe rule 15.2 to mean that the decisions of the Board denying certification

4. Rule 15.2 also specifies there is no right of review if the Board's denial is based on the failure to pass the legal specialization examination. However, there is no evidence in the record that applicant failed his exams and therefore this issue is not before us.

5. The implementation of rule 15.2 was part of a complete overhaul of the regulatory scheme for legal specialization, which the Board proposed "to streamline and standardize what had become an overly complex certification process." (17th Annual Report of the California Board of Legal Specialization of the State Bar of California (2004) p. 3.)

or recertification based on a prior final discipline shall not be subject to further review by the State Bar Court, but shall be subject to review by the Supreme Court in accordance with rule 952(d) of the California Rules of Court. We believe this construction of rule 15.2 is dictated by the implementing legislation for the Specialization Program found in California Rules of Court, rule 983.5(f), adopted by the Supreme Court on May 11, 1995, and effective January 1, 1996, which provides "Nothing in these rules shall be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law."[6]

Our interpretation of rule 15.2 also is prescribed by the State Bar Act, Business and Professions Code section 6087, which states: "Notwithstanding any other provision of law, the Supreme Court may by rule authorize the State Bar to take any action otherwise reserved to the Supreme Court in any matter arising under [the State Bar Act] or initiated by the Supreme Court; *provided, that any such action by the State Bar shall be reviewable by the Supreme Court* pursuant to such rules as the Supreme Court may prescribe." (Emphasis added.)

Finally, our construction of rule 15.2 is consistent with the decisional law. In *Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 166 (*Pinsker I*), the Supreme Court held that "an applicant for membership [in a professional organization] has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process . . . ." (See also *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 938 ["when membership in an association is a practical economic necessity, judicial review is available to examine bases for exclusion from membership." (Citations omitted.)]; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 (*Pinsker II*) [decision to deny applicant membership in a professional organization must be "both substantively rational and procedurally fair."].)

As noted *ante*, we are greatly troubled by the legislative history of rule 15.2 because it discloses that the State Bar's promulgation of the rule was specifically intended to divest applicants, who had been previously disciplined, of their right of appeal based on the Board's "longstanding belief . . . that the public expects that certification" would not be made available to *any* applicant with a prior substantial discipline. (Request at pp. 15–16; Report at pp. 10–11.) The legislative intent of the State Bar in promulgating rule 15.2 is thus directly at odds with our expressed concerns in *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 542) about the preclusive effect of a prior discipline on an attorney's right to become certified as a legal specialist in California. At oral argument in *Mudge*, the State Bar took the position that "prior discipline is a 'threshold criterion' for specialist certification." (*Ibid.*) We disagreed with that position, finding that "[n]either the Supreme Court, which retains the inherent authority to regulate attorneys, nor the Legislature has indicated that prior discipline is such a bar. [Citations.]" (*Ibid.*) The preclusion of attorneys from legal specialization based on prior discipline also is at odds with the well settled law in other areas of attorney regulation that favors rehabilitation (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 316), and which permits reinstatement of those individuals with serious prior disciplinary histories, provided they can demonstrate a sufficient passage of time and rehabilitation. (*Ibid.*; see also *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423 and cases cited therein at pp. 437–438.)

Moreover, an applicant for certification as a legal specialist is entitled to have his or her application decided in accordance with the requirements of the common law right of fair procedure, and that right includes the "meaningful opportunity to be heard in his own defense. [Citation]" (*In the Matter of Mudge*, *supra*, 2 Cal. State Bar Ct. Rptr. 543–544.) The denial of this right is the very issue presented here by

6. The inherent supervisory powers of the Supreme Court have in the past been utilized "to apply procedural rules which will guarantee a 'fair hearing.' [Citation.]" (*Smith v. State Bar* (1985) 38 Cal.3d 525, 532.)

applicant that we are prevented from considering by rule 15.2.

Were it not for the procedural safety net provided by the right of review to the Supreme Court found in California Rules of Court, rule 952(d), the unconditional language of rule 15.2 denying review by this court would in our view constitute an abrogation of applicant's common law right to fair procedure.[7] The right to fair procedure would be an empty one indeed without the opportunity for review, since the Board would be immunized from any challenge to its decision–making process by an applicant with a previous disciplinary history, no matter how remote in time or unrelated to the field of specialization for which certification is sought.[8]

Unfortunately, it appears that applicant did not timely avail himself of the avenue of relief provided to him by California Rules of Court, rule 952(d).[9] Because we have been divested of jurisdiction to review applicant's appeal, we must leave for another day and a timely petition the Supreme Court's consideration of whether rule 15.2 satisfies the due process or fair procedure claims of disciplined attorneys who are denied certification as a legal specialist by the Board because of a prior discipline. **[2f]** As sympathetic as we can be to applicant's claim, we are compelled to agree with the hearing judge below, who correctly dismissed this matter for lack of jurisdiction.

We concur:
STOVITZ, P. J.
McELROY, J.*

7. We further note that rule 15.2 effectively divests applicants with a prior discipline of the many procedural protections available to all other applicants who are challenging the Board's actions with respect to their certification as specialists. For example, rule 15.5 provides for a noticed hearing; rule 15.6 provides for a written Statement of Issues and a written Response, and for good cause, additional witnesses may be called and additional evidence may adduced; rule 15.8 applies the Rules of Procedure of the State Bar; rule 15.9 provides for an appeal of the hearing judge's decision to the Review Department; rule 15.10 provides for review by the Supreme Court. Although not expressly provided, the applicant is not proscribed from representation by counsel in the proceedings in the State Bar Court and the Supreme Court, whereas the right to counsel is expressly denied in the informal and formal oral interviews with the Board. (Rules 9.4 and 9.6.)

8. We note that applicant's misconduct occurred in 1994, that before that he had practiced without incident for many years, and that the State Bar stipulated in the prior disciplinary proceeding that he had demonstrated candor, remorse, and good faith and had fully cooperated with the investigation and prosecution of the matter. Further, applicant voluntarily paid most of the restitution to his client upon discovery of the loss to his client.

9. Parenthetically, applicant presently may re–apply to the Board for recertification (rule 16.1), and if denied, timely petition the Supreme Court directly.

* Hon. Patrice E. McElroy, Hearing Judge, sitting by designation pursuant to rule 305(e), Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROLANDO M. LUIS

A Member of the State Bar

No. 03–PM–03298

Filed December 10, 2004

SUMMARY

In 2002, respondent was suspended from the practice of law by the Supreme Court for three years, execution was stayed, and he was placed on five years' probation with conditions. In this 2003 probation revocation proceeding, the hearing judge found that respondent violated the terms of his probation and recommended that the probation be revoked, that the stay of execution of the three–year suspension be lifted and that respondent be actually suspended from the practice of law for thirty months, and until he had shown proof satisfactory to the State Bar Court pursuant to standard 1.4(c)(ii), Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. However, as the State Bar Court rules of procedure limit the amount of actual suspension that may be imposed in a probation revocation proceeding to the amount of stayed suspension originally imposed, the hearing judge limited respondent's actual suspension by recommending that it shall not exceed three years, which was the total length of stayed suspension originally imposed. (Hon. Robert M. Talcott, Hearing Judge.)

The State Bar sought review, arguing that the hearing judge had the authority to impose an actual suspension that included a standard 1.4(c)(ii) showing which could extend the length of the actual suspension beyond the length of the originally imposed stayed suspension. The review department agreed and so modified the recommended discipline in this case.

COUNSEL FOR PARTIES

For State Bar: Kimberly G. Anderson

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

[1a, b] **135.86 Procedure–Revised Rules of Procedure–Division VIII–Standard 1.4(c)(ii)**
176 Discipline–Standard 1.4(c)(ii)
A showing under standard 1.4(c)(ii), Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, is normally required when an attorney is actually suspended for two or more years. 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 are required by a preponderance of the evidence before the member is to be relieved of actual suspension. The purpose of staying the execution of a suspension and ordering probation with an actual suspension and a required showing under standard 1.4(c)(ii) is for public protection and attorney rehabilitation. Although all forms of attorney discipline have the key purpose of protecting the public, the legal community and the maintenance of high professional standards, a standard 1.4(c)(ii) requirement offers public protection in a formal, although expedited proceeding which ensures moral fitness and legal learning before an attorney, suspended for over two years, is permitted to return to the practice of law.

[2a–c] **135.82 Procedure–Revised Rules of Procedure–Division VIII–Probation**
135.86 Procedure–Revised Rules of Procedure–Division VIII–Standard 1.4(c)(ii)
176 Discipline–Standard 1.4(c)(ii)
1714 Probation Cases–Degree of Discipline
In order to make a showing under standard 1.4(c)(ii), Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, and be relieved from suspension, an attorney can petition as early as six months before the earliest date that the actual suspension may terminate. Also, since these proceedings are expedited, an attorney could demonstrate rehabilitation, fitness to practice law and present learning and ability in the general law without necessarily extending his or her actual suspension period. In probation revocation proceedings, the rules of procedure limit the actual suspension that can be imposed to the total amount of stayed execution originally imposed. However, a standard 1.4(c)(ii) condition does not necessarily extend the actual suspension of a respondent where a showing can be made within the period of actual suspension. Therefore, the review department concluded that the State Bar Court was not prohibited from recommending such a condition in a probation revocation proceeding even though the condition could result in an actual suspension that exceeded the length of the originally imposed stayed suspension. To do otherwise would permit respondent to violate probation and resume the practice of law after being suspended for over five years, without ever making a showing of his rehabilitation, fitness to practice law or his learning and ability in the general law, thus defeating the important level of public protection regularly recommended in lengthy suspensions.

ADDITIONAL ANALYSIS

Other

1751 Probation Cases–Probation Revoked
1815.09 Actual Suspension–3 Years
1830 Standard 1.4(c)(ii)

OPINION

STOVITZ, P.J.:

In recommending revocation of attorney disciplinary probation and imposition of a three–year actual suspension, we must decide whether the State Bar Court may also recommend that a previously disciplined attorney, respondent Rolando M. Luis, be required to make a showing of rehabilitation, fitness and learning, under Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct,[1] standard 1.4(c)(ii) (standard 1.4(c)(ii)), although respondent's underlying stayed suspension did not contain a requirement for that showing.

For the reasons we discuss *post*, we hold that a member of the State Bar who is recommended for an actual suspension of two years or more as a sanction for revocation of probation, may also be required to comply with the requirements of standard 1.4(c)(ii) even if that requirement was not included in the initial stayed suspension. Moreover, we determine that if the member fails to apply to return to good standing or fails to make the required showing under standard 1.4(c)(ii) prior to the expiration of the total period of stayed suspension, the member's actual suspension may be recommended to continue until the required showing is established.

In this case, we note, as also discussed *post*, that although respondent's initial stayed suspension omitted a standard 1.4(c)(ii) requirement, it was contained in his conditions of probation.

I. STATEMENT OF THE CASE

A. Background

Respondent was admitted to practice law in California on May 31, 1989. On September 1, 2001, the State Bar placed respondent on administrative inactive membership status for noncompliance with the State Bar's Minimum Continuing Legal Education (MCLE) requirements as required by section 6070, subdivision (a) of the Business and Professions Code, rule 958(d) of the California Rules of Court, and sections 13.1 and 13.2 of the State Bar MCLE Rules and Regulations.[2] Respondent was actually suspended on September 16, 2003, for failure to pay bar membership fees pursuant to section 6143, and remains suspended for that reason.

B. 2002 Original Disciplinary Proceeding, State Bar Court Case No. 01–O–00318 (*Luis I*)

Pursuant to stipulation, respondent admitted that in 2000 and 2001 he conspired to commit insurance fraud, shared legal fees with a non–lawyer, and made misrepresentations to the State Bar regarding his association with a non–lawyer contractor and his representation of clients (*Luis I*). Aggravating circumstances included that respondent's misconduct was surrounded and followed by bad faith, dishonesty, concealment and overreaching. In mitigation, after the initial exchanges of correspondence, respondent displayed spontaneous candor and cooperation with the State Bar during disciplinary proceedings.

Effective April 3, 2002, respondent was suspended from the practice of law by the Supreme Court for three years, execution was stayed, and he was placed on five years' probation with conditions including 1) a two–year actual suspension and until a required showing was made under standard 1.4(c)(ii), 2) submission of quarterly reports stating compliance with the State Bar Act and Rules of Professional Conduct, and 3) successful completion of Ethics School within one year of the effective date of discipline.

Although the two–year *actual* suspension condition required a showing satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii) before the respondent would be permitted to resume the practice of law, the

1. Unless noted otherwise, all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

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

three–year *stayed* suspension did not require such a showing.[3]

As of the date of this opinion, approximately two and one–half years have passed since the effective date of the two–year actual suspension, and respondent has not petitioned our court to have his actual suspension terminated, although he has been eligible for almost a year to file such a petition. (Rule 632, Rules Proc. of State Bar.)[4]

C. 2003 Probation Revocation Proceeding, State Bar Court Case No. 03–PM–03298 (*Luis II*)

On September 8, 2003, the State Bar filed a motion with our court's hearing department to revoke respondent's probation (*Luis II*). Respondent did not participate in these proceedings and, on January 13, 2004, the State Bar Court found by a preponderance of the evidence (rule 561) that respondent failed to comply with the terms of his probation by failing to submit quarterly reports for the April 2003 and July 2003 quarters and by failing to submit proof of successful Ethics School completion by April 3, 2003.

The State Bar Court recommended that the respondent's probation be revoked, that the stay of execution of the three–year suspension be lifted and that respondent actually be suspended from the practice of law for thirty months, and until he has shown proof satisfactory to the State Bar Court pursuant to standard 1.4(c)(ii). However, the State Bar Court then limited the actual suspension by stating that it "shall not exceed three years, which is the total length of stayed suspension originally imposed."

On January 30, 2004, the State Bar sought clarification or reconsideration of the State Bar Court's decision. Specifically, the State Bar requested clarification as to why the State Bar Court imposed a thirty–month actual suspension with a 1.4(c)(ii) showing which was not to exceed three years actual suspension. The State Bar further inquired whether the Court found the discipline of thirty months' of actual suspension more appropriate or if the Court believed that it lacked the authority to impose an actual suspension of three years and a standard 1.4(c)(ii) requirement since it might exceed the total length of stayed suspension originally imposed.

On March 15, 2004, the hearing judge issued an order clarifying his decision, stating that pursuant to rule 562, any actual suspension recommended could not exceed the three–year period of stayed suspension in the underlying disciplinary matter. While the hearing judge agreed that respondent should be required to comply with standard 1.4(c)(ii) before he is permitted to practice law again, the judge stated that attaching that requirement to the actual suspension would be meaningless because it must terminate at the end of the three–year period. On April 8, 2004, the State Bar filed a request for summary review pursuant to rule 308, not requesting oral argument, and we submitted the matter without argument.

II. DISCUSSION

In a probation revocation proceeding, as a general rule, the hearing judge is limited by rule 562 and may not recommend an actual suspension as a sanction for probation revocation that exceeds the originally stayed suspension. The issue here is whether the hearing judge had the authority to impose an actual sentence that includes a standard 1.4(c)(ii) showing which may extend the length of stayed suspension beyond that originally imposed.

The original discipline recommended in *Luis I* required respondent as *a condition of probation* to make a standard 1.4(c)(ii) showing before he could resume the practice of law. Thus, the respondent's suspension could continue indefinitely, even after the

3. The form of stipulated disposition used by the parties provided the opportunity to choose a standard 1.4(c)(ii) requirement to attach to the three year stayed suspension, but neither party chose it, and it was approved in that manner by the hearing judge.

4. Unless noted otherwise, all further references to rules are to the Rules of Procedure of the State Bar of California.

period of actual suspension had expired. At first glance, this indefinite suspension appears to moot the issue on review. However, by recommending a full revocation of probation, the effect of the hearing judge's decision effectively eliminates all of the conditions of probation, including the showing under standard 1.4(c)(ii) that imposed the potentially indefinite suspension in the original proceeding.

Although State Bar Court proceedings are unique and not strictly civil, criminal or administrative in nature (e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300–302), we have looked at criminal procedure in evaluating some probation revocation issues. (See, e.g., *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Under California criminal procedure, when a court revokes a defendant's felony probation, it has the "option of either placing defendant on probation once again, on the same or modified conditions, or terminating probation and sentencing defendant to state prison. [Citations.]" (*People v. Hawthorne* (1991) 226 Cal.App.3d 789, 792). Although the criminal courts have discretion in imposing probation with modified conditions or terminating probation, once probation is terminated, if the judgment has been pronounced and its execution stayed, the court does not have discretion and must order that the judgment be imposed in full force and effect. (*People v. Howard* (1997) 16 Cal.4th. 1081, 1088, citing Pen. Code, § 1203.2, subd. (c)[5]; Cal. Rules of Court, rule 435(b)(2) (now rule 4.435(b)(2)).) Nevertheless, once probation is revoked, the conditions of that probation are also revoked. (See, e.g., *People v. Young* (1995) 38 Cal.App.4th 560, 562.)

A. The State Bar's Contentions

The State Bar presents four arguments in this case. First, it argues that the hearing department is not limited by rule 562 in recommending the full amount of stayed suspension originally imposed *and* a showing under standard 1.4(c)(ii). Second, the State Bar argues that rule 562 does not preclude the hearing department from imposing a standard 1.4(c)(ii) showing, even when the discipline in *Luis I* did not expressly include such a showing as a condition of the *stayed* suspension. Third, the State Bar argues that the purpose of imposing a standard 1.4(c)(ii) showing is not to extend the respondent's actual suspension period, but rather to protect the public. Fourth, the State Bar contends that the hearing department's decision in *Luis II* which terminates the respondent's actual suspension at the end of three years, effectively eliminates a showing under standard 1.4(c)(ii), thus depriving the public of needed protection.

B. *Howard* and *Hunter*

We have decided two cases that shed limited light on this matter: *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445 (*Howard*) and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81 (*Hunter*).[6] Although we have never expressly articulated whether rule 562 allows a standard 1.4(c)(ii) showing that may extend the actual suspension beyond the stayed suspension originally imposed, we have implicitly authorized it in *Howard*. Also, in *Hunter* we required a restitution requirement before the respondent in that case was permitted to resume the practice of law, and, if respondent was to be actually suspended for

5. Penal Code section 1203.2, subdivision (c) provides in relevant part, "Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. However, if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect."

6. We have also discussed briefly in *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 286 (*Dahlz*) the addition in an *original disciplinary proceeding* of a standard 1.4(c)(ii) requirement as part of a stayed suspension. However, in *Dahlz*, our brief reference to standard 1.4(c)(ii) was merely designed to show that its provisions there would become effective only upon the setting aside of the stayed suspension. (*Ibid.*) Moreover, *Dahlz* identified that if probation were subsequently revoked, no issue would be raised, as is now before us, as to the court's ability to require compliance with standard 1.4(c)(ii). (*Ibid.*)

more than two years, we recommended a showing under standard 1.4(c)(ii), even though such conditions were not part of the original discipline.

In *Howard*, the Supreme Court suspended the attorney from the practice of law for three years, stayed the execution of the suspension and placed him on probation for three years, subject to certain conditions including a thirty–day actual suspension. The original disciplinary suspension did not include a standard 1.4(c)(ii) requirement. When Howard failed to meet the conditions of probation and defaulted in the proceedings, his probation was revoked and the hearing judge recommended an actual suspension of 90 days. The State Bar requested review regarding the degree of discipline, arguing that the recommended discipline be increased to two years and include a required showing under standard 1.4(c)(ii). On review, we recommended that the degree of discipline be increased to a one–year actual suspension and until Howard had satisfied the requirements under standard 1.4(c)(ii). In doing so, we noted that Howard had already been inactively enrolled continuously for over one year and, cumulatively, the inactive enrollment and the one–year actual suspension had rendered Howard ineligible to practice law for over two years.

In *Hunter*, the Supreme Court suspended the attorney from the practice of law for one year, stayed the execution of that suspension and placed him on probation for three years with a thirty–day actual suspension and imposed other conditions, including restitution. When Hunter later violated probation, the hearing judge recommended that his probation be revoked and he be actually suspended for one year and until he made the restitution ordered in his underlying suspension. We adopted the hearing judge's recommendation by recommending that Hunter be actually suspended for one year and until he provided proof of restitution as ordered in his underlying suspension. We therefore recommended restitution in a probation revocation proceeding where such a condition could extend the attorney's period of actual suspension. In addition, we recommended that if Hunter's actual suspension were to last longer than two years, a showing under standard 1.4(c)(ii) would be required. A requirement under standard 1.4(c)(ii) was added since Hunter's suspension would last longer than originally imposed. Lastly, in a footnote in *Hunter* we stated that the condition of restitution does not extend the period of suspension where a respondent may satisfy these conditions during the period of actual suspension. (*Hunter*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 87, fn. 4.)

In both *Howard* and *Hunter*, we recommended a standard 1.4(c)(ii) requirement after the revocation of probation where such a requirement was not a part of the originally imposed sentence and where it would not necessarily extend the suspension beyond that imposed in the original proceeding, providing that the attorney complied with the respective duties within the original period of the actual suspension. In each case, the Supreme Court adopted our recommendation.

C. Policy Underlying Standard 1.4(c)(ii)

[1a] A showing under standard 1.4(c)(ii) is normally required when an attorney is actually suspended for two or more years. 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 are required by a preponderance of the evidence before the member is to be relieved of actual suspension. (Rule 634.)

[1b] The purpose of staying the execution of a suspension and ordering probation with an actual suspension and a required showing under standard 1.4(c)(ii) is for public protection and attorney rehabilitation. (See *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298–299; see also std. 1.3; std. 1.4(c)(ii).) Although all forms of attorney discipline have the key purpose of protecting the public, the legal community and the maintenance of high professional standards (std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 318; *In re Nevill* (1985) 39 Cal.3d 729, 734; *In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 580 (*Murphy*)), a standard 1.4(c)(ii) requirement offers public protection in a specially needed area: a formal, although expedited and simpler proceeding than a formal reinstatement proceeding, which normally

ensures moral fitness and legal learning before an attorney, suspended for over two years, is permitted to return to the practice of law.[7]

Looking at criminal law analogously, in *People v. Young*, *supra*, 38 Cal.App.4th at page 565, the court suspended the defendant's sentence and placed him on probation with the condition that the defendant pay restitution to the crime victim. The defendant violated probation and argued that restitution could not be ordered when probation is revoked if the originally suspended sentence did not include an order of victim restitution. (*Ibid.*) The court disagreed with the defendant, stating that it would be absurd to interpret the statute limiting probation revocation sentencing as requiring victim restitution when probation is granted and when probation is denied but not when probation is revoked. (*Id.* at p. 566.) The court further noted that the defendant's claim would allow the defendant to accept probation and violate it the next day and thereby avoid making restitution to the victim. (*Ibid.*) The court in *Young* stated that the intent of the statute would prevail over the literal construction and concluded that "victim restitution does not constitute an increase in punishment where it was a condition of probation and is continued as part of a sentence following revocation of probation." (*Ibid.*)

We discuss *Murphy*, *supra*, 3 Cal. State Bar Ct. Rptr. at page 579 and *In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 299) (*Terrones*) to distinguish those cases from the present one. In *Murphy*, which was followed by *Terrones*, we rejected the distinction that a standard 1.4(c)(ii) proceeding is regulatory rather than disciplinary in nature. *Murphy* and *Terrones* were both cases in which a suspended attorney sought relief from suspension by petitioning the court for a hearing to establish the requisite showing under standard 1.4(c)(ii). In both cases, the hearing judge granted the petition and permitted the disciplined attorney to resume the practice of law. The State Bar sought review in *Murphy* and argued that a standard 1.4(c)(ii) proceeding was regulatory for the purposes of protecting the public and not disciplinary in nature. We rejected the distinction that a standard 1.4(c)(ii) proceeding was purely regulatory, and held instead that it was disciplinary, and that decision was later followed in *Terrones*. Nothing in *Murphy* and *Terrones* militates against our holding here.

In many other states, attorneys who are suspended actually must petition for reinstatement or establish rehabilitation and fitness before being permitted to practice law after the basic period of suspension.[8] This requirement translates into an indefinite suspension for attorneys who choose not to

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7. [2a] In order to make a showing under standard 1.4(c)(ii) and be relieved from suspension, an attorney can petition as early as six months before the earliest date that the actual suspension may terminate. (Rule 632.) Also, since these proceedings are expedited (rule 630(b)), a petitioner could demonstrate rehabilitation, fitness to practice law and present learning and ability in the general law without necessarily extending his or her actual suspension period.

8. ABA/BNA Lawyers' Manual on Professional Conduct at page 101:3006. The rules of at least 18 other states require reinstatement for suspensions varying from over sixty days in some states to suspensions of over one year in others.

For a state requiring reinstatement after suspensions of sixty days, see Iowa Court Rules, rule 35.12 (2).

For states requiring reinstatement after suspensions of ninety days, see Rules Regulating the Florida Bar, rule 3–5.1(e); Minnesota Rules on Professional Responsibility, rule 18.

For states requiring reinstatement after suspensions of six months, see Arizona Rule of the Supreme Court 64(c); Delaware Lawyers' Rules of Disciplinary Procedure, rule 22(a); Illinois Supreme Court Rule 764; Indiana Rules for Admission to the Bar and the Discipline of Attorneys, rule 23, sections 3(a) and 4(a), (c) (requiring reinstatement for indefinite suspensions as well as definite suspensions exceeding six months); Kentucky Rules of the Supreme Court, rule 3.510 (1); Maryland Rules, rule 16–781(d)(1) (requiring reinstatement for indefinite suspensions and suspensions for more than six months); Rules of Discipline for the Mississippi State Bar, rule 12; Ohio Supreme Court Rules for the Government of the Bar of Ohio, Rule V, section 10(A), (C) (requiring reinstatement for indefinite suspensions as well as definite suspensions of six months or more); Oregon State Bar Rules of Procedure, rule 8.1(a).

For states requiring reinstatement after suspensions of one year, see Colorado Rules of Civil Procedure, rule 251.29(b); Pennsylvania Rules of Disciplinary Enforcement, rule 218(a); Tennessee Supreme Court Rule 9, section 4.2.

Finally, for a state that requires reinstatement for any suspension other than for nonpayment of membership fees, see West Virginia Rules of Lawyer Disciplinary Procedure, rule 3.30.

petition or fail to make the necessary showing. California, by contrast, is more lenient than many other states in not ordinarily requiring a showing of rehabilitation unless the actual suspension is two or more years. Also, the American Bar Association Model Rules for Lawyer Disciplinary Enforcement recommend that attorneys suspended for more than six months should be required to petition for reinstatement to protect the public and that reinstatement is appropriate upon a showing of rehabilitation. (ABA Model Rules for Lawyer Disciplinary Enforcement, rule 25; see also ABA Stds. for Imposing Lawyer Sanctions, std. 2.3.)[9] In other states, the purpose of requiring reinstatement after a lengthy suspension is also to protect the public. (See, e.g., *Driscoll v. People* (Colo. O.P.D.J. 2003) 77 P.3d 471, 477; *Matter of Reinstatement of Page* 2004 Ok 49, ¶ 3 [94 P.3d 80, 82]; *In re Starr* (2000) 330 Or. 385, 389 [9 P.3d 700, 704]; *Matter of Bucci* (R.I. 1994) 643 A.2d 192,193–194; *State ex rel. Florida Bar v. Hogsten* (Fla. 1961) 127 So.2d 668, 670; *Matter of Woolbert* (Ind. 1996) 672 N.E.2d 412, 417.)

D. Effect of Standard 1.4(c)(ii) Does Not Necessarily Extend Suspension Period

[2b] Imposing a condition under standard 1.4(c)(ii) does not necessarily extend the actual suspension. As we noted in *Hunter*, the respondent could satisfy the condition before the period of actual suspension terminates. (Std. 1.4(c)(ii); *Hunter, supra,* 3 Cal. State Bar Ct. Rptr. at p. 87, fn. 4.) Here, respondent had notice of his probation and the conditions, including the standard 1.4(c)(ii) condition, and not only did he violate probation, but he did not participate in these proceedings.[10]

[2c] In probation revocation proceedings, rule 562 limits the recommended actual suspension to the total amount of stayed execution originally imposed. However, a standard 1.4(c)(ii) condition does not necessarily extend the actual suspension of a respondent where a showing can be made within the period of actual suspension. Therefore, although a standard 1.4(c)(ii) requirement was not attached to the three–year stayed suspension, following the implicit authority to do so in *Hunter*, and persuaded by the analogy in *People v. Young*, *supra*, 38 Cal.App.4th 560 we are not prohibited from recommending such a condition in a probation revocation proceeding. To do otherwise would permit respondent to violate probation and resume the practice of law after being suspended for over five years, without ever making a showing of his rehabilitation, fitness to practice law or his learning and ability in the general law, thus defeating the important level of public protection regularly recommended in lengthy suspensions, which was imposed as a condition of probation.

III. CONCLUSION

For the foregoing reasons, we find that rule 562 does not limit the State Bar Court's authority to impose a standard 1.4(c)(ii) requirement in a probation revocation recommendation, even where the originally stayed suspension did not include such a requirement or where the recommendation for actual suspension as a form of discipline will exceed two years.

The hearing judge in *Luis II* recommended a thirty–month suspension with a showing under standard 1.4(c)(ii) for only six months as an incentive for respondent to end his suspension within three years by making a satisfactory showing of rehabilitation. The hearing judge agreed that the respondent should be required to demonstrate his rehabilitation before being permitted to return to the practice of law, to afford protection to the public. However, the hearing judge limited the total period of suspension to three years pursuant to rule 562. Although the hearing judge was correct in not recommending an actual

9. ABA standard 2.3 states, in part, that "Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with all applicable discipline or disability orders and rule, and fitness to practice law." ABA standard 2.3 advocates reinstatement for all suspensions since it also recommends that suspensions be of six months or greater.

10. We offer no opinion in this case as to whether or not respondent has made the requisite showing under standard 1.4(c)(ii) should he petition to terminate his actual suspension.

suspension that necessarily exceeded the stayed suspension in the underlying disciplinary matter, he incorrectly concluded that a standard 1.4(c)(ii) showing was not available unless it were limited to a duration of six months.

IV. FORMAL RECOMMENDATIONS

For the reasons stated, we recommend to the Supreme Court that respondent Rolando M. Luis's probation in Supreme Court matter S102790 (State Bar Court case no. 01–O–00318) be revoked; that the stay of execution of the previous suspension be lifted; and that respondent be actually suspended from the practice of law for three years[11] and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. We also recommend that the State Bar be awarded costs in this matter pursuant to section 6068.10 of the Business and Professions Code and that those costs be payable in accordance with section 6140.7 of the Business and Professions Code.

Since respondent is already under a duty to pass the Multistate Professional Responsibility Examination in *Luis I*, we do not again recommend that he be required to take and pass the examination. We are not recommending that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court, since respondent was already ordered to comply with these requirements incident to his actual suspension in *Luis I*.

We concur:

WATAI, J.
EPSTEIN, J.

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11. The hearing judge in *Luis II* would have recommended a three–year actual suspension when revoking probation, but also wanted to recommend a standard 1.4(c)(ii) requirement and he believed he was limited to three years for all recommendations per rule 562. Thus, we regard our recommendation of three years' actual suspension and until a 1.4(c)(ii) requirement as essentially consistent with the hearing judge's overall aim in recommending discipline.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DEMETRA PASYANOS

A Member of the State Bar

No. 02–O–11558

Filed January 13, 2005

SUMMARY

After respondent's admission to practice, the State Bar brought an original disciplinary proceeding based on respondent's pre–admission failure to update her moral character application to disclose a misdemeanor complaint charging battery and disobedience of a restraining order. The hearing judge found that respondent knowingly failed to disclose a material fact on her moral character application in violation of Rules of Professional Conduct, rule 1–200(A). However, because the hearing judge found no intent to conceal the misdemeanor complaint or to mislead the Committee of Bar Examiners, finding instead an oversight or innocent mistake, the hearing judge declined to conclude that respondent's omission involved moral turpitude. The hearing judge further determined that cancellation of respondent's law license would be grossly excessive and instead recommended public reproval. (Hon. Patrice McElroy, Hearing Judge.)

On review, the State Bar urged that respondent's license to practice law be canceled and that her admission to the practice of law be revoked, contending that the Committee of Bar Examiners was denied the right to make a full and informed evaluation of respondent while a candidate for admission and that respondent should be placed in the same position in which she would have been had she disclosed the misdemeanor complaint. The State Bar also contended that respondent's failure to update her application to disclose the criminal charges was an act of moral turpitude. The review department rejected these contentions, concluding that this was an appropriate case in which to recommend discipline, rather than license cancellation, and adopted the hearing judge's public reproval recommendation.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: Erica Tabachnick

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

[1a–d] **139 Procedure–Miscellaneous**
191 Effect/Relationship of Other Proceedings

When a member of the State Bar has committed misconduct prior to admission to practice law, the State Bar may seek the attorney's discipline or seek to recommend the cancellation or revocation of the member's law license. Depending on the balance of facts and circumstances unique to each case, either or both alternatives could be considered in appropriate cases. It appears that the Supreme Court considers cancellation the appropriate step when an applicant has wrongfully obtained the benefits of admission such as by intentional misrepresentation which prevents the Committee of Bar Examiners from adequately considering the applicant's fitness to practice. Although respondent should have timely updated her application to disclose to the Committee of Bar Examiners misdemeanor charges against her, as she had a duty to do so under the Rules Regulating Admission to Practice Law and it bore upon her application to practice law, the nondisclosure was not intended to and did not result in wrongfully conferring on respondent the benefit of law licensure. Given the formal record of the events surrounding respondent's misdemeanor charges before the review department, the Committee of Bar Examiners was not deprived of the opportunity to adequately consider respondent's fitness to practice such that respondent wrongfully obtained the benefit of law licensure. Therefore, the review department did not recommend cancellation of respondent's law license.

[2a, b] **251.30 Rule 1–200(A) [no former rule]**

Respondent stipulated that she did not disclose to the Committee of Bar Examiners pending misdemeanor charges against her, nor did she disclose to the State Bar after her admission to practice law her conviction of challenging another person in a public place to fight. When respondent was charged criminally, there was no formal record of those events before the Committee of Bar Examiners. It was therefore incumbent on respondent to timely and candidly disclose the charges and her later conviction so that the Committee of Bar Examiners could make adequate inquiry. The criminal charges and subsequent convictions were "material facts" within the meaning of Rules of Professional Conduct, rule 1–200(A). "Materiality" used in the context of this rule is a substantial likelihood that a reasonable person would consider it important in evaluating whether an applicant for admission to the practice of law is of requisite good moral character. Materiality for purposes of this rule does not mean facts that are necessarily outcome–determinative of a finding of moral character. Information is material for purposes of the rule when it is specifically required to be disclosed on the application for admission or is of the nature that it comes within the continuing duty to update the application. The information regarding respondent's criminal charges, when taken in the context of respondent's application for admission, would have been considered by the Committee of Bar Examiners as relevant to its determination of respondent's moral fitness or capacity to practice law and was therefore material, even though the information in all likelihood would not have affected the ultimate determination of moral fitness to practice law.

[3a–c] **221.00 State Bar Act–Section 6106**

The review department concluded that respondent's failure to update her moral character application to disclose misdemeanor charges did not involve moral turpitude where (1) the hearing judge (and review department) gave credibility to respondent's testimony of innocent mistake and no intent to mislead the Committee of Bar Examiners; (2) respondent disclosed other litigated matters, including those involving her former husband; (3) the non–disclosed charges took place 10 or 11 months after the submission of the moral character application; and (4) the review department

agreed with the hearing judge that respondent could not have reasonably believed that the disclosure of the misdemeanor charges of a domestic dispute, combined with all other information in the application, was crucial and would adversely affect her admission to practice law.

ADDITIONAL ANALYSIS

Culpability

Found

251.31 Rule 1–200(A) [no former rule]

Not Found

221.50 Section 6106

Discipline

1041 Public Reproval–With Conditions

OPINION

BY THE COURT[1]:

The principal question presented in this matter is: whether respondent Demetra Pasyanos's failure to update an Application for Determination of Moral Character submitted to the Committee of Bar Examiners (CBE) in order to disclose a 2001 misdemeanor complaint charging battery and disobedience of a restraining order warrants cancellation of respondent's Bar license or, alternatively, discipline.

In an original disciplinary proceeding brought after respondent's admission to practice, based on the foregoing, the hearing judge found that respondent knowingly failed to disclose a material fact in violation of rule 1–200(A) of the Rules of Professional Conduct[2] in connection with her application for admission. The judge found no intent of respondent to conceal or to mislead the CBE, but rather found an oversight or innocent mistake on the part of respondent. As a result, the hearing judge found no violation of section 6106 of the Business and Professions Code.[3] She determined that cancellation of respondent's law license "would be grossly excessive" and recommended public reproval.

The State Bar urges cancellation of respondent's license to practice law and the revocation of her admission to the practice of law, contending that the CBE was denied the right to make a full and informed evaluation of respondent while a candidate for admission to the State Bar and that respondent should be placed in the same position she would have been in had she disclosed the misdemeanor complaint against her. According to the State Bar, respondent's failure to update her application to disclose the criminal charges was an act of moral turpitude.

Respondent points to her testimony that her failure to report the charges to the CBE or to the State Bar was inadvertent and an oversight, done without any intent to mislead the CBE. She contends that the oversight was not of a material fact. She does not dispute the public reproval recommended below.

On review, we granted a motion to augment the record submitted by the State Bar, reserving consideration and weight to be given to this additional evidence which documented respondent's criminal court sentencing. We find that this evidence, which was not before the hearing judge, bears only remotely on the issues before us, therefore justifying only negligible weight.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that this is an appropriate case in which to recommend discipline, rather than license cancellation. We shall adopt the hearing judge's findings and her recommendation as to discipline and impose public reproval on respondent on the conditions set forth in the hearing judge's decision.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent events are not disputed and may be summarized partly in tabular form as follows:

Mar. 2000
Respondent filed her Application for Determination of Moral Character.

Feb. 26, 2001
Misdemeanor Complaint charging violation of Penal Code sections 243, subdivision (e)(1) and 166, subdivision (a)(4) was filed. The charges were not reported to the CBE.

Mar. 28 to Nov. 16, 2001
Respondent personally appeared in superior court on the charges.

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1. Before Stovitz, P. J., Watai, J. and Epstein, J.

2. Unless noted otherwise, all further references to rules are to these Rules of Professional Conduct.

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

Nov. 19, 2001
Respondent was admitted to the practice of law in California.

Jan. 18, 2002
During an appearance on the criminal charges, respondent disclosed to the superior court that she was an attorney.

Feb. 1, 2002
The criminal charges were amended to charge respondent with one misdemeanor count of Penal Code section 415, subdivision (1) (challenging another person in a public place to fight). Respondent pleaded nolo contendere to the charge and all other charges were dismissed. Respondent was released on her own recognizance on the condition that she comply with five specified conditions. Sentencing was continued to February 2004, at which time, if respondent had complied with the conditions of her release and if she could establish her rehabilitation, she would be able to seek an order dismissing the conviction or reducing it to an infraction. The conviction was not reported to the CBE or any other office of the State Bar.

July 18, 2002
Notice of disciplinary charges (NDC) was filed by the State Bar charging rule 1–200(A) (false statement regarding admission) and section 6106 (acts of moral turpitude, dishonesty or corruption).

Dec. 17, 2002
Respondent and the State Bar entered into a partial stipulation of facts.

May 8, 2003
Hearing judge's decision filed with the finding of culpability of rule 1–200(A) in count 1, knowingly failing to disclose a material fact in connection with an application for admission to the State Bar. She found no culpability of section 6106 in count 2, commission of any act involving moral turpitude.

Respondent stipulated that she failed to update her application for admission. She testified that she had no intention to mislead the CBE and that the non–disclosure was an innocent oversight. She pointed to the fact that she had disclosed at least ten litigated matters, including three matters between herself and David Yardley, the victim of her criminal conviction at issue here. Respondent and Yardley have an extensive history of a continuing feud, as supported by the many incidents and restraining orders between them. William J. Hardy, an attorney for whom respondent worked for about six months and who represented her in the underlying criminal incident, testified that Yardley and respondent have joint custody of their son and that their relationship has been contentious. He further testified that charges of battery and vandalism have been directed at each other and Yardley has been arrested and prosecuted and respondent has been arrested and prosecuted for these charges.

As to the particular incident in question, respondent testified that she had arranged with Yardley to obtain $20 from him. He instructed her to meet him at a theater. When she approached him, he took the bill out of his wallet and offered it to her, but wouldn't release it when she grasped it. They struggled over the money and fell to the ground with respondent on top. She left the theater without the money. Yardley filed a criminal complaint against her and she ultimately pleaded nolo contendere to violation of Penal Code section 415, subdivision (1), making a challenge to fight in public. All other charges were dismissed. Sentence was deferred to February 2004, and respondent was released on her own recognizance with conditions.

Respondent presented seven character witnesses, including two attorneys and five lay persons, who attested to her honesty and trustworthiness. They also agreed, unequivocally, as a general matter that the CBE should be given all pertinent information for proper evaluation but that respondent did not demonstrate dishonesty in not revealing the misdemeanor charges. Respondent testified about her pro bono work through law school and continuing today.

No evidence was presented to contradict this character evidence, and the hearing judge found no aggravating circumstances. At oral argument, the State Bar stated that it was not seeking to discipline respondent in this proceeding for any misconduct surrounding the incident with Yardley, other than for her non–disclosure of it to the CBE.

DISCUSSION

[1a] When a member of the Bar is alleged to have committed misconduct prior to admission to practice law, the decisional law offers two alternatives: the State Bar may undertake an original disciplinary proceeding as occurred here and seek the attorney's discipline (*Stratmore v. State Bar* (1975) 14 Cal.3d 887, 890–891; see also *In re Bogart* (1973) 9 Cal.3d 743, 749), or it may seek to recommend that the Supreme Court cancel or revoke the law license previously issued (e.g., *Goldstein v. State Bar* (1989) 47 Cal.3d 937; *State Bar v. Langert* (1954) 43 Cal.2d 636; *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483). Although these two alternatives exist, it appears, as we shall note, that the Supreme Court considers cancellation, rather than discipline, the appropriate step when an applicant has wrongfully obtained the benefits of admission such as by intentional misrepresentation which prevents the CBE from adequately considering the applicant's fitness to practice.

[1b] Prior to considering each alternative, we have concluded that respondent should have disclosed timely to the CBE, by updating her application, her arrest and ultimate conviction of the misdemeanor offense. She had a duty to do so under the CBE rules[4] and it bore upon her application to practice law even though, as we shall conclude, her non–disclosure was not intended to and did not in this case result in conferring wrongfully on respondent the benefit of law licensure.

License cancellation.

We review first the alternative of license cancellation as urged here by the State Bar.

The State Bar cites *State Bar v. Langert*, *supra*, 43 Cal.2d 636, to support its argument to justify revoking the order admitting respondent to practice in California. We do not agree with the State Bar's reading of the case.

In *State Bar v. Langert, supra,* 43 Cal.2d 636, there was a deliberate concealment of material facts in a verified application to the CBE in 1944. Langert stated in his application that he had never held a license; that he had never been reprimanded, censured or otherwise disciplined as an attorney; that no charges had ever been made or filed against him; that he had worked in several capacities, none of which was the practice of law; and he gave his Illinois addresses in Chicago, Peoria, and Henry. It was then learned that Langert had been admitted to the Bar in Illinois, had practiced law in Rock Island, Illinois, for his entire legal practice from 1927 to 1938, had been charged with unprofessional conduct and, after a hearing in 1941, there was a recommendation that Langert be disbarred. The Supreme Court held that it was Langert's duty to truly answer the questions asked by the CBE and that the facts with respect to his prior conduct in the practice of the law in Illinois might have justified an order refusing to allow him to take the bar examination in this State. The court concluded that the CBE's approval of Langert was based on the admitted false answers in his application. Thus, the Supreme Court vacated its order admitting Langert and cancelled his license to practice law.

We are also directed to *Goldstein v. State Bar*, *supra*, 47 Cal.3d 937. Goldstein had been denied admission to the State Bar in 1983 because he did not possess the requisite moral character and had been allowed to re–apply after three years. He re–applied after only two years in 1985 and failed to disclose that he had been denied admission once before. His failure to disclose this prior denial of admission was found to be willful, and he was found to have been admitted to the State Bar without adequate consideration of his

4. Rule VI, section 7, of the Rules Regulating Admission to Practice Law in California, in effect during the pendency of respondent's application, reads as follows: "Until they have been admitted, applicants are under a continuing obligation to keep their applications current and must update responses whenever there is an addition to or a change to information previously furnished the Committee. Applicants shall annually file during the month of their birth a statement made under penalty of perjury that there have been no changes to the information provided in their previously filed application or if there have been changes, the nature of the changes. The annual filing shall not be required of an applicant until at least twelve (12) months have elapsed since the filing of his or her Application for Determination of Moral Character."

moral character. His law license was cancelled. The court considered the State Bar's suggestion that it disbar Goldstein but determined that the appropriate step, as in *State Bar v. Langert, supra,* 43 Cal.2d 636, was to withdraw from him the benefits he obtained wrongfully by his dishonesty.

In *In the Matter of Ike, supra,* 3 Cal. State Bar Ct. Rptr. 483, a conviction referral matter, Ike had been admitted to the practice of law after eight unsuccessful attempts at taking the examination. He concealed from the CBE, by not updating his application form, his arrest and pending trial on 11 felony charges, including conspiracy to commit theft, grand theft of more than $25,000 and forgery. After admission to the practice of law, he pleaded to two of the felony charges. He, then, notified the State Bar of his guilty pleas. Ike's non–disclosure of the felony charges was found to be willful, especially in light of his eight separate applications filed with the CBE in which he was reminded that disclosure or update was required. We considered the facts and circumstances of Ike's convictions of theft and conspiracy to commit theft and determined that Ike lacked the essential qualities of honesty and trustworthiness and was unfit to practice law. We 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.]' [Citation.]" (*Id.* at p. 492.) We recommended that the Supreme Court vacate its order admitting Ike to the practice of law or in the alternative recommended that he be disbarred.

Summarizing these cases cited above, Langert failed to disclose his background as an attorney who had been disbarred; Goldstein failed to disclose the fact that he had been found not morally fit to practice law two years before; and Ike failed to disclose 11 felony charges of conspiracy to commit theft, grand theft and forgery. The facts and circumstances surrounding their undisclosed matters clearly established that they intentionally concealed material facts which deprived the CBE from any reasonable ability to assess these applicants' moral fitness.

Attorney discipline.

The lead precedent involving attorney discipline for pre–admission misconduct is *Stratmore v. State Bar, supra,* 14 Cal.3d 887. Stratmore was admitted to the Bar in 1972. He was ordered to show cause why the order admitting him to the practice of law should not be revoked for his misconduct committed about a year before his admission to the practice of law. He was charged with knowingly making false representations in 1971 to 11 New York law firms regarding his job interview expenses with the intent to deceive and wrongfully obtain money. The Supreme Court found that it was irrelevant that Stratmore's misconduct preceded his admission to practice and noted that the court's concern lies in protecting the public's right to representation by attorneys who are worthy of trust. The court held that under its inherent power, it could "discipline an attorney for conduct 'either in or out of [his] profession' which shows him to be unfit to practice (*The People v. Turner* [(1850)] 1 Cal. 143, 150). . . ." (*Id.* at p. 890.) Stratmore was suspended from the practice of law for two years, execution stayed, and placed on probation for two years on condition that he was actually suspended for the first nine months. Although the court noted at the outset that the proceeding had sought Stratmore's license cancellation, in deciding the case, it discussed only lawyer discipline.

In *In the Matter of Ike, supra,* 3 Cal. State Bar Ct. Rptr. at page 494, we discussed the basis for our alternative recommendation of disbarment for Ike's conviction of crimes inherently involving moral turpitude arising prior to his admission to practice law, and undisclosed to the CBE. As noted, *ante,* the Supreme Court chose to cancel Ike's license rather than to discipline him.

Comparison of the two alternatives and applicability to this case.

[1c] In *Goldstein v. State Bar, supra,* 47 Cal.3d 937, and *State Bar v. Langert, supra,* 43 Cal.2d 636, the Supreme Court expressly chose

license cancellation over discipline. In *Stratmore v. State Bar, supra,* 14 Cal.3d 887, the court discussed only discipline. This does not necessarily create only one appropriate course for all cases of pre–admission misconduct or failure to disclose material facts on an application for admission. Depending on the balance of facts and circumstances unique to each case, either or both alternatives could be considered in appropriate cases. (See *In the Matter of Ike, supra,* 3 Cal. State Bar Ct. Rptr. 483.) In this case, we conclude, as did the hearing judge, and as the Supreme Court concluded in *Stratmore, supra,* 14 Cal.3d 887, that attorney discipline is the appropriate resolution.

[1d] There is no evidence that respondent's non–disclosure was intended to thwart the CBE's consideration of her moral fitness, and she revealed to the CBE other matters involving Yardley. Given the formal record of the events surrounding respondent's misdemeanor charges now before us, we cannot agree with the State Bar's position that the CBE was deprived of the opportunity to adequately consider respondent's fitness to practice so that respondent wrongfully obtained the benefit of law licensure. For this reason, we do not recommend cancellation of her license. However, we cannot condone respondent's failure to disclose the misdemeanor charges in a timely manner, which, as we discuss below, constituted a breach of the duties prescribed by rule 1–200(A). We therefore consider the alternative of attorney discipline and, by independently reviewing the record, determine whether the State Bar proved by clear and convincing evidence grounds for respondent's discipline, based on her non–disclosure.

Attorney discipline: rule 1–200(A) and section 6106.

[2a] Rule 1–200(A) prohibits a member from knowingly making a false statement regarding a material fact or knowingly omitting a material fact in connection with an application for admission to the State Bar. The hearing judge found that respondent knowingly failed to disclose a material fact to the CBE in violation of rule 1–200(A). We agree. Respondent stipulated that she did not disclose to the CBE the pending misdemeanor charges against her, nor did she disclose to the State Bar (after admission to the practice of law) her conviction of Penal Code section 415, subdivision (1). In these circumstances, we find respondent satisfied the knowledge requirement of rule 1–200(A) as she was well aware that these charges were the type to be disclosed timely to the CBE, since she had disclosed other, similar information concerning her contacts with Yardley on her application to the CBE. (See, e.g., *King v. State Bar* (1990) 52 Cal.3d 307, 313–314 [establishing the level of knowledge for a violation of the Rules of Professional Conduct].)

[2b] At the time that respondent was charged criminally, there was no formal record of those events before the CBE. It was therefore incumbent on respondent to timely and candidly disclose the charges and her later conviction so that the CBE could make adequate inquiry. Accordingly, we consider the criminal charges and subsequent convictions to be "material facts" within the meaning of rule 1–200(A). Adapting the Supreme Court's definition of materialty for a perjury conviction based on failure to comply with disclosure requirements of the Political Reform Act (Gov. Code, § 8100 et. seq.); (*People v. Hedgecock* (1990) 51 Cal.3d 395, 406–407), we conclude that an apt definition of "materiality" used in the context of rule 1–200(A) is a "substantial likelihood that a reasonable person would consider it important in evaluating" whether an applicant for admission to the practice of law is of requisite good moral character (*Hedgecock,* at p. 406). We wish to make clear that materiality for the purposes of rule 1–200 does *not* mean facts that are necessarily outcome–determinative of a finding of moral character. Information is material for purposes of rule 1–200 when it is specifically required to be disclosed on the application for admission or is of the nature that it comes within the continuing duty to update the application. The application for admission expressly required respondent to disclose the charges and conviction arising out of the incident with Yardley. We have no doubt as well that this information, when taken in the context of respondent's application for admission, would have been considered by the CBE as relevant to its determination of respondent's moral fitness or capacity to practice law. We therefore find the non–disclosed information to be material, even though the surrounding information, when developed, in all

likelihood would not have affected the ultimate determination of her moral fitness to practice law.[5]

[3a] We further note that the hearing judge gave credibility to respondent's testimony of innocent mistake and no intent to mislead the CBE. As stated, *ante,* respondent disclosed other litigated matters, including those involving Yardley, and also noted that the non–disclosed charges took place ten or eleven months after the submission of her application. The hearing judge determined that respondent could not have reasonably believed that the disclosure of the misdemeanor charges of a domestic dispute, combined with all of the other information in the application for admission, was crucial and would adversely affect her admission to the practice of law. We agree. We find no evidence to refute this. We properly defer to the hearing judge's credibility finding also, since she was in the best position to observe respondent's demeanor while testifying. (Rules Proc. of State Bar, rule 305(a); see *Connors v. State Bar* (1990) 50 Cal.3d 1047, 1056.)

[3b] The hearing judge did not find respondent culpable of violating section 6106, since she did not find by clear and convincing evidence that respondent intended to mislead the CBE or the State Bar. She found respondent credible when she testified that her failure to disclose was an oversight and a mistake.

[3c] Section 6106 prohibits "[t]he 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. . . ." "Moral turpitude" has been defined as " ' " everything done contrary to justice, honesty, modesty, or good morals" [citations] and as "[a]n act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man" [citations].' [Citation.]" (*Hallinan v. Committee of Bar Examiners, supra,* 65 Cal.2d. 447, 452, fn. 4.) "It has been described as any crime or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all. [Citation.]" (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) As broad as these definitions are, they are not without the requirement of, at the very least, gross neglect or recklessness. (E.g., *Baker v. State Bar* (1989) 49 Cal.3d 804, 815–816; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020–1021.) Having adopted the hearing judge's factual findings, we agree with the hearing judge's decision finding no violation of section 6106.

Degree of discipline.

Our independent review and the foregoing reasons lead us to the conclusion that some discipline is warranted for the protection of the public and the maintenance of the integrity of the legal profession.

In the area of an attorney's isolated misrepresentation to, false testimony before, or concealment of a material fact from a court, public reproval has been imposed in the appropriate cases. (See, e.g., *DiSabatino v. State Bar* (1980) 27 Cal.3d 159; *Mushrush v. State Bar* (1976) 17 Cal.3d 487; *Mosesian v. State Bar* (1972) 8 Cal.3d 60; *In re Cooper* (1971) 5 Cal.3d 256.)

We conclude that the hearing judge's recommendation also for public reproval should be adopted.

ORDER

It is ordered that respondent Demetra Pasyanos is hereby publicly reproved, effective when this decision becomes final (Rules Proc. of State Bar, rule 270(a)). Finding that the protection of the public and the interests of respondent will be served thereby, we adopt and we incorporate in this decision, the conditions attached by the hearing judge to the public reproval. (Cal. Rules of Court, rule 956(a).)

5. As noted in *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 459, not every intentional violation of law, standing alone, is grounds for exclusion from law licensure.

COSTS

It is further ordered that respondent pay costs to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs are payable in accordance with Business and Professions Code section 6140.7.

NOTICE PURSUANT TO RULE 956

Pursuant to the provision of rule 956(a) of the California Rules of Court, respondent is hereby notified that "An attorney's failure to comply with conditions attached to a public or private reproval may constitute cause for a separate proceeding for willful breach of rule 1–110, Rules of Professional Conduct" (Cal. Rules of Court, rule 956(b)).

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID M. VAN SICKLE

A Member of the State Bar

No. 99-O-12923

Filed February 8, 2005

[Editor's Note: The Supreme Court remanded this case to the Review Department with directions to vacate its recommendation and reconsider. (S133042, filed 11/30/05.) The State Bar Court Review Department opinion previously published at pp. 756-773 has been deleted from the *California State Bar Court Reporter* pending further action of the Review Department on remand.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PATRICK JOSEPH MALONEY, JR., AND THOMAS STEVEN VIRSIK

Members of the State Bar

No. 00–O–14000; 00–O–14001

Filed January 14, 2005

Reconsideration denied February 17, 2005

SUMMARY

Respondents became involved in an intra–tribal power struggle when they advised a dissident tribal faction in its efforts to dispossess a parent tribe of its governing authority. The Superior Court sanctioned respondents for their egregious conduct arising from their surreptitious attempt to perpetrate a fraud upon the court and opposing counsel while representing a defendant which the parent tribe sued for employment harassment. The hearing judge found that respondents committed acts of moral turpitude and wilfully failed to obey a sanctions order but dismissed as duplicative the charge that respondents violated their duty never to seek to mislead a judge or other judicial officer. In mitigation, the respondent who was a senior partner had no prior record of discipline in 31 years of practice and demonstrated good character. In aggravation, both respondents displayed lack of candor during trial, and their misconduct interfered with the proper administration of justice. The hearing judge afforded no weight to the finding that respondents' misconduct was surrounded by overreaching, determining that the evidence was duplicative of the misconduct supporting the charge that respondents committed acts of moral turpitude. The hearing judge recommended two years' probation with conditions for both respondents, including actual suspension of 45 days for the senior partner and actual suspension of 90 days for the associate. (Hon. Patrice McElroy, Hearing Judge.)

Respondents sought review requesting they be exonerated of all charges. The State Bar urged the review department to adopt the hearing judge's findings of culpability and most of the factors in aggravation and mitigation and sought a six–month actual suspension for both respondents.

The review department adopted the hearing judge's culpability finding that respondents committed acts of moral turpitude and agreed that the charge that respondents violated their duty never to seek to mislead a judge or other judicial officer should be dismissed as duplicative but recommended that the charge that respondents wilfully failed to obey a sanction order be dismissed with prejudice since there was not clear and convincing evidence in the record that respondents knew there was a final, binding court order. The review department found good character testimony to be compelling as to both respondents and found additional factors in aggravation including that the misconduct was comprised of multiple acts, that respondents displayed

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.

indifference towards atonement or rectification, that respondents committed uncharged misconduct, and that the senior partner's misconduct was surrounded by overreaching. The review department found the associate less culpable than the senior partner and recommended that respondents be suspended for one year, stayed, that they be placed on probation for two years on the condition that the senior partner be actually suspended for 90 days and that the associate be actually suspended for 60 days.

COUNSEL FOR PARTIES

For State Bar: Esther Rogers

For Respondent: Spencer W. Strellis, Jonathan I. Arons

HEADNOTES

[1 a–c] **221.00 State Bar Act–Section 6106**
Respondents committed acts of moral turpitude by knowingly making repeated misrepresentations to the Superior Court when they submitted numerous pleadings for filing that were permeated with half–truths, omissions, and outright misstatements of fact and law. Respondents' misconduct was compounded by the fact that they signed many of their pleadings under penalty of perjury which should have put reasonable persons on notice to ensure their pleadings were accurate, complete and true. Because respondents' misleading statements to the court were not the result of mere carelessness but were intended to secure an advantage in litigation, respondents' misconduct reflected a disregard of their duty to adhere to the requirements of the law and professional responsibilities as officers of the court and constituted evidence of moral turpitude.

[2] **106.30 Procedure–Pleadings–Duplicative Charges**
213.40 State Bar Act–Section 6068(d)
Dismissal of duplicative violations is appropriate where misconduct establishing respondents' culpability for violating their duty never to seek to mislead a judge or other judicial offer by an artifice or false statement of law or fact is covered by the misconduct establishing culpability for committing acts of moral turpitude which supports identical or greater discipline.

[3] **220.00 State Bar Act–Section 6103, clause 1**
Where the record concerning respondents' knowledge of the import of the Superior Court's sanctions decision is confusing at best, there is not clear and convincing evidence that respondents knew there was a final, binding court order and respondents were therefore not culpable of violating their duty not to disobey or violate an order of the court since knowledge is an essential element to establishing such a violation.

[4a, b] **715.50 Mitigation–Good Faith–Declined to Find**
Although attorneys have a duty to zealously represent their clients and assert unpopular and novel positions in advancing their clients' legitimate objectives, they also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. Thus, 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. Even though respondents and the State Bar stipulated that respondents had researched the law and believed a tribal election was valid, that stipulation does not establish good faith mitigation since respondents'

misrepresentations of fact and law went far beyond the specific issue of the validity of the election results.

[5] **561 Aggravation–Uncharged Violations–Found**
Where respondents chose to conceal the full and complete factual circumstances surrounding a disputed tribal election as well as the novelty of the legal theories and authorities upon which they were seeking to induce the Superior Court to dismiss a case and where the record is replete with additional pleadings and verbal statements which were rife with material omissions and express misstatements of fact and law not identified in the notice of disciplinary charges, such uncharged but proven misconduct is properly considered for purposes of aggravation.

[6] **551 Aggravation–Overreaching–Found**
Where respondent wrote letter to a bank asserting a rival tribal faction had unconditional authority to dispossess another tribe of its property when respondent knew that the results of a tribal election were only preliminary, respondent's action was evidence of overreaching and considered in aggravation.

[7 a–c] **611 Aggravation–Lack of Candor–Bar–Found**
Where the record is at complete odds with respondents' testimony in the hearing department and respondents' testimony is evasive, inconsistent and replete with convenient memory lapses, respondents' lack of candor constitutes a strong aggravating circumstance.

[8] **586.10 Aggravation–Harm to Administration of Justice–Found**
Where respondents' conduct required an opposing party to perform substantial additional work and incur additional expense and resulted in a court order for additional monetary sanctions against respondents because of the burden respondents imposed on the court, such actions threatened the efficient administration of justice and improperly burdened the court system constituting an aggravating circumstance.

[9] **521 Aggravation–Multiple Acts–Found**
Where respondents' misconduct was comprised of multiple acts committed in concert with each other over a three–month period and where respondents chose to expressly or impliedly create a false picture of the true state of affairs and ignore contrary facts and legal position and where respondents had numerous opportunities to correct their misleading statements but chose not to do so, respondents' repeated acts of misconduct demonstrated a pattern of disrespect for professional norms and was considered an aggravating factor.

[10] **591 Aggravation–Indifference–Found**
Respondents went beyond tenacity to truculence when they continued to claim in the face of overwhelming facts and legal authority that their conduct was justified which demonstrates an indifference toward rectification of or atonement for the consequences of their misconduct.

[11 a, b] **691 Aggravation–Other–Found**
Respondents' efforts to simultaneously represent opposing parties in a harassment lawsuit where an actual conflict existed was considered an aggravating factor.

[12 a–d] 1015.02 Discipline–Actual Suspension–2 Months
1015.03 Discipline–Actual Suspension–3 Months

Where respondents committed acts of moral turpitude by knowingly making repeated misrepresentations to the Superior Court, where there was extensive aggravation including uncharged misconduct, lack of candor, harm to the administration of justice, multiple acts of misconduct demonstrating a pattern of disrespect for professional norms, indifference towards atonement or rectification, with mitigation for strong good character testimony, extensive community service, and no prior record for respondent who was supervising counsel, and where respondent who was inexperienced associate had only practiced law in California for less than three years prior to misconduct and was not culpable of overreaching, appropriate discipline recommendation was one year stayed suspension, two years' probation on conditions, which included 90 days actual suspension for respondent who was partner in charge and 60 days actual suspension for respondent who was associate.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106–Deliberate Dishonesty/Fraud

Not Found

213.45 Section 6068(d)
214.55 Section 6068(o)
220.05 Section 6103, clause 1

Mitigation

Found

710.10 No Prior Record
740.10 Good Character
765.10 Pro Bono Work

Declined to Find

710.53 No Prior Record

Standards

833.90 Moral Turpitude–Suspension

Discipline

1013.06 Stayed Suspension–1 Year
1017.08 Probation–2 Years

Other

175 Discipline–Rule 955

OPINION

EPSTEIN, J.:

This case illustrates how over–zealous advocacy compromised the ethical obligations of respondents Patrick J. Maloney Jr. and Thomas Virsik to the courts and the legal system. Respondent Maloney was admitted to practice in 1969 and has no prior disciplinary record. Respondent Virsik, who worked as an associate for Maloney, was admitted in 1997 and has no prior discipline. Respondents represented the Round Valley Nation (RVN), a dissident faction of the Round Valley Indian Reservation, which was engaged in an intra–tribal power struggle with the Round Valley Indian Tribes (RVIT). Respondents advised RVN in their efforts to dispossess RVIT of its governing authority. Respondents also represented Carlino Bettega, who was sued by RVIT for employment harassment, in a case entitled *Round Valley Indian Tribes v. Bettega* (*Bettega*). During the course of that litigation, the Mendocino County Superior Court (Superior Court) imposed sanctions against respondents pursuant to Code of Civil Procedure section 128.7 for their "egregious conduct" arising from the "surreptitious attempt by counsel Maloney and Virsek [*sic*] . . . to dismiss the action and to perpetrate a fraud upon the court and opposing counsel. . . ."

The hearing judge below found, inter alia, that respondents were culpable of acts of misrepresentation to the Superior Court constituting moral turpitude in violation of Business and Professions Code section 6106 and the failure to obey the Superior Court's sanction order in wilful violation of Business and Professions Code section 6103. The hearing judge recommended that respondent Maloney be placed on probation for two years with conditions, including actual suspension of 45 days and that respondent Virsik be placed on two years' probation with conditions, including 90 days' actual suspension. Respondents and the State Bar here appeal.

Upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we adopt some of the hearing judge's culpability findings and reject others, as discussed more fully below. We also re–weigh some of the aggravating and mitigating factors considered by the hearing judge and find substantial additional aggravating circumstances, including numerous acts of uncharged but proven misconduct. We ultimately recommend that respondents be suspended for one year, stayed, on the condition that respondent Maloney receive 90 days' actual suspension and respondent Virsik receive 60 days' actual suspension.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents Assist RVN with Attempted Tribal Coup

RVIT is organized under the Indian Reorganization Act of 1934, title 25 United States Code section 461 et seq., pursuant to a Constitution, which was adopted in its revised form in 1994, pursuant to title 25 United States Code section 476, and approved by the Deputy Commissioner of Indian Affairs of the Bureau of Indian Affairs of the United States Department of the Interior (BIA).[1] For many years RVIT and RVN have been engaged in a wide–ranging dispute over RVIT's governing authority and its conduct of tribal business.

Respondents were retained by RVN in February 2000 to advise about a strategy to effect a bloodless "coup." On February 10, 2000, RVN held a meeting of its supporters to consider the formation of a new tribal government and to elect an "Interim Tribal Council." A "Declaration of Independence" was signed by forty–four individuals on February 16, 2000. The election procedures required by the 1994 Constitution and title 25 United States Code section 476(a) were not followed, and instead respondents fashioned a novel election approach to unseat the

1. The 1994 Constitution enabled the BIA to maintain a government–to–government relationship with RVIT.

governing council of RVIT.[2] RVN held an election on April 14–16, 2000. It has never been determined if those who voted were qualified voters, but those who did participate voted overwhelmingly to adopt a new constitution and to elect a new government to replace RVIT. RVN then unilaterally declared an election "victory."

The governing council of RVIT publicly repudiated the election, calling it a "sham" and disavowed the legitimacy of RVN's Interim Tribal Council. The BIA also rejected RVN's claim of victory after it was notified by RVN on May 8, 2000, of the outcome of the election.[3] Similarly, the Office of Self–Government of the United States Department of Interior (OSG) declined a request from RVN that it be allowed to participate in the Self–Government Program on March 30, 2000, because it found that RVN was "not from the tribal governing authority recognized by the BIA."

Respondents now concede on appeal that the determination of the election outcome was "preliminary." Nevertheless, immediately after the April 14–16 election, RVN set about to appropriate the rights and privileges of RVIT as the governing authority. On April 17, 2000, the Chairperson of the Interim Council of RVN, Janice Freeman, made written demands to "all banks transacting business in Mendocino County" instructing that "any and all accounts, credit cards, line of credit, or other institutional relationships between your institution and the . . . RVIT . . . are no longer authorized." A few days later, RVN notified RVIT's Tribal Council that all of the current employees of RVIT's governmental administration were *de facto* fired and must meet with RVN representatives if they had an interest in being re–hired by RVN's newly elected governing body. Similarly, RVN notified the Commissioners of the Round Valley Housing Authority that RVN was terminating their authority "*effective immediately.*" (Emphasis in the original.) Finally, RVN wrote to Stephen Quesenberry of the California Indian Legal Services, which had represented RVIT for nearly 30 years, advising him that RVN was terminating their legal services.

Respondents actively participated in these efforts to perfect the coup. For example, respondent Maloney assisted RVN in its efforts to appropriate RVIT's funds and bank accounts. On April 28, 2000, he sent a letter on his law firm letterhead to the General Counsel of Tri Counties Bank, John Dunlop, enclosing a "Resolution" by RVN attesting that the April 14–16 election had dissolved RVIT and established RVN "as the official and legal Tribal Government." The enclosed Resolution also specified Freeman and Dolores Bettega "as the only persons with the authority to withdraw and transfer funds or sign check(s) on behalf of [RVN]." At the time of this written communication to the bank instructing them to transfer RVIT's assets and accounts to RVN, Maloney knew that RVN's claim of victory was in dispute, because he sent a second letter to Dunlop on the same day, enclosing two newspaper articles from *The Round Valley News*. One of the articles reported that the BIA's Agency Superintendent had reaffirmed "its exclusive recognition and support of the existing tribal government [RVIT]," and the other article reported that RVIT viewed RVN as an "outlaw group" whose attempted overthrow of the government was "a fraud on the law abiding tribal members of the Round Valley Tribes. . . ." Maloney commented about these articles in his cover letter to

2. Respondents argue that they were prevented from following the election procedures required by the 1994 Constitution because the BIA never provided them with a list of qualified voters.

3. Respondents appealed to the BIA's Central California Superintendent, which issued a decision on November 11, 2000, declining to recognize RVN and continuing to recognize RVIT as the official tribal government. Respondents then appealed to the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals (IBIA), which affirmed the BIA's decision on January 29, 2003. In its Order, IBIA held that RVIT's 1994 Constitution provided for the proper procedures for recall elections and amendments to the Constitution itself. "Rather than attempting to change the 1994 constitution through the established procedures, [RVN] decided to circumvent those procedures. . . . *Therefore, their election was invalid.* . . ." (Emphasis added.) (IBIA'S Order Affirming the BIA Decision was made part of this record upon order of this court on August 15, 2003, granting respondents' Motion to Augment the Record, filed on June 16, 2003.)

Dunlop, saying "this will give you som [sic] idea of where the new government is headed."[4] The bank's attorney refused to accede to Maloney's directions, telling him in a letter dated May 1, 2000, that both the BIA and the attorneys for RVIT had advised the bank "that this new organization does not have proper tribal authority to take control of the accounts on deposit with Tri Counties Bank." Maloney confirmed his receipt of this letter on May 3, 2000.

B. Respondents' Involvement with the Bettega Lawsuit

As part of the internecine power struggle between RVN and RVIT, respondents attempted on several occasions to obtain a dismissal of RVIT's lawsuit against Bettega (who was a member of RVN) using a variety of procedural maneuvers.[5] Maloney supervised Virsik in the preparation of most of the pleadings, although at times Virsik prepared certain documents without Maloney's review, even signing Maloney's name to the documents.

1. February 16th Request for Dismissal

The day after the adoption of the Declaration of Independence, and two months *before* RVN held its election, Maloney appeared at a hearing on February 17, 2000, in the *Bettega* lawsuit on a motion to modify the restraining order against Bettega. At that hearing, and prior to consideration of the motion, Maloney submitted to the judge a Request for Dismissal, dated February 16, 2000 (February 16th RFD)[6], which was signed by respondent's client, Freeman, who purported to be making the request for dismissal on behalf of RVIT in pro per.[7] The February 16th RFD misrepresented that Freeman had the authority on behalf of the plaintiff, RVIT, to request the dismissal of the case with prejudice. Quesenberry, the attorney for RVIT, was given no prior notice of the February 16th RFD. Although Maloney claimed to the Superior Court that he did "not know the significance of [the dismissal request]," he nevertheless signed it as the attorney for the defendant Bettega and argued in support of the dismissal request, claiming "Ms. Freeman's power is based on the Declaration of Independence and the establishment of an interim government."

Maloney failed to disclose to the Superior Court that Ms. Freeman and RVN were his clients, and he falsely implied that the February 16th RFD was a legally sufficient and enforceable document by signing it on behalf of Bettega and attesting that "consent to the . . . dismissal is hereby given." The Superior Court refused to file the February 16th RFD.

2. May 7th Request for Dismissal

Undaunted, respondents submitted a second Request for Dismissal, dated May 7, 2000 (May 7th RFD), to the clerk of the Superior Court. Virsik prepared the May 7th RFD at Maloney's direction, and Maloney signed it as the attorney of record for and on behalf of the plaintiff, RVIT, even though he also was the attorney of record for the defendant Bettega. Maloney and Virsik also were identified on the May 7th RFD as the attorneys for RVN's "Interim Tribal Counsel." Maloney personally submitted the May 7th RFD to the Superior Court clerk for filing, but the clerk did not file it, apparently because it had

4. Maloney disingenuously testified in the hearing below that he had not read these articles, even though he forwarded them to Dunlop and referenced their contents in his cover letter. Virsik testified at trial that he (Virsik) knew about the articles around the time they were published.

5. As noted *ante*, Carlino Bettega, a member of RVN, was sued for workplace harassment of RVIT's employees. Thereafter, Bettega filed a cross-complaint against RVIT in which he sought affirmative relief from RVIT and restraining orders against 23 of RVIT's employees. Quesenberry and the California Indian Legal Services represented RVIT in the *Bettega* lawsuit, and respondents represented the defendant and cross-complainant, Bettega.

6. For purposes of consistency, unless otherwise stated, we refer to the pleadings by the dates they were signed because not all of the pleadings that respondents submitted to the Superior Court were actually filed by the court.

7. The February 16th RFD and the two other requests for dismissal respondents submitted for filing in the *Bettega* lawsuit were prepared on a Judicial Council of California form Request for Dismissal (Judicial Council Forms, form 982(a)(5)). That form permits the clerk of the court to dismiss an action with or without prejudice without judicial oversight or participation (Code Civ. Proc., § 581), and its use is mandatory (div. III, Appendix to Cal. Rules of Court) except when a party seeks the dismissal of a proceeding by filing a motion to dismiss.

become separated from two other supporting documents. Respondents misrepresented on the May 7th RFD that they were the attorneys for RVIT and as such were authorized to seek a dismissal of the *Bettega* lawsuit when they knew that RVIT was represented by Quesenberry and the California Indian Legal Services, and that RVIT and Quesenberry had not agreed to a substitution of counsel or the dismissal of the case. They also misrepresented that RVN had standing to file pleadings and to intervene.

3. May 8th Declaration of Maloney

A Declaration In Support of Dismissal of Action, dated May 8th (May 8th Declaration) was filed in the Superior Court at the same time that respondents submitted the May 7th RFD. Respondents Virsik and Maloney were identified on the May 8th Declaration as the attorneys for Bettega and the Interim Tribal Counsel [of RVN], and Maloney signed the pleading as the declarant. In the May 8th Declaration, Maloney described in some detail the "Constitutional election," as a conclusive and uncontested victory for RVN. Maloney attested that "[n]o Tribal member (or anyone else) has to date challenged the election . . ." and that, under the 1994 Constitution, any such challenge was required to have been made within three days after the election.

When they filed the May 8th Declaration, respondents knew that the election outcome was only preliminary and was contested by RVIT, the BIA and the OSG, which had expressly refused to recognize RVN as the legally constituted governing body. Respondents did not advise the Superior Court of these facts. Also, in the May 8th Declaration respondents affirmatively misrepresented that RVN had the authority to and in fact did terminate the services of RVIT's attorney, Stephen Quesenberry, and to direct him to dismiss the *Bettega* lawsuit when they knew that Quesenberry had not withdrawn from his representation of RVIT, and that RVIT had neither agreed to substitute respondents as their counsel nor to terminate the *Bettega* lawsuit.

4. May 8th Opposition to First Motion for Sanctions

On May 9th, Maloney also filed an Opposition to RVIT's first Motion for Sanctions, which he signed on May 8th, as attorney for the defendant, Bettega (May 8th Opposition).[8] In the May 8th Opposition, respondents averred, inter alia, that RVIT's first Motion for Sanctions was moot because "the form of the government of the plaintiff has changed since the motion was filed and *the governing body has since dismissed the action*." (Emphasis added.) Respondents misrepresented that "The Interim Tribal Council, which is now the governing body of the Tribal members, has dismissed Mr. Quesenberry, directing him to dismiss the instant action which apparently was not done. The Interim Tribal Council now stands in the shoes of the prior employer–plaintiff [RVIT]. . . . [T]he Interim Tribal Council has directed its replacement counsel [respondents] to file a dismissal. . . . *As the action has been dismissed by the original plaintiff–employer's successor as a matter of political process,* the motion for sanctions is moot. . . ." (Emphasis added.)

5. May 11th Request For Dismissal and Letter to the Court Clerk

In response to a telephone conversation with the clerk's office of the Superior Court, Virsik prepared and submitted yet a third Request for Dismissal, dated May 11, 2000 (May 11th RFD), together with a transmittal letter advising: "You may disregard the prior [May 7th RFD] and file the enclosed one in its stead."[9] Respondents were denominated on the May 11th RFD as attorneys for "Round Valley Nation f/k/a Round Valley Indian Tribes." Virsik

8. RVIT's first Motion for Sanctions was based on the filing by RVN of an alleged frivolous cross–petition.

9. The record discloses that Virsik prepared the documents that accompanied his transmittal letter of May 11th without Maloney's review. Nevertheless, "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority." (*Crane v. State Bar* (1981) 30 Cal.3d 117, 123.)

signed Maloney's name on the May 11th RFD twice — as the attorney for the plaintiff RVIT *and* for the defendant and cross–complainant Bettega.[10]

Respondents again misrepresented in the May 11th RFD that they were attorneys for the plaintiff RVIT in the *Bettega* matter, and as such they were authorized to seek dismissal of the entire action with prejudice. They also misrepresented that RVN was formerly known as RVIT.

6. Notice of Name Change

In addition to the May 11th RFD, respondents filed a Notice of Change of Name (Notice) which identified them as attorneys for the "defendant [*sic*] Round Valley Nation f/k/a Round Valley Indian Tribes." This document, which was signed by Virsik using Maloney's name, averred that the plaintiff RVIT had changed its name to RVN as the result of the April "constitutional election" which had caused a change in the "form of governance." This was a stealth attempt to substitute RVN for RVIT as the plaintiff in the *Bettega* case, in order to effect a dismissal of the *Bettega* case without authorization by RVIT or the intervention of the Superior Court. Respondents knew when they filed the Notice that RVIT had not changed its name to RVN and had not consented to the substitution of RVN as a party/plaintiff.

7. Bettega's Reply to RVIT's Opposition to Strike or Tax Costs

Finally, on May 11th, respondents filed a Reply to RVIT's Opposition to Motion to Strike or Tax Costs (Reply) on behalf of Bettega. Respondents again wore multiple legal hats when filing this pleading. Instead of appearing as the attorneys for RVN and/or the Interim Tribal Council, they appeared on behalf of defendant Bettega and also as the "newly retained counsel" for the plaintiff, RVIT.[11] Respondents represented unconditionally that "plaintiff Round Valley Indian Tribes has been replaced in a constitutional election by the Round Valley Nation. . . ." Respondents further stated in the Reply they were "filing the dismissal, as the record reflects. Thus, the issues of costs are moot." Finally, they misrepresented as a *fait accompli* that RVN was "the successor of the plaintiff . . . [and] has in fact dismissed [the case] itself" and that the issue of costs accordingly was moot.

On May 12, 2000, RVIT's attorney, Quesenberry, responded vigorously to respondents' various tactics in a Declaration in Opposition to Defense Counsel's Fraudulent Attempts to Dismiss Action. He attested that Maloney had filed various pleadings and taken action "without any authorization of [RVIT], with full knowledge that his other client [RVN] had no lawful authority to act on [RVIT's] behalf, and without informing the Court . . . in fact, that the United States government has reaffirmed that the duly authorized and recognized governing body of the Tribes is the Tribal Council [of RVIT]." Quesenberry further averred that Maloney and RVN's actions were intended "to convert [the *Bettega*] case of workplace harassment into an expanded and unwarranted inquiry into the laws and internal affairs of the Round Valley Indian Tribes."

The Superior Court responded on May 15, 2000, and ordered sua sponte the clerk not to file either the May 7th RFD or May 11th RFD, but merely to lodge the documents in the file. In its order, the Superior Court specifically found that Maloney "is not the attorney for the plaintiff named in this action. Interim Tribal Council is not a party to this action. [RVN] is not a party to this action."

C. Respondents Sanctioned for Attempted Fraud on the Court

Undeterred by the Superior Court's findings in its May 15th order, respondents filed three more

10. The record shows that as of May 11th respondents claimed to be the attorneys for the defendant and cross–complainant, Bettega, and for RVN and RVIT. As we discuss in aggravation, *post*, the simultaneous representation of all three parties in the *Bettega* lawsuit constituted a non–waivable conflict of interest. (Rules Prof. Conduct, rules 3–700(c) & 3–310.)

11. See footnote 10, *ante*, regarding a non–waivable conflict of interest.

pleadings, each containing additional misrepresentations.

1. May 15th Supplemental Declaration

Respondents filed a Supplemental Declaration in Support of Dismissal of Action, dated May 15, 2000 (May 15th Declaration). Attached to this Declaration as an exhibit was a May 10th letter "from an unidentified employee of the BIA" stating that the BIA "did not recognize the political faction known as the [RVN]." By way of excuse, Maloney averred that he received this letter after he filed his May 8th Declaration. Maloney nevertheless misled the Superior Court as to the import and relevance of the BIA letter. The "unidentified employee of the BIA" who signed the letter was Dale Risling, Sr., who respondents knew was the Superintendent at the California BIA because they had previously contacted him on several occasions on behalf of RVN to deal with tribal governance issues.

In this May 8th Declaration, Maloney also admitted that he knew of the BIA's opposition to RVN's victory claim at least as early as April 15, 2000, because of the newspaper article published in *The Round Valley Times*. However, he attempted to minimize the significance of this knowledge by averring that the effect of the "Constitutional election" was "to divorce the Tribes from the BIA and instead proceed under a self–governance program of the Department of the Interior." Maloney again misled the Superior Court because he failed to disclose that as early as March 30, 2000, his client, Freeman, wrote to the BIA on behalf of RVN seeking the BIA's assistance in "effecting the orderly transfer of accounts, resources and responsibilities to the new [RVN] government." Maloney also failed to disclose that RVN had been denied participation in the self–governance program by the Director of the OSG because RVN did not meet the criteria and because the request was "not from the tribal governing body recognized by the [BIA]."

Maloney did not recant or correct his previous misstatements about the election outcome. He also did not recant his previous misrepresentation about his status as attorney for RVIT or his authority and standing to seek a dismissal of the *Bettega* case on RVIT's behalf.

2. May 16th Supplemental Opposition to Sanctions

Even though the Superior Court ruled on May 15th that neither the Interim Tribal Council nor RVN was a party to the *Bettega* action, on May 16, 2000, respondents filed a Supplemental Opposition to Sanctions and appeared as attorneys, not only for Bettega, but on behalf of RVN and the Interim Tribal Counsel. In the Opposition, respondents again stated that the "constitutional" election had resulted in a change in governance, and that "the new sovereign [RVN] has retained other counsel to dismiss this action." Respondents thus refused to adopt or adhere to the previous factual and legal determinations of the Superior Court.

3. RVIT files a Second Sanctions Motion Against Respondents

As a result of respondents' efforts to dismiss the *Bettega* case, on May 12, 2000, Quesenberry filed a second Motion for Sanctions[12] pursuant to Code of Civil Procedure section 128.7. The hearing on the second Motion for Sanctions was set for June 23, 2000. On June 8, 2000, the Superior Court filed its Decision on Motion to Tax Costs and Decision on Motions for Sanctions (June 8th Decision). The Superior Court denied RVIT's first sanctions motion, arising from the filing of the cross–petition, but granted RVIT's second sanctions motion relating to the attempted fraud on the Superior Court, finding that but for the diligence of RVIT's counsel and the clerk, the "surreptitious attempt by counsel Maloney and Virsek [*sic*] . . . to dismiss the action and to perpetrate a fraud upon the court and opposing

12. As noted in footnote 8, *ante*, Quesenberry filed RVIT's first Motion for Sanctions in response to an alleged frivolous cross–petition filed by Bettega.

counsel . . ." would have gone undetected. Furthermore, the Superior Court found respondents had "clearly represented to the court that they represented the plaintiff [RVIT] in the [*Bettega*] matter," which was untrue because RVIT's legal counsel had not "consented to a substitution of counsel and . . . RVIT itself had not applied to the court for an order of the court substituting counsel, and . . . no notice was given by the plaintiff [RVIT] or its counsel of record . . . of an intent to substitute counsel." The Superior Court noted that "no argument has been advanced by [respondents] that their action was inadvertent or that it was the result of a failure to understand the applicable law."

The Superior Court accordingly imposed sanctions on Bettega and respondents jointly and severally in the amount of $1,500, payable to RVIT and an additional $500, payable to the court.[13]

4. June 12th Opposition to Sanctions

Even though the Superior Court ordered sanctions on June 8th, respondents filed an Opposition to Sanctions on behalf of Bettega, dated June 12, 2000 (June 12th Opposition), because respondents asserted they understood the June 8th Decision to be a tentative ruling since it was made before Bettega's and Maloney's opposition was due and before the scheduled June 23, 2000, hearing on the second sanctions motion. In the June 12th Opposition, respondents continued to assert that Quesenberry had been properly dismissed as legal counsel for RVIT and that their client, RVN, had the authority to retain new legal counsel on RVIT's behalf.

5. Plaintiff's Withdrawal of Second Sanctions Motion

On June 19, 2000, Quesenberry filed a pleading for RVIT entitled Withdrawal of Inadvertently Filed Notice of Motion and Motion for Sanctions (Withdrawal) because RVIT's second motion for sanctions was filed in violation of Code of Civil Procedure section 128.7(c)(1).[14] Quesenberry included with the Withdrawal a letter dated June 15, 2000, asking that the hearing on the second sanctions motion be removed from the June 23rd calendar and stating that he disagreed with respondents' statement that the June 8th Decision was a tentative ruling. On June 21, 2000, Virsik sent the Superior Court a letter stating that Bettega had no objection to the Withdrawal of the Second Motion for Sanctions. The next day, Virsik sent the Superior Court another letter confirming Bettega's understanding that the June 23rd hearing on the Second Motion for Sanctions had been taken off calendar in accordance with Quesenberry's request. Respondents thereafter verified that the matter had been taken off calendar, and the Superior Court's docket entry confirms that the second motion for sanctions was removed from the calendar, stating: "Matter dropped."

Quesenberry sent the Superior Court a letter in response to Virsik's June 21st letter to the Superior Court, reiterating his understanding that the Superior Court's June 8th Decision imposing monetary sanctions was final because "the Court has authority under the California Rules of Court and the Local Rules to impose sanctions on its own initiative . . . ."

13. Respondents did not appeal this sanctions order, which is final and binding on them. However, respondents appealed the imposition of the restraining order on behalf of Bettega, which the California Court of Appeal for the First District affirmed in an unpublished opinion on July 27, 2001. Among the issues raised in the appeal was whether the Superior Court improperly refused to enter the dismissal of the *Bettega* case proffered by respondents. The Court of Appeal found the Superior Court properly rejected the request for dismissal because it was filed without authorization of RVIT. In respondents' Brief to the Court of Appeal, they conceded that Bettega was not appealing the sanctions order, although they gratuitously raised the issue "as a matter of caution." The Court of Appeal responded, in dicta, that "plainly it was misconduct for counsel to purport to represent both sides in seeking a dismissal, without having secured a proper substitution of counsel for [RVIT]."

14. The version of Code of Civil Procedure section 128.7(c)(1) in effect in 2000 mandates that a motion for sanctions under section 128.7 must be served on opposing counsel, but must not be filed or otherwise presented to the court for at least 30 days after service so as to provide the opposing counsel with at least a 30-day "safe harbor" in which he or she may withdraw or correct the alleged offending pleading without penalty.

6. Order to Show Cause Re: Respondents' Failure to Pay Sanctions

Some six months later, in early January 2001, Quesenberry sent respondents a letter about their failure to pay RVIT the $2,000 in sanctions. Quesenberry sent a copy of his letter to the Superior Court, and relying on that letter, the Superior Court issued an order to show cause (OSC) on January 10, 2001, directing respondents and Bettega to show why further sanctions should not be imposed on them for not paying the earlier sanctions. Respondents replied to the OSC, setting forth their position that the June 8th Decision was void on due process grounds because the sanctions were imposed before respondents were given the opportunity to be heard. In addition, respondents noted that the Superior Court had previously advised counsel at an earlier hearing on the first sanctions motion that it would "see you folks on June 23 [for a hearing on the second sanctions motion]." Nevertheless, respondents tendered two cashier's checks to the clerk of the Superior Court, payable to RVIT and the Superior Court if the court determined that such payment was warranted. The Superior Court ordered the cashier's checks to be delivered to RVIT and the Superior Court, but it did not impose additional sanctions.

D. State Bar Proceedings

On November 20, 2000, the State Bar filed and served Notices of Disciplinary Charges (NDCs) on respondents, which were amended and filed on July 23, 2002. Respondents were charged with misrepresentations constituting moral turpitude under Business and Professions Code section 6106 (Count One);[15] seeking to mislead a judicial officer in violation of section 6068, subdivision (d) (Count Two); failing to obey a court order under section 6103 (Count Three); and failing to report sanctions under section 6068, subdivision (o)(3) (Count Four). Upon the filing of the NDCs, a vigorous discovery battle ensued, culminating in an order of the hearing judge granting the State Bar's Motion to Compel on April 5, 2002, after she considered and rejected in part respondents' assertion of the attorney–client privilege on behalf of Bettega, RVN, and RVN's Interim Tribal Council.[16]

On August 6, 2002, the first day of a five–day trial, respondents' Partial Stipulations were filed. On December 13, 2002, the hearing judge issued her decision, finding respondents culpable on Counts One and Three. With respect to Count Two, the hearing judge found clear and convincing evidence that respondents deliberately sought to mislead the Superior Court judge in violation of section 6068, subdivision (d), but she nevertheless dismissed Count Two as duplicative of the misconduct alleged in Count One. After trial, the hearing judge dismissed Count Four, upon request of the State Bar in its Closing Brief. After weighing mitigating and aggravating factors, the hearing judge imposed discipline of one year's suspension, stayed, and two years' probation with conditions, including an actual suspension of 45 days for respondent Maloney and 90 days for respondent Virsik.

Respondents and the State Bar seek review in this court. Respondents ask that they be exonerated of all charges, or in the alternative, that we remand this matter for a full hearing to enable them to present witnesses and evidence for which they asserted the attorney–client and/or work product privileges in the trial below. The State Bar asks us to affirm the hearing judge's findings of culpability and most of the factors in aggravation and mitigation, but the Bar seeks six months' actual suspension for both respondents.

II. DISCUSSION

On appeal, respondents raise myriad issues that ultimately are not relevant to our consideration of the decision below. As to those arguments not expressly

15. Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

16. In her decision, the hearing judge found that respondents were not candid or cooperative during discovery, having redacted documents that were not privileged and claiming that their privileged materials comprised seven linear feet, then subsequently submitting only six inches of documents to the court.

addressed herein, we have considered and rejected them as unmeritorious. The issues that *are* material are relatively straightforward: 1) Did respondents commit acts of moral turpitude in the course of litigating the *Bettega* case; and 2) Did respondents disobey the Superior Court's sanction order in violation of section 6103.

A. Count One: Misrepresentation; Moral Turpitude (Section 6106)

[1a] We agree with the hearing judge's finding that respondents committed acts of moral turpitude in wilful violation of section 6106 by knowingly making repeated misrepresentations to the Superior Court. It is well established that acts of moral turpitude include an attorney's false or misleading statements to a court or tribunal. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124.) The actual intent to deceive is not necessary; a finding of gross negligence in creating a false impression is sufficient for violation of section 6106. (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90–91.) Acts of moral turpitude include concealment as well as affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) Indeed, " '[n]o distinction can . . . be drawn among concealment, half–truth, and false statement of fact. [Citation.]' [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Also, it is not necessary that respondents actually succeeded in perpetrating a fraud on the court. (See, e.g., *Bach v. State Bar*, *supra*, 43 Cal.3d 848, 852–853, 855 [attorney violated section 6106 even though he did not succeed in committing fraud on the court due to intervention of opposing counsel].)

[1b] The misconduct alleged in Count One involved numerous pleadings submitted by respondents to the Superior Court for filing in the *Bettega* matter.[17] These pleadings were permeated with half–truths, omissions, and outright misstatements of fact and law. The Supreme Court "has denounced such misleading conduct and has not hesitated to impose discipline in such cases. [Citations.]" (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.) Respondents' misconduct was compounded when they signed many of their pleadings under penalty of perjury, which gave the additional imprimatur of veracity to their misstatements and should have put reasonable persons on notice to take care that their pleadings were accurate, complete and true.

[1c] The hearing judge found that "Respondents' statements to the [Superior] court were made with an intent to secure an advantage, which was to dismiss the lawsuit against their client Bettega." We agree. Their deception thus was not the result of mere carelessness; rather, respondents intentionally wove a tapestry of deception in their over–zealous efforts to effectuate a legal strategy. Taken as a whole, respondents' conduct reflects an indifferent disregard of their duty to adhere to the requirements of the law and their professional responsibilities as officers of the court, which is additional evidence of moral turpitude. *In re Caldwell* (1975) 15 Cal.3d 762, 772; *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 600.)

B. Count Two: Misleading a Judge or Judicial Officer (Section 6068(d))

[2] The hearing judge found that respondents' repeated misrepresentations to the Superior Court were sufficient to establish respondents' culpability as charged in Count Two for violation of their duty under section 6068, subdivision (d), never to seek to mislead a judge or other judicial officer by an artifice or false statement of law or fact. However, she further found that "the misconduct underlying the section 6068, subdivision (d) charge is covered by the section 6106 charge, which supports identical or greater discipline. . . ." We agree, and accordingly recommend that Count Two should be dismissed as duplicative of Count One. (*In the Matter of Torres*

17. The following pleadings were identified in Count One: 1) May 7th Request for Dismissal; 2) May 8th Declaration of Maloney; 3) Notice of Change of Name; 4) May 11th Request for Dismissal; and 5) Reply to Opposition to Motion to Strike or Tax Costs.

(Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

C. Count Three: Failure to Obey a Court Order (Section 6103)

The hearing judge found that respondents wilfully violated section 6103 by failing to pay sanctions totaling $2,000 as ordered by the Superior Court. As we discuss below, we do not adopt this culpability finding, and we therefore recommend Count Three be dismissed with prejudice.

Before an attorney may be disciplined under section 6103, the State Bar must prove by clear and convincing evidence that the attorney wilfully disobeyed or violated a court order. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) Generally, the level of wilfulness required for acts of professional misconduct is established by a showing that the attorney merely acted purposefully (i.e., the attorney knew what she or he was doing and intended either to commit the act or abstain from committing it). (*King v. State Bar* (1990) 52 Cal.3d 307, 313–314.) Section 6103 requires a somewhat more precise level of wilfulness. (*In the Matter of Respondent X, supra*, 3 Cal. State Bar Ct. Rptr. at p. 603.)

At a minimum, it must be established that an attorney "'"*knew* what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." [Citations.]' " (*King v. State Bar, supra*, 52 Cal.3d at p. 314, emphasis added.) The record here concerning respondents' knowledge of the import of the Superior Court's sanctions decision of June 8, 2000, is confusing at best. The Superior Court filed its decision without receiving a response or opposition from Bettega or respondents, which they understood they would be entitled to under Code of Civil Procedure section 128.7, subdivision (c). Furthermore, a hearing on the second motion was set for June 23, 2000, fifteen days *after* the Superior Court issued its decision, and the Superior Court even reminded the parties at the May 19th hearing that it would see the attorneys at the June 23, 2000 hearing. Respondents therefore believed it was a tentative ruling, and accordingly, on June 13, 2000, filed an opposition to the second sanctions motion, referencing the hearing set for June 23, 2000. Thereafter, in a letter dated June 15, 2000, RVIT's attorney asked the clerk to take the June 23rd hearing off calendar. He also filed a pleading entitled "Withdrawal of Inadvertently Filed Notice of Motion and [Second] Motion for Sanctions." Respondents then wrote to the Superior Court on June 21, 2000, stating that they did not oppose RVIT's withdrawal of the second sanctions motion, and doing so would render the premature rulings in the June 8 decision moot. Finally, before the June 23, 2000 hearing, respondents called the Superior Court and were told that RVIT's motion had been "dropped." This was corroborated by the Superior Court's docket sheet stating "Matter dropped."

[3] Accordingly, we find that there is not clear and convincing evidence in the record that respondents knew there was a final, binding court order. Such knowledge is an essential element to establishing that an attorney wilfully disobeyed or violated it in violation of section 6103. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 666 [review department adopted hearing judge's finding that attorney's failure to obey court order did not violate section 6103 because attorney did not receive notice of the order in time to comply with it]; *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867–868 [review department agreed with hearing judge that, because attorney clearly knew of the relevant court order, the only issue regarding the charged violation of section 6103 was whether attorney had a reasonable time to comply with the order]; see also, *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367 [knowledge of a court order necessary to establish culpability under section 6068, subdivision (b) for failure to obey the order]; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403–404 [attorney's lack of knowledge defense to charged violations of section 6068, subdivision (b) and section 6103 for failure to obey court orders rejected because attorney was present when the orders were issued and because the opposing

party sent attorney written requests for compliance with the orders].)[18] Neither do we find sufficient evidence that they intended to disobey the court's decision, and accordingly, we recommend that Count Three should be dismissed with prejudice.

D. Count Four: Failure to Report Sanctions (Section 6068(o)(3))

As we noted *ante*, the State Bar moved, in the interests of justice, to dismiss the charges relating to respondents' alleged violations of section 6068, subdivision (o)(3) by not reporting to the Bar the sanctions imposed on them in the Superior Court's June 8, 2000 Decision. The State Bar does not here contest the action of the hearing judge, who dismissed Count Four. We have concluded that there is insufficient evidence of respondents' knowledge of a final, binding sanctions order, and therefore, it would be improper to now find a violation of section 6068, subdivision (o)(3). Accordingly, we adopt the hearing judge's dismissal of Count Four.

III. DISCIPLINE

To properly assess the degree of recommended discipline, we consider each case on its own facts, as well as the evidence in mitigation and in aggravation. (See, e.g., *Rodgers v. State Bar*, *supra*, 48 Cal.3d 300, 316.)

A. Mitigation

1. Good Faith (Std. 1.2(e)(ii))[19]

[4a] Respondents assert as mitigation that they acted reasonably and in good faith. (Std. 1.2(e)(ii).) They contend that even if their analysis of the facts and the law in this matter are without merit, lawyers must be free to assert unpopular positions on behalf of their clients if they believe in good faith they are correct. We agree with respondents that attorneys have a duty to zealously represent their clients and assert unpopular and novel positions in advancing their clients' legitimate objectives. However, as officers of the court, attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. (Rules Prof. Conduct, rule 3-200(B).) "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. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.)

[4b] Even though respondents and the State Bar stipulated that respondents had researched the law and on that basis believed the election was valid, that stipulation does not establish good faith mitigation. Their misrepresentations of fact and law went far beyond the specific issue of the validity of the election results. For example, respondents misrepresented that RVIT had fired its legal counsel and that they were authorized to substitute themselves as RVIT's counsel of record in the *Bettega* litigation. They further misrepresented that they were authorized by RVIT to dismiss the *Bettega* lawsuit, that RVN was a party/plaintiff with standing to dismiss the lawsuit, and that RVIT had changed its name to RVN.[20]

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18. Our conclusion is expressly limited to section 6103 violations and does not modify prior holdings that the wilfulness of an attorney's violation of a rule of the Rules of Professional Conduct is not dependent upon the attorney's knowledge of the rule (*King v. State Bar*, *supra*, 52 Cal.3d at p. 314; *Gassman v. State Bar* (1976) 18 Cal.3d 125, 131); nor does it modify the holding that, in the context of rule 955 of the California Rules of Court, wilfulness requires "[o]nly a general purpose or willingness to commit the act or permit the omission." (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.)

19. This reference and all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

20. Respondents contend on appeal that their good faith defense was compromised by their assertion of the attorney–client privilege, because they were unable to disclose privileged documents and communications with their clients as well as various statements by federal government officials assuring them that they need not rely on the BIA recognition of the RVN prior to asserting the RVN's rights. However, this purportedly privileged evidence would not establish a good faith belief in the numerous misrepresentations described above unrelated to the validity of the election outcome.

Moreover, the stipulation as to their belief in the validity of the election does not address respondents' failure to disclose to the Superior Court the nature and extent of the various challenges to the legitimacy of the election. "Whether or not [respondents] believed [they] had colorable arguments . . , [they were] duty bound not to mislead or attempt to mislead the court . . . ." (*Bach v. State Bar, supra*, 43 Cal.3d at p. 855.)

The Superior Court's finding that respondents' conduct was "egregious," is further evidence that they did not act reasonably.[21] Given the magnitude of their deception and the breadth of their actual knowledge about the true state of affairs surrounding the intra–tribal battle, we find no basis on this record to conclude that respondents had an honest or reasonable belief in the truth and accuracy of their statements to the Superior Court. Indeed, respondents' misconduct "exceeds the bounds of zealous advocacy. It cannot be condoned." (*Davis v. State Bar* (1983) 33 Cal.3d 231, 239.) We therefore give no mitigative weight to their assertion of a good faith belief in the election outcome.

2. Absence of Prior Discipline (Std. 1.2(e)(i))

The hearing judge found that respondent Maloney practiced law for 31 years with no prior disciplinary record, and gave weight to this factor as mitigation. We agree. (Std. 1.2(e)(i).) Although the present misconduct is serious, the lack of a prior record of discipline may be considered as a mitigating factor. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [many years of practice without a prior record may be considered as a mitigating circumstance even if the present misconduct is serious].) Respondent Virsik had only practiced law in California for less than 3 years prior to his misconduct, which is not a sufficient time period for mitigative evidence. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456; Std. 1.2(e)(i).)

3. Good Character Testimony and Community Service

The hearing judge gave the testimony of the character witnesses "significant" mitigative weight, but she did so only as to Maloney. We find the good character testimony to be compelling as to both respondents. A total of thirteen witnesses testified in this matter; six witnesses testified on behalf of both Maloney and Virsik, and Virsik presented three additional witnesses who spoke only on his behalf.[22] (Maloney also presented four other character witnesses who testified exclusively on his behalf.) All of the witnesses were reasonably informed about respondents' misconduct and all testified that their opinion of Maloney or Virsik would not change if the misconduct were found to be true. The overwhelming theme of the character testimony was respondents' sincere and substantial commitment to using their professional skills on behalf of the under–served, and to do good works within the community. The character testimony goes a long way towards explaining respondents' belief, albeit misguided, that their litigation strategy would right the perceived wrongs of the downtrodden RVN faction.

Maloney's character witnesses testified that he is an honest person who has provided extensive contributions to society, including extensive pro bono work. His commitment to the practice of law is often selfless and sometimes to his personal detriment, but he nevertheless is motivated to do the right thing for the ends of social justice. Maloney presented five attorney witnesses, all with many years of practice, who believed he had excellent character and a reputation for honesty in the community.

Virsik's character witnesses included four attorneys. These character witnesses testified to their personal knowledge of his honesty and competence, but they were unable to comment on his reputation in

21. While not dispositive, the Superior Court decision and its findings and conclusions are entitled to a strong presumption of validity if supported by substantial evidence. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) We note that under Code of Civil Procedure section 128.7 the Superior Court's imposition of sanctions required an extremely high showing of bad faith, frivolous tactics or intention to cause delay.

22. The hearing judge only considered the three witnesses who testified solely for Virsik and in so doing, she found that they did not reflect "a wide range of references in the legal and general communities." (Std. 1.2(e)(vi).)

the community since Virsik had been practicing law for only a short period. Virsik's character witnesses testified that Virsik is a respectful and considerate person who helps others and devotes time to pro bono work and community services.

A sampling of the 13 witnesses is instructive. Elihu Harris, an attorney for almost 30 years, was the former mayor of Oakland and former chair of the Judiciary Committee in the State Assembly for 12 years. Harris has known Maloney for 20 years, and met with him regarding his representation of RVN. Harris testified that Maloney is absolute in his commitment to professionalism and to social justice on behalf of his clients and that he is honest, very frank, and has a firm sense of right and wrong. Harris stated that Maloney's involvement in the community included helping abused women and the homeless, including raising money for a women's shelter in Oakland. Harris has known Virsik for 10 years and thinks of him as a man of few words. Harris believed Virsik has a reputation for honesty and professionalism in his work. Harris further testified that respondents' motivation to represent the RVN was not for financial gain since they absorbed significant costs and time to help them.

Janet Clinton, an attorney for 22 years and co–owner of their office building with Maloney, has known Maloney for 20 years and has had contact with him four or five times a week for the last five years. Clinton testified that Maloney has a firm belief in social justice, has a sterling character and is committed to helping young people. She helped represent Maloney in a dispute concerning a mobile home park for low income seniors that Maloney owns where Maloney spent tens of thousands of dollars to protect the residents of the mobile home park from a disadvantageous agreement, which was against his own self–interest. Clinton also has known Virsik for the past 10 years and sees him three to four times a week. Her opinion is that he is an upright, honest person and is extremely sincere. Virsik also participated in Leukemia walk–a–thons.

Several impressive witnesses testified on behalf of Maloney only. Kathy Neal was a business owner for 13 years and a former member of the State Bar Board of Governors. Neal has known Maloney for 20 years, and has known him well for 10 years, because he and Neal have taught continuing legal education classes together and served on volunteer boards, including a women's shelter in Oakland. She testified he is an exceptional person and she respects his honesty and integrity as well as his commitment to law and justice. Neal finds that Maloney is a unique individual with a strong belief in the basic rights for everyone and has used his education and knowledge to argue vociferously for the interests of justice.

John Macmeeken is a retired attorney who practiced for 45 years. He was a member and then chairman of the disciplinary committee of the State Bar for 12 years. Macmeeken has known Maloney for 16 years through the Outlook Club of California, where they met twice a month. Macmeeken understands the charges against Maloney, but this did not detract from his opinion that Maloney has an excellent character and is concerned about the administration of justice. Macmeeken believes Maloney is a fair, thoughtful person whose word is unimpeachable and that he has a reputation as a straight shooter and as a reliable and conscientious lawyer who serves his clients well.

Virsik's three other witnesses testified as to his honesty, diligence and professionalism. They all knew him well because of their personal relationships with him as a sister, friend and girlfriend. However, their objectivity may well have been affected by their personal relationships with him. Because Virsik had been in practice for only a few years, he did not have the opportunity to develop as widespread a reputation among the community or to perform as extensive pro bono activities as Maloney. But, both respondents demonstrated their significant commitment to pro bono work and community service, which "is a mitigating factor that is entitled to 'considerable weight.'" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785, quoting *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.)

B. Aggravation

We must balance the strong evidence in mitigation against the substantial evidence in aggravation as reflected in this record.

1. Uncharged But Proven Misconduct (Std. 1.2(b)(iii))

[5] The record contains clear and convincing evidence of numerous acts of uncharged but proven misconduct, which we here consider for purposes of establishing aggravation under standard 1.2(b)(iii). (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35–36.) Specifically, we find that respondents wilfully made additional misrepresentations to the Superior Court in the following instances: 1) the February 16th Request for Dismissal; 2) Maloney's oral statements to the Superior Court at the February 17th Hearing; 3) the May 9th Opposition for Sanctions; 4) the May 13th Opposition to Motion for Sanctions; 5) the May 16th Supplemental Opposition to Motion for Sanctions; and, 6) the May 16th Supplemental Declaration by Maloney.

"[T]he filing of false or misleading pleadings or documents is ground for discipline." (*Davis v. State Bar*, *supra*, 33 Cal.3d at p. 239.) As discussed in detail *ante*, the record is replete with additional pleadings and verbal statements, not identified in the NDC, which were rife with material omissions and express misstatements of fact and law. The high degree of integrity, frankness and truthfulness required of respondents as officers of the court cannot be underestimated. (*Spears v. The State Bar* (1930) 211 Cal. 183, 187.) Moreover, respondents had an unconditional and continuing duty to make full disclosure to the Superior Court (Cf. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 493; Rules Regulating Admission to Practice Law, rule VI, § 7); nevertheless, they chose to conceal the full and complete factual circumstances surrounding the disputed tribal election, as well as the novelty of the legal theories and authorities upon which they were seeking to induce the Superior Court to dismiss the *Bettega* case. We consider this in aggravation.

2. Overreaching (Std. 1.2(b)(iii))

[6] The hearing judge found in aggravation that respondents' misconduct was surrounded by dishonesty, concealment and overreaching (std. 1.2(b)(iii)), but she gave this no weight because she found this evidence was duplicative of the misconduct in Count One. We agree, insofar as the aggravating circumstances apply to respondents' attempted fraud on the Superior Court. However, we find that Maloney's conduct in writing on his letterhead stationery to the Tri–Counties Bank instructing the bank to transfer RVIT's accounts and assets to RVN constitutes overreaching and is an aggravating factor. When he wrote the letter to the bank, Maloney knew that the results of the election were only "preliminary," and yet respondent asserted the authority of RVN as unconditional in order to dispossess RVIT of its property. Maloney's misuse of his professional status in this context was clearly improper. This evidence of overreaching is not duplicative of the misconduct charged in Count One, and we find this is aggravation with respect to Maloney. (Std. 1.2(b)(iii).)

3. Lack of Candor in the State Bar Court (Std. 1.2(b)(vi))

The hearing judge found some of respondents' testimony in the proceeding below was not credible and that they lacked candor as well. Great weight is given to the hearing judge's findings on credibility (i.e., believability) and candor (truthfulness). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) However, it is still our responsibility to independently examine the record.

Upon our de novo review, we find clear and convincing evidence that some of respondents' testimony was neither believable nor truthful. An example of respondents' lack of candor is their testimony before the hearing judge about the BIA's position with respect to RVN's constitution. At their August 2002 trial, Maloney testified: "I don't know of any BIA disapproval of the constitution." Similarly, Virsik testified that the BIA had approved RVN's constitution as "a matter of the administrative law standard, failing to act, they approved it [the constitution.]" Yet, two years prior to this testimony, respondents had appealed the BIA's Pacific Regional Director's written decision of November 6, 2000, declining to recognize RVN's constitution.

[7a] Equally questionable is respondents' testimony that they never intended to "file" the various requests for dismissal in the *Bettega* matter and that they merely intended to "lodge" the documents with the Superior Court for its further consideration and action.

Not only did Virsik specifically instruct the clerk of the Superior Court in writing to "file" the May 11th RFD, but respondents stated in several of their pleadings that the requests for dismissal were being submitted for filing or had already been filed. Further, Virsik in his oral argument in the Superior Court on May 19, 2000, expressly represented that "the [RVN] has in fact *filed* a dismissal of this action as successor of what was the [RVIT] as the plaintiff. . . ." (Emphasis added.) The record thus is at complete odds with respondents' testimony in the hearing department. (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)

[7b] Much of respondents' testimony also was evasive and inconsistent, and replete with convenient memory lapses. (See, e.g., *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, 172.) Moreover, when asked about various questionable legal positions that he asserted in the Superior Court in the *Bettega* litigation, Maloney repeatedly deflected responsibility for his actions to his clients. For example, Maloney was asked "was it your position . . . that the BIA was not authorized to speak on behalf of the Interim Tribal Council or the council membership?" He responded: "That was my client's position. I shouldn't be saying it's my position." Again, when asked "didn't [you] care what California Indian Legal Services had to say about the validity of the election?" he responded "My client did not care what California Indian Legal Services did."

[7c] Respondents' testimony went beyond equivocation; it was disingenuous and dishonest. The Supreme Court has on several occasions stated " 'that deception of the State Bar may constitute an even more serious offense than the conduct being investigated.' " (*In the Matter of Dahlz, supra,* 4 Cal. State Bar Ct. Rptr. at p. 282, citing *Franklin v. State Bar*, *supra*, 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.), italics omitted.) We accordingly find respondents' lack of candor to be a strong aggravating circumstance. (*In the Matter of Dahlz, supra,* 4 Cal. State Bar Ct. Rptr. at p. 282; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

4. Harm to the Administration of Justice (Std. 1.2(b)(iv))

[8] We agree with the hearing judge's finding in aggravation that respondents' conduct interfered with the proper administration of justice. (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 642.) Respondents assert that no harm occurred because "everyone" knew about the on–going battle for power, and therefore no one was deceived. They are wrong. The Superior Court specifically found in its June 8th Decision that "[a]s a result of [respondents'] action California Indian Legal Services was required to perform substantial additional work and its client Round Valley Indian Tribes incurred additional expense." The judge ordered additional monetary sanctions against respondents because of the burden respondents had imposed on the court. The record clearly establishes that respondents' actions threatened the efficient administration of justice and improperly burdened the court system and RVIT's attorneys, which we find is an aggravating circumstance. (Std. 1.2(b)(iv).)

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

[9] Additionally we find in aggravation that respondents committed multiple acts of misconduct. (Std. 1.2(b)(ii).) This was not a case of one or two inadvertent or even negligent misrepresentations to the Superior Court. Respondents' misconduct was comprised of multiple acts which were committed in concert with each other over a three–month period. (*Rodgers v. State Bar, supra,* 48 Cal.3d 300, 317.) Time and again, respondents chose to expressly or impliedly create a false picture of the true state of affairs and to ignore contrary facts and legal position. Respondents had numerous opportunities to correct their misleading statements, and yet they chose not to do so. By their repeated acts of misconduct, respondents have demonstrated a pattern of disrespect for professional norms, which we find as additional aggravation. (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 334.)

6. Indifference Towards Atonement or Rectification (Std. 1.2(b)(v))

[10] Respondents' demonstrated lack of insight into the seriousness of their misconduct is particularly troubling to this court. They continue to claim in the face of overwhelming facts and legal authority that their conduct was justified, which demonstrates an indifference toward rectification of or atonement for the consequences of their misconduct, and we find this is an additional aggravating circumstance. (Std. 1.2(b)(v); *In re Morse, supra*, 11 Cal.4th 184, 197–198, 206, 209.) Respondents' conduct "reflects a seeming unwillingness even to consider the appropriateness of [their legal strategy] or to acknowledge that at some point [their] position was meritless or even wrong to any extent. Put simply, [respondents] went beyond tenacity to truculence." (*Id.* at p. 209; see also *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 [meritless defenses show lack of insight in the wrongfulness of one's actions].)

7. Conflicts of Interest

[11a] In their single–minded effort to effect a political upheaval, respondents steadfastly failed to recognize their serious conflicts of interest.[23] Without question, attorneys owe a duty of undivided loyalty to their clients. Respondents ignored this duty and instead purported to represent RVIT's interests in the *Bettega* harassment lawsuit while simultaneously advancing Bettega's and RVN's litigation and political strategies. Given there was an actual conflict, as opposed to a potential conflict, respondents could not represent the various entities and individuals they asserted were their clients in the absence of obtaining their written, informed consent. (Rules Prof. Conduct, rules 3–700(c) & 3–310.) They claimed that the "appropriate" conflicts waivers had been obtained when they had not.

[11b] The Supreme Court explained the policy that underlies rule 3–310 in *Anderson v. Eaton* (1930) 211 Cal. 113, 116: "The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation]." To here overlook respondents' conduct in purportedly representing multiple parties in the same lawsuit would greatly diminish this important policy. Accordingly, we find their efforts to simultaneously represent all three parties in the *Bettega* case to be aggravating conduct.

C. Level of discipline

[12a] The Standards for Attorney Sanctions for Professional Misconduct provide us with guidelines in determining the appropriate degree of discipline to be recommended. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) The gravamen of respondents' misconduct is their multiple misrepresentations to the Superior Court. Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person or of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." We note that respondents' misconduct was closely aligned with their practice.

The standards are to be construed in light of the decisional law (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30), although we find few analogous cases because respondents' misconduct is unusual in its duration and varied procedural contexts. In cases involving fraud on the court, the discipline imposed ranges from stayed suspension to 6 months' actual suspension. At one end of the disciplinary spectrum are cases such as *Sullins v. State Bar* (1975) 15 Cal.3d 609, and *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal.

23. The record discloses that in the *Bettega* litigation respondents claimed to simultaneously represent the plaintiff, RVIT, the defendant, Bettega and the "cross–claimant" RVN.

State Bar Ct. Rptr. 211, where no actual suspension was imposed on attorneys who misled or misrepresented facts to the court. In *Sullins,* the Supreme Court ordered public reproval of an attorney found to have committed moral turpitude by failing to disclose to the court a letter he received while representing the executor in a probate case. The letter was from the decedent's nephew disclaiming any interest in the property under his aunt's will. (*Sullins v. State Bar, supra,* 15 Cal.3d at p. 615.) Sullins requested an increase in his contingency fee, from 33 and 1/3 percent to 50 percent, arguing the matter had been and would be "fiercely contested." (*Id.* at. p. 616.) The court noted that in analogous cases the discipline imposed was more severe, but considered Sullins's 45 years of practicing law without blemish and adopted the disciplinary board's recommendation of public reproval.

In *In the Matter of Jeffers, supra,* 3 Cal. State Bar Ct. Rptr. at p. 226, we recommended a one–year suspension, stayed, and two years' probation. Jeffers failed to disclose to a superior court judge that his client had died, in spite of repeated questions by the judge that should have elicited this information. (*Id.* at pp. 217–218.) Jeffers also had written numerous letters to other counsel involved in the matter and failed to advise them of his client's death. (*Id.* at p. 218.) Jeffers was sanctioned for failing to appear as ordered at a mandatory settlement conference. We determined that there was insufficient evidence in the record to give weight in aggravation to a prior out–of–state discipline, but we gave significant weight in mitigation because several character witnesses testified for Jeffers, Jeffers had practiced law in excess of 30 years before the prior disciplinary matter, and participated in many civic and pro bono activities.

The misconduct in the present case is similar to *Sullins* and *Jeffers*, but it is more far–reaching since it involves numerous pleadings and appearances over a four–month time period. There also is substantial aggravation in the instant case where none was found in *Sullins* and *Jeffers*. But here, the mitigation evidence to some extent offsets the evidence in aggravation. On balance, more serious discipline is warranted here than in those cases where no actual suspension was imposed.

In the middle of the disciplinary spectrum is *McMahon v. State Bar* (1952) 39 Cal.2d 367, where the Supreme Court suspended McMahon for sixty days for making misrepresentations in an effort to mislead the court. McMahon alleged the deceased died intestate in order to appoint his client as administrator in the probate proceeding. However, McMahon had information regarding the existence of a will which he failed to disclose. McMahon is similar to the case at hand in that the attorneys ignored the information available to them and proceeded with legal action which misrepresented facts to the court in an effort to mislead. But the extent of the deception is far more limited in the *McMahon* case and the court there did not address aggravation or mitigation evidence.

Also falling somewhere in the middle of the spectrum is *Bach v. State Bar, supra*, 43 Cal.3d 848, wherein an attorney intentionally misled a judge that he had not been ordered to produce his client at a child custody mediation, or in the alternative that he had not been served with such an order. However, the evidence showed that Bach was informed of the order both orally and in writing. The Supreme Court found that this conduct was serious and involved moral turpitude and was the kind of behavior "that threatens the public and undermines its confidence in the legal profession." (*Id.* at p. 857.) In ordering a one–year stayed suspension, with a three–year probation and 60 days' actual suspension, the court noted there was no mitigation evidence. (*Ibid.*) Moreover, the attorney in *Bach* had previously been publicly reproved for communicating with an adverse party represented by counsel, which was found to be an aggravating circumstance. Here, the misrepresentations were more numerous and there were significantly more aggravating factors, but here also is strong mitigation evidence, which was absent in *Bach*. Also, Bach had a previous disciplinary record, which is not a factor in the present case.

On the higher end of the discipline spectrum are the cases of *In the Matter of Chesnut, supra*, 4 Cal. State Bar Ct. Rptr. 166, *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, and *Levin v. State Bar* (1989) 47 Cal.3d 1140, where attorneys who made misrepresentations were actually suspended for six months. In the case of *In the Matter*

of Chesnut, supra, 4 Cal. State Bar Ct. Rptr. 166, we recommended six months' actual suspension for an attorney who falsely represented to two judges that he had personally served papers on an opposing party. (*Id.* at pp. 171–175, 177.) As in the instant case, we found in mitigation that the attorney's eight witnesses demonstrated good character and that the attorney engaged in pro bono activities. (*Id.* at pp. 175–177.) In *Chesnut*, like this case, we found in aggravation the attorney did not admit to any wrongdoing and the testimony in the State Bar Court lacked candor. However, in *Chesnut*, our key concerns were the attorney's prior disciplinary record and the fact that the attorney had been in practice for less than five years at the time of his second discipline, which we found "requires strong prophylactic measures." (*Id.* at p. 178.) Here, although respondents' conduct is more egregious, there is no other evidence of misconduct having occurred either before or after this matter.

We also consider *In the Matter of Farrell, supra*, 1 Cal. State Bar Ct. Rptr. 490, wherein an attorney was suspended for two years, stayed, and placed on six months' actual suspension. Farrell was found culpable of violating section 6106 because he falsely stated to a trial judge that a witness had been subpoenaed and he failed to cooperate with the State Bar. (*Id.* at p. 497.) In mitigation, Farrell believed that the subpoena had actually been sent by a member of his staff, but had no basis to believe it had been served. In aggravation, he had a prior record of discipline in two client matters resulting in 90 days' actual suspension. The misconduct here is far more serious, but Farrell's prior discipline is a significant distinguishing factor.

Lastly, in *Levin v. State Bar, supra*, 47 Cal.3d 1140, an attorney misrepresented to opposing counsel that he had the authority to settle the case as an officer of his incorporated client. (*Id.* at p. 1143.) Levin was not an officer, but under this guise, he also tried, on numerous occasions, to communicate with the adverse litigant despite the opposing counsel's letters that Levin stop these communications. (*Ibid.*) In the same disciplinary proceeding, but in a different client matter, Levin settled a personal injury claim without the client's consent and failed to inform her of the settlement. Instead, Levin paid himself his fees and then gave the remaining settlement proceeds to the client's cousin, who gave the client only a part of the money, claiming the rest was payment for a debt owed. The client then requested an accounting from Levin, which he failed to deliver. (*Id.* at p. 1145.) The court found that Levin's acts of dishonesty were the most reprehensible of his misconduct. (*Id.* at p. 1147.) The misconduct in *Levin*, while more varied, is perhaps the closest in scope to the case at hand.

Mitigating weight was given due to Levin's 18 years of practice without prior discipline and his unblemished conduct subsequent to the State Bar investigation, as well as for his candor and cooperation with the State Bar. Nevertheless, the court found this evidence was outweighed by aggravating evidence of Levin's attempts to conceal his dishonest acts, and that his dishonesty while not actually constituting a pattern of wrongdoing, "at the very least . . . demonstrate[d] repeated, similar acts of misconduct" which merited six months' actual suspension. (*Id.* at pp. 1149–1150.)

[12b] The primary purposes of the disciplinary proceedings 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; *In re Morse, supra*, 11 Cal.4th at p. 205.) But, no fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) In the instant case, we have found less culpability and more mitigation, but we also have found considerably more aggravation than the hearing judge. Respondents clearly lost their way when they abandoned any notion of objectivity and professional responsibility in their effort to co–opt the litigation process for the benefit of their client, RVN. Given that they had ample time over a four–month period to reflect on what they were doing, we are concerned that respondents' serious ethical lapses may not be aberrational. (See *Mosesian v. State Bar* (1972) 8 Cal.3d 60, 65.) The aggregate number of their misrepresentations also raises concerns over whether the misconduct was aberrant. (*In the Mat-*

ter of Kueker (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

[12c] Militating in favor of respondents is their strong character evidence demonstrating their commitment to community service and social justice, their reputation for honesty and diligence, and their unblemished record save for their unfortunate foray into spurious litigation tactics. Also, while respondents' misconduct is serious and repeated, it occurred in a single client matter. Moreover, while not attempting to minimize the gravity of their misconduct, it was the result of over–zealous representation of their client and not for personal gain. Thus, even though the seriousness of the misconduct in this case appears to be most like those cases imposing six months actual suspension, we do not believe such severe discipline is needed here.

[12d] Although the hearing judge viewed the respective culpability of each respondent as similar, and found more mitigation evidence for Maloney, we conclude that respondent Maloney's actions warrant greater discipline than those of respondent Virsik. We find Virsik to be less culpable than Maloney since he did not appear or make misrepresentations at the February 16th hearing in the Superior Court, and there is no evidence he prepared the misleading February 16th RFD, which Maloney submitted to the Superior Court. Also we find that Virsik is not culpable of overreaching in aggravation, because there is no evidence he prepared the misleading letters to the bank demanding that RVIT's accounts be transferred to RVN. Finally, and perhaps most importantly, as the State Bar points out in its brief on appeal, and as Maloney has so stipulated, he was the partner in charge of the litigation tactics here in question, and he had more than 30 years' experience, while Virsik was a relatively inexperienced associate. As such Maloney must bear more responsibility than Virsik. Regrettably, Maloney's "lengthy practice and professional achievements did not aid [either] respondent in avoiding basic violations of the Rules of Professional Conduct." (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.) Accordingly we recommend 90 days' actual suspension for Maloney on the conditions stated below, and we find the appropriate discipline for Virsik to be 60 days' actual suspension on the conditions stated below.

IV. FORMAL RECOMMENDATION

We recommend that respondents Patrick J. Maloney and Thomas S. Virsik be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed, and that respondents be placed on probation for two years on the following conditions:

1. Respondent Maloney be actually suspended from the practice of law in the State of California during the first 90 days of probation; and respondent Virsik be actually suspended from the practice of law in the State of California during the first 60 days of probation.

2. Respondents 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. Respondents must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a)(1).) Respondents must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondents' home addresses and telephone numbers will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondents must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondents must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondents are on probation (reporting dates). However, if respondents' probation begins less than 30 days before a reporting date, respondents may submit the first report no later than the second reporting date after the beginning of probation. In each report, respondents 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 respondents have complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation since the beginning of probation; and
>
> (b) in each subsequent report, whether respondents have complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation during that period.
>
> During the last 20 days of this probation, respondents 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, respondents 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.

5. Subject to the proper or good faith assertion of any applicable privilege, respondents must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondents, whether orally or in writing, relating to whether respondents are complying or have complied with the terms and conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondents must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondents' California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondents are ordered not to claim any MCLE credit for attending and completing this course. (Accord Rules Proc. of State Bar, rule 3201.)

7. Respondents' probation will commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if respondents have complied with the terms and conditions of probation, the Supreme Court order suspending respondents from the practice of law for one year will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondents 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 such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

We further recommend that respondent Maloney 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 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar 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.

We concur:

STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOSHUA M. DALE

A Member of the State Bar

No. 00–O–14350

Filed May 6, 2005

SUMMARY

While representing tenants in a negligence lawsuit against an apartment owner arising from an arson fire, respondent used his status as an attorney to gain access to the individual incarcerated for setting the fire. Respondent took advantage of the individual's vulnerability and exacerbated the individual's dissatisfaction with his attorneys and offered to represent the individual at his parole hearing if he would sign an incriminating declaration. The hearing judge found respondent culpable of improperly communicating with a represented party, committing acts of moral turpitude, and breach of a fiduciary duty owed to a non–client and recommended four months' actual suspension.

The review department concluded that respondent was not culpable for his communications with the incarcerated individual but otherwise adopted the hearing judge's findings and conclusions with respect to moral turpitude and breach of fiduciary duty. The review department recommended that respondent be suspended for one year, stayed, that he be placed on probation for two years on the condition that he be actually suspended for four months.

COUNSEL FOR PARTIES

For State Bar: Robin B. Haffner

For Petitioner: Jerome Fishkin

HEADNOTES

[1 a, b] 257.00 Rule 2–100 (former 7–103)
257.05 Rule 2–100 (former 7–103)–Not Found
Where respondent, who represented tenants in a negligence lawsuit against an apartment owner, communicated with an incarcerated individual, who was not a party to the negligence lawsuit but was nevertheless represented by counsel, such communications are not in violation of rule 2–100.

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] **159 Evidence–Miscellaneous**
Although the discussion accompanying a rule of professional conduct can be considered as an interpretive aid, it cannot add an independent basis for imposing discipline.

[3] **159 Evidence–Miscellaneous**
Under the rules of statutory construction, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose if possible. Statutes are to be given effect according to the usual, ordinary import of the language employed in framing them.

[4] **221.00 State Bar Act–Section 6106**
221.12 Gross negligence–Found
Where respondent elicited an incriminating statement from an individual who was incarcerated and awaiting the appeal of his confession to the police and where respondent was an experienced criminal attorney who knew that the incriminating statement could be used as evidence at re–trial, respondent's overreaching was the height of irresponsibility and constituted at least gross neglect establishing a basis for a finding of moral turpitude.

[5] **221.00 State Bar Act–Section 6106**
221.19 Other factual basis–Found
Where respondent was aware that a witness's attorneys objected to his cooperation with respondent, where respondent circumvented their objections and ultimately convinced the witness to reject his attorneys' advice, and where there is no evidence that the witness gave a knowing and intelligent waiver of his right to counsel, respondent committed misconduct involving moral turpitude by allowing the witness to act as his own counsel.

[6] **221.00 State Bar Act–Section 6106**
221.12 Gross negligence–Found
Respondent was culpable of moral turpitude when he made misleading statements in order to induce a witness to sign a confession. Respondent was, at best, grossly negligent in not fully explaining to a witness the consequences of his cooperation. A finding of gross negligence in creating a false impression is sufficient for violation of section 6106. Acts of moral turpitude include concealment as well as affirmative misrepresentations and no distinction can be drawn among concealment, half–truth, and false statement of fact.

[7 a–c] **213.10 State Bar Act–Section 6068(a)**
213.11 State Bar Act–Section 6068(a)–Found
430.00 Breach of Fiduciary Duty
430.01 Breach of Fiduciary Duty–Found
Where the record contains clear and convincing evidence that respondent led a witness to believe they had a special relationship of trust and confidence and that his interests would be protected by respondent, respondent assumed a fiduciary duty towards the witness, who was a vulnerable criminal defendant, when he used his superior knowledge and position as an attorney to create a confidential relationship of trust and dependency. In so doing, respondent caused the witness to reject his attorney's advice and accede to respondent's wishes thereby breaching his common law fiduciary duty to the witness in wilful violation of section 6068, subdivision (a).

[8 a, b] **430.00 Breach of Fiduciary Duty**
430.01 Breach of Fiduciary Duty–Found
Respondent owed an incarcerated witness the same high duty of honesty and obedience to fiduciary duty as if he were acting as his attorney. An attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney–client relationship.

[9] **555 Aggravation–Overreaching–Declined to Find**
Although respondent's misconduct was surrounded by concealment and overreaching, it was appropriate not to consider this as a factor in aggravation since it would be duplicative of the misconduct comprising acts of moral turpitude for which respondent was found culpable.

[10] **586.10 Aggravation–Harm to administration of justice–Found**
Where respondent's conduct undermined a witness's relationship with his attorneys and compromised the witness's Fifth and Sixth Amendment rights, such conduct significantly harmed the administration of justice and is properly considered as a factor in aggravation.

[11] **1015.03 Discipline–Actual Suspension–3 Months**
Where respondent committed multiple acts involving moral turpitude and breached an implied fiduciary duty in violation of section 6068(a), where there was mitigation for good character and entering into a comprehensive stipulation of facts, and where there was aggravation due to multiple acts of wrongdoing, significant harm to the administration of justice, and a failure to recognize the serious consequences of his behavior, the appropriate disciplinary recommendation was one year stayed suspension, two years of probation on conditions which included four months actual suspension.

OPINION

EPSTEIN, J.:

Respondent, Joshua M. Dale, compromised the integrity of the criminal justice system when he systematically befriended and then cajoled Darryl Geyer, an incarcerated 22–year–old with a 10th grade education, into giving a confession about an arson fire at an apartment building. Geyer had previously confessed to the police about the fire, and the voluntariness of that confession was the key issue upon which he was appealing his second degree murder conviction. Respondent, who was representing the tenants in a negligence lawsuit against the apartment owner arising from the same fire and was facing the owner's summary judgement motion, needed Geyer's statement about the condition of the premises when he set the fire.

Respondent knew that the declaration he obtained from Geyer could be used as evidence at Geyer's re–trial if his conviction were reversed on appeal. Geyer's trial and appellate attorneys refused respondent's requests to contact Geyer, and they advised Geyer not to speak with respondent. Nevertheless, respondent intentionally used his status as an attorney to gain access to Geyer while he was in jail and to meet with him in private. He skillfully took advantage of Geyer's vulnerability and exacerbated Geyer's dissatisfaction with his attorneys. Respondent offered his services to represent Geyer at his parole hearing if he would sign the incriminating declaration, and Geyer acquiesced. Even after obtaining the declaration, respondent continued to curry favor with Geyer so that he would make himself available as a percipient witness at the civil trial. Respondent ultimately obtained a $400,000 settlement in his civil case.

The hearing judge found respondent culpable of violating rule 2–100 of the Rules of Professional Conduct[1] by improperly communicating with a represented party; committing acts of moral turpitude in violation of Business and Professions Code section 6106;[2] and breach of a fiduciary duty owed to a non–client in violation of section 6068, subdivision (a). She recommended, inter alia, four months' actual suspension. For the reasons set forth below, we modify her culpability determinations, but we nevertheless adopt her disciplinary recommendations.

I. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts material to our decision are the subject of a Joint Stipulation in the disciplinary proceedings below. We nevertheless independently review the record (*In re Morse* (1995) 11 Cal.4th 184, 207), and accordingly our findings are based on our de novo review of the evidence adduced at the hearing below as well as the Joint Stipulation.

Darryl Geyer confessed to the police that he set several fires, including a fire to an apartment building at 1011 Bush Street, San Francisco on June 11, 1996. One of the occupants died in the fire, several were injured and many suffered property damage. Attorney Kenneth Quigley was appointed to represent Geyer in the criminal matter (*People v. Geyer*) on June 28, 1996. In July 1996, William Burke and several of the tenants at 1011 Bush Street asked respondent to represent them in a suit for personal injuries (*Burke v. Chen*) against the owner of the apartment building, Grace Chen, based on allegations that the premises were maintained negligently, which contributed to the fire. Geyer was not named in the suit, but he was a percipient witness to the condition of the building at the time he set fire to it.

Geyer was indicted on 13 counts of arson (Penal Code section 451) one count of auto theft (Vehicle Code section 10851) and one count of murder with arson special circumstances (Penal Code sections 187 and 190.2, subd.(a)(17)(H)). His criminal trial commenced on July 23, 1999, and lasted until July 27, 1999, when Geyer withdrew his not guilty plea and submitted a guilty plea to six counts of arson. The homicide charge was submitted to the judge who found Geyer guilty of second–degree murder. How-

1. All further references to "rule" are to the Rules of Professional conduct, unless otherwise noted.

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

ever, in a carefully crafted plea agreement, Geyer retained his right to appeal the homicide conviction on the grounds of an illegal confession.

Meanwhile, respondent, who was admitted in 1994 and was inexperienced as a civil lawyer,[3] was facing a motion for summary judgement by the owner's attorneys. Respondent believed that Geyer's declaration about his involvement in setting the fire at 1011 Bush Street, and his observations about the condition of the premises at the time he set the fire, were vital to his ability to defeat the summary judgement motion. Sometime during the pendency of the case, and while Geyer was incarcerated, respondent contacted Quigley and asked him if he could interview Geyer in connection with his civil suit. Quigley refused to give his permission. Nevertheless, on at least three occasions respondent waited in the hallway at the Hall of Justice where inmates were kept while they were awaiting court proceedings, specifically to observe Geyer and make contact with him. The only persons with access to this area were court personnel and attorneys. Respondent succeeded in exchanging nods with Geyer, and on one occasion spoke to him, saying in effect "we are going to have to talk someday."

On July 30, 1999, after the conclusion of the trial, but prior to Geyer's sentencing, respondent visited Geyer in the San Francisco County Jail. During this visit respondent gained direct access to Geyer by using the entrance and the procedures reserved for attorneys rather than regular visitors, thus enabling respondent to speak to Geyer face–to–face and in private, rather than through a glass partition in the public reception area. He told Geyer he would need his statement about the 1011 Bush Street fire for his civil trial. Geyer said he wanted to speak with his attorney before he would agree to give a statement, and he followed up with a letter to respondent on August 5, 1999, stating: "I have been unable to contact my attorney Kenneth M. Quigley about giving you a deposition on the events that took place at 1011 Bush Street. . . . I will be unable to respond to questions in regards to 1011 Bush Street. I'm sure that you understand." Respondent persisted with five more visits to the county jail, all of which were prior to Geyer's sentencing and while Quigley was Geyer's counsel of record. Each time respondent had face–to–face conversations with Geyer in private by utilizing the special procedures reserved for attorneys. The purpose of these visits was to befriend Geyer in order to cultivate him as a favorable witness in respondent's personal injury case. During these visits, they discussed current events, the challenges of life in jail and Geyer's hopes and dreams, in addition to his involvement as a witness in the *Chen* case.

On August 25, 1999, Geyer told Quigley that he was dissatisfied with him and that he wanted to fire him and employ new counsel. However, Geyer did not succeed in replacing Quigley, who remained his court appointed attorney at the time of the trial in the hearing department below. On September 28, 1999, Geyer was sentenced to 20 years to life, with the possibility of parole, at the earliest, in 2013. On September 30, 1999, Quigley signed and filed a notice of appeal, which was lodged in the Court of Appeal on October 29, 1999. Geyer was listed on the Notice of Appeal as representing himself in pro per.

Meanwhile, on October 21, 1999, respondent again visited Geyer, who by this time had been transferred to San Quentin prison. Respondent brought with him a letter agreement, typed on his letterhead, which stated:

> "Pursuant to our many conversations, I offer you the below contract between the two of us. [¶] If you date and sign the enclosed declaration, under penalty of perjury, I will do what I can to assist you when you come up for parole, including but not limited to, being your attorney if you choose, or your witness. [¶] As your witness at any hearing, I would tell how you took responsibility early on . . . . I will also encourage the tenants of 1011 Bush Street to do the same, and some are willing only if you take the first step by telling the

3. Respondent is a criminal defense attorney who is experienced in representing individuals charged with driving under the influence. He has no prior record of discipline.

> truth about the fire, how you entered the building, and what else occurred in the basement of that building on June 11, 1996. [¶] The declaration is made up of the facts your [*sic*] told in your video taped confession to the police."

Geyer testified that he was grateful for respondent's offer of legal assistance with his parole hearing since he had no confidence in Quigley and could not afford to hire other counsel. With this contract as an inducement, Geyer acquiesced to signing the declaration, which respondent had prepared and brought with him to San Quentin. The declaration stated, in part:

> "In the early morning hours of June 11, 1996, I was walking in the vicinity of Bush Street and Jones with a friend, Gabriel Cano. [¶] As I walked along Jones Street, I noticed an empty door. I entered through that door and found it lead [*sic*] to a basement area. I later found out that this was the basement of 1011 Bush Street. . . . While in the basement of 1011 Bush Street I noticed a large amount of paper and cardboard. I also noticed that the walls of the basement were made of exposed wood. Mr. Cano and I stayed in the basement for approximately ten minutes before deciding to leave. Just before I left the basement, I lit a single match and threw it in some of the paper and cardboard I had seen in the basement area."

However, before Geyer would sign this statement, he insisted that respondent add the following, which was inserted in respondent's handwriting:

> "Addendum: I have been assured by Joshua M. Dale, Esq., that this document cannot and will not be used or effect [*sic*] my appeal of my conviction in the San Francisco Superior court matter."

After respondent signed the addendum, Geyer signed the declaration under penalty of perjury.

The one area where there is conflicting evidence relates to the nature of respondent's verbal assurances to Geyer at the time he signed the above statement. Respondent asserts that he assured Geyer that his declaration would not harm his appeal, but that he also discussed how Geyer's statement could be used against him at re–trial if he won his appeal. Geyer testified that he was not advised of the full import of his declaration, and that respondent told him repeatedly that the statement could not hurt him in any respect, but would only help him with his eventual parole hearing. Geyer explained: "My primary intention was to make right what I had done to the tenants but I wouldn't have done it if I thought it would hurt me."

Respondent filed the declaration in the superior court in the *Burke v. Chen* case on October 23, 1999. When Quigley found out about the declaration he was furious and demanded that respondent withdraw it. In a letter dated October 25, 1999, to respondent, Quigley stated that respondent had "used [his] status as an attorney to get in the San Francisco County Jail and interview Mr. Geyer, who is still my client. . . . the result of that interview is that you have obtained a declaration that contains admissions by Mr. Geyer that are devastating to his criminal case. . . . [and] so destructive of Mr. Geyer's interest that it could result in him spending his life in a small cage." The following day, respondent attempted to head–off any fallout from Quigley's anger by writing to Geyer: "Kenneth Quigley is trying to get my law license for talking to you even though you'd fired him, and he wasn't even your attorney after sentencing. I'd say you should expect a visit or letter from him, or his representative, soon . . . . I'll write to you soon regarding all the commotion that your declaration has created. I again think that your telling the truth is the best thing you could have done." In that same letter, he informed Geyer that he had talked with the district attorney (D.A.) about his appeal and parole, and that the D.A. had told him if Geyer won his appeal, he would only serve eight years. Respondent also advised that the D.A. "agrees that you should do your best to make your first parole hearing count."[4]

Respondent communicated with Geyer by mail on at least three other occasions for the purpose of

4. The D.A. disputed that he had such a conversation with respondent.

currying his favor as a witness at the upcoming civil trial. For example, one letter, dated November 3, 1999, said, "Your declaration saved the tenants' case. Thank you. Your letter of apology is spectacular, and the tenant will, and some have already, forgive [*sic*] you for the disruption to their lives. You have much to be proud of and I look forward to visiting soon. . . . you are a special person on earth. . . . [Emphasis in the original.]"

John Jordan was appointed as Geyer's appellate counsel of record on January 18, 2000. Nevertheless, respondent continued to communicate with Geyer. Thus, on January 28, 2000, respondent wrote to Geyer, warning him: "I'd really be careful with any promises if they've seen you. They are the ones that got you convicted, remember?" In the same letter, respondent persisted with his cultivation of Geyer's friendship, stating: "I'm enclosing some things for you like before. I've talked with several of the people at your new location. There are many things that you may do there. . . . I'll be able to do more down the road if you begin to send me promising things about you." Three days later, respondent filed a motion in the civil case to obtain a court order to produce Geyer at the trial. Respondent did not serve the notice on Jordan or otherwise notify him and no attorney appeared for Geyer. The motion was granted on February 10, 2000. Respondent settled the *Chen* case in mid–February 2000 for $400,000. He never again communicated with Geyer, and he provided no further legal assistance to him. Geyer lost his appeal, although his declaration did not affect the outcome.

Geyer filed a complaint with the State Bar on May 3, 2000. After an investigation by the State Bar, a three–count Notice of Disciplinary Charges (NDC) was filed on April 3, 2002, alleging respondent violated rule 2–100 by improperly communicating with a represented party; committed acts of moral turpitude in violation of Business and Professions Code section 6106; and violated section 6068 subdivision (a) arising from a breach of a fiduciary duty owed to a non–client. A three–day trial was held in the hearing department commencing on April 22, 2003. Kenneth Quigley, Geyer's trial attorney, and John Jordan, Geyer's appeals attorney, offered testimony, and the videotape testimony of Geyer also was admitted in evidence.[5] Seven good character witnesses testified on behalf of respondent.

The hearing judge found respondent culpable of all three counts, and she recommended that respondent be suspended for one year, stayed, and placed on probation for two years, with conditions, including four months' actual suspension. As we discuss in detail below, we do not agree with hearing judge's finding of culpability under rule 2–100, but adopt her findings and conclusions with respect to moral turpitude and breach of fiduciary duty. We also adopt her disciplinary recommendations.

II. DISCUSSION

A. Count One: Communication with a Represented Party (Rule 2–100(A))

Respondent was charged in Count One of the NDC with communicating with a represented party in violation of rule 2–100(A). The rule provides: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."[6]

5. Prior to trial, Geyer's video deposition was taken, and the parties stipulated that the videotape and transcript could be used at trial in lieu of his personal appearance, subject to valid objections.

6. Versions of this "no contact" rule are in effect in all fifty states. Twenty–seven states use the term "party" in their analogous rules to rule 2–100. Of those, eighteen states (Alabama, Arkansas, Arizona, Colorado, Connecticut, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, West Virginia, Wisconsin, and Wyoming) have provided drafter's Commentary to expressly clarify that the rule covers any person whether or not a party to a formal proceeding. Twenty–two states use the word "person" and clearly intend the rule to prohibit communications with any person who is represented by counsel, whether or not a party in a proceeding (Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Vermont).

Respondent argues that he did not violate rule 2–100 because: 1) Geyer was not represented by an attorney at the time respondent obtained his declaration; and 2) Geyer was not a party to the civil case, *Burke v. Chen.*

We can readily dispose of respondent's first contention. Respondent stipulated that his meeting with Geyer on October 21, 1999, when he obtained Geyer's declaration, was the culmination of at least five previous meetings, all of which took place while Geyer was awaiting sentencing and was represented by Quigley. Additionally, respondent communicated with Geyer at least two more times while Geyer was represented by appellate counsel, John Jordan. From the outset, respondent's communications were directed at securing Geyer's declaration and, ultimately, his testimony at trial about his involvement with the arson fire – the very facts that were the crux of Geyer's defense at his murder trial and were the basis of his appeal.

[1a] Respondent's second contention that rule 2–100 is inapplicable because Geyer was not a represented "party" in the *Burke v. Chen* personal injury suit is not so readily disposed of. Geyer's involvement with the civil suit was only as a witness. Thus, in order to find a violation of rule 2–100, we must construe the proscription against communicating with a represented "party" to mean represented "person." This was the approach taken by the hearing judge below, but we find very limited support for this broad interpretation of rule 2–100.

[2] There is one California case which, in dicta, interpreted the term "party" to mean "person." In *Jackson v. Ingersoll–Rand Co.* (1996) 42 Cal.App. 4th 1163, 1167, the appellants sought review of an order disqualifying defense counsel pursuant to rule 2–100 because the attorney communicated with the former wife of a co–plaintiff in a personal injury case. The former wife had been dismissed because she no longer had a claim for loss of consortium. In reversing the order of disqualification, the Court of Appeal asked: "Was Ms. Jackson a represented party? [Fn. omitted.] Under Rule 2–100, 'party' broadly denotes person, and is not limited to litigants, so Ms. Jackson's dismissal from the case does not conclusively settle the question. (Drafter's notes, Rule 2–100.)" The court nonetheless found rule 2–100 was not applicable because, even if the ex–wife was represented by counsel, the defendant's counsel had no knowledge of her prior representation by the plaintiff's counsel. (*Ibid.*) We find some additional support for the hearing judge's interpretation in the drafter's Discussion section that follows the rule. It states: "Rule 2–100 is intended to control communications between a member and *persons* the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. [Emphasis added.]" Although we may look to the Discussion accompanying the rule as an interpretative aid, it cannot add an independent basis for imposing discipline. (Rule 1–100(C).)

We find scant authority in the drafting history of rule 2–100, the rules of statutory construction, and the decisional law for construing rule 2–100 so as to prohibit contacts with a non–party. Indeed, the drafting history of rule 2–100 provides us with precious little guidance.[7] When the rule was adopted by the Supreme Court in 1988, changes were made to the predecessor rule 7–103, which were directed at contacts with corporate parties. No consideration was given to the usage of the term "party" or whether non–parties were to be included within the definition.[8]

7. See Request That the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation (Dec. 1987) Office of Professional Standards of the State Bar of California, pp. 24–26.

8. The term "party" was carried over from the earlier California rule 7–103 and its predecessor rule 12, both of which were patterned on American Bar Association (ABA) Model Code DR 7–104. The current version of ABA Model Rules of Professional Conduct, rule 4.2 (Model Rule 4.2) was amended in 1995 to substitute the word "person" for "party" specifically to clarify that the rule applies to non–parties. (See drafter's comment to Rule 4.2.) In its current form Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." (Emphasis added.) Many states have followed suit and similarly amended their no contact rules to apply to persons instead of parties. (See fn. 7 *ante.*)

[3] Turning to rules of statutory construction, we note that the language of rule 2–100 specifically uses the term "person" within its own definition of "party."[9] We therefore must presume that the drafters were aware of the distinction between "party" and "person" when they simultaneously used both terms in the very same statutory definition. " ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." [Citation.]' " ' (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.) Moreover, ' " '[w]e are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]' " ' (*Ibid.*)

The few cases that have interpreted rule 2–100 have given it a narrow construction, albeit while focusing on different provisions of the rule than those of concern here. Thus, in *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401, the Court of Appeal expressly rejected Taco Bell's assertion that the rule should be construed broadly, finding instead that "Rule 2–100 should be given a reasonable, commonsense interpretation, and should not be given a 'broad or liberal interpretation' which would stretch the rule so as to cover situations which were not contemplated by the rule." (Citing *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 120–121.)

Discipline has been imposed under rule 2–100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party.[10] (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [attorney communicated directly with opposing party]; *Mitton v. State Bar,* (1969), 71 Cal.2d 525 [attorney for the plaintiff communicated with defendant]; *Turner v. State Bar* (1950) 36 Cal.2d 155 [attorney culpable when he had opposing party sign settlement papers]; *Chronometrics, Inc., v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [member disqualified for communicating with a represented cross–defendant in a civil action]; *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70 [attorney communicated directly with opposing party whom he knew to be represented by counsel during litigation].)

Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re–write rule 2–100, which by its plain language is limited to a represented "party." We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction[11] could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez, supra,* 4 F.3d 1455, 1458–1459: "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel . . . . [T]he trust necessary for a successful attorney–client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." Our Supreme Court echoed this same assessment in *Mitton v. State Bar, supra,* 71 Cal.2d 524, 534: "[The no contact rule] shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist."

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9. Specifically, rule 2–100 (B) states: "For purposes of this rule, a 'party' includes: (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such *person* in connection with the matter which may be binding upon or imputed to the organization . . . . [Emphasis added.]"

10. Several cases have considered the application of the no contact rule to individuals in the dual role of witness/party. (See, e.g., *Mills Land & Water Co. v. Golden West Refining* Co. (1986) 186 Cal.App.3d 116, 126–128; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140; *United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455.)

11. The Discussion accompanying rule 2–100 makes clear that it is not limited to a litigation context.

[1b] The instant case illustrates how the concern about interference with the attorney–client relationship as expressed by the Ninth Circuit Court of Appeals and the Supreme Court is equally relevant when the represented individual is not a party to the proceedings. But we defer to the Board of Governors and the Supreme Court for any curative efforts should they determine that the purpose of rule 2–100 is ill–served by its present language. We therefore are compelled to conclude that respondent is not culpable for his communications with Geyer under rule 2–100 because Geyer was not a represented party in the *Burke v. Chen* lawsuit, and we dismiss Count One with prejudice.

B. Count Two: Moral Turpitude (Section 6106)

[4] Our exposition of rule 2–100 does not absolve respondent of culpability. On the contrary, the same misconduct that is alleged to be the basis of a rule 2–100 violation also is alleged in Count Two of the NDC to constitute acts involving moral turpitude in violation of section 6106. The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Indeed, as we discuss below, the moral turpitude allegations provide the underpinnings to our analysis of respondent's misconduct.

Respondent was so focused on avoiding the technical prohibitions of rule 2–100, he was blinded to the larger issue of the overreaching inherent in the circumstances surrounding his relationship with Geyer. Eliciting the incriminating statement from Geyer while he was incarcerated and awaiting the appeal of his confession to the police was the height of irresponsibility and constituted at least gross neglect. Gross negligence is a well established basis for a finding of moral turpitude. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 425; *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297.) Respondent's conduct is particularly egregious because he was an experienced criminal attorney who knew that Geyer's declaration could be used as evidence to convict Geyer at a re–trial.

We are equally troubled that respondent's conduct was surrounded by overreaching because he took advantage of Geyer's vulnerability as an incarcerated young man with a 10th grade education. He plied Geyer with small gifts such as magazines and stamps, and wrote: "you have much to be proud of" and that he was "a special person on earth." He also took advantage of the county jail procedures reserved for attorneys in order to meet with Geyer in private, and he used these opportunities to systematically befriend him. Respondent then leveraged this friendship to drive a wedge between Geyer and his attorneys, by writing, for example, "Remember, they are the ones who got you convicted."[12] He intentionally waited until after sentencing to take advantage of the window of time when respondent believed Geyer was acting in pro per to extract Geyer's written confession.

[5] Respondent was not free to unilaterally determine that Geyer was without representation and therefore available to communicate with respondent; he was obliged to either confirm the status of Geyer's representation with Quigley or at a minimum seek authorization from the criminal court with jurisdiction over Geyer's case. (*Jackson v. Ingersoll–Rand Co., supra*, 42 Cal.App. 4th at p. 1168.) Even assuming, arguendo, that respondent had a reasonable belief that Geyer was unrepresented by counsel when he met with him at San Quentin on October 21, 1999, we are compelled to conclude that respondent was culpable of misconduct involving moral turpitude by allowing Geyer to act as his own counsel. Respondent was well aware that Geyer's attorneys objected to his cooperation with respondent, yet he circumvented their objections and ultimately convinced Geyer

12. Geyer was a product of numerous foster care families, had been physically and sexually abused, and had been in the juvenile justice system for years.

to reject his attorneys' advice.[13] In so doing, respondent improperly saddled Geyer with the responsibility of representing himself in his negotiations with respondent.

Given the intellectual inequality between respondent and Geyer and Geyer's comparative inexperience with legal matters, we are struck by the utter disparity in their respective bargaining power. "When the accused assumes functions that are at the core of the lawyer's traditional role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right." (*United States v. Kimmel* (9th Cir. 1982) 672 F.2d 720, 721.) We find no evidence in this record that Geyer gave a knowing and intelligent waiver of his right to counsel at the time that respondent motivated him to embark on his perilous journey to promised salvation. Respondent thus subverted Geyer's right to the protections of the criminal justice system to respondent's own selfish ends. Accordingly, we find respondent committed additional misconduct involving moral turpitude.

Based on the foregoing acts involving overreaching, the additional allegations in Count Two concerning respondent's false and misleading statements to induce Geyer to sign a confession are not essential to our culpability determination. But these allegations are additive, and therefore we address them here. Respondent contends that he truthfully represented to Geyer that his appeal would not be affected by his confession, which ultimately was not considered by the court in denying his appeal. In reality, respondent's explanation to Geyer was only a half–truth. The unvarnished truth was that if Geyer succeeded on appeal, his declaration would have provided the crucial evidence to convict him at his re–trial. Respondent also testified he made Geyer aware of the countervailing considerations in signing the declaration and that Geyer had given up on his appeal because he thought he would not win. The hearing judge found respondent's testimony in this regard was not credible and we agree. Geyer testified "I wouldn't have [signed the declaration] if I thought it would hurt me." Even though Geyer was an admitted perjurer, the overwhelming evidence supports his testimony. Geyer's insistence on the hand written addendum to his declaration stating that he had "been assured by Joshua M. Dale, Esq., that this [declaration] cannot and will not be used or affect my appeal of my conviction in the San Francisco Superior court matter" makes no sense if he were willing to forfeit the benefits of his appeal on re–trial. It also does not follow that Geyer, who was highly motivated to obtain early parole, would at the same time be willing to do something that could result in receiving a life sentence *without* the possibility of parole.

[6] The fundamental illogic of this situation compels the conclusion that, at best, respondent was grossly negligent in not fully explaining the consequences of Geyer's cooperation, or at worst, that respondent intentionally misrepresented the legal effect of his second confession. A finding of gross negligence in creating a false impression is sufficient for violation of section 6106. (*In the Matter of Moriarty*, *supra*, 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90–91.) Acts of moral turpitude include concealment as well as affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Furthermore, " '[n]o distinction can . . . be drawn among concealment, half–truth, and false statement of fact. [Citation.]' [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) We thus conclude that in addition to gross neglect accompanied by overreaching, respondent is culpable of moral turpitude as charged for making misleading statements in order to induce Geyer to sign a confession.

13. Respondent led Geyer to believe that respondent was being honest and had Geyer's best interests at heart, while his attorneys were inept and dishonest. He caused Geyer to second guess and ultimately disregard Quigley's advice. In Geyer's words: "One [attorney] got me believing one way and then another one got me believing the other way. It was kind of a push/pull thing. . . . And Mr. Dale was the one I was having the most contact with at the time."

C. Count Three: Fiduciary Duty to a Non–client (Section 6068, subd.(a))

[7c] Count Three of the NDC incorporates by reference the misconduct alleged in Counts One and Two and further alleges that respondent breached his common law fiduciary duty to Geyer, thereby willfully violating section 6068, subdivision(a), when he offered to represent Geyer at his parole hearing and gave him advice about his criminal appeal and parole while at the same time representing the conflicting interests of the tenants who needed Geyer's confession to "save" their case. Respondent argues that this case in essence is about his right to interview witnesses in his zealous representation of the victims of the fire and that he owed no fiduciary duty to Geyer, even if Geyer's testimony resulted in further criminal prosecution, citing *De Luca v. Whatley* (1974) 42 Cal.App.3d 574, 576.

[7a] We believe the instant matter implicates vastly different issues than the mere interviewing of third party witnesses as discussed in *De Luca*. The record contains clear and convincing evidence that respondent led Geyer to believe they had a special relationship of trust and confidence and that his interests would be protected by respondent. Respondent's written communications with Geyer were on his letterhead and were signed "Joshua M. Dale, Esq." Each of respondent's letters was denoted as "confidential legal correspondence." Respondent even admonished Geyer in a letter dated January 28, 2000: "I was quite surprised to see that you may have threatened our confidentiality by submitting your letter to the general mail at San Quentin." Respondent even offered a written "contract" for services, promising to help Geyer as his attorney or as a witness at his parole hearing if Geyer signed the declaration (which he did). In a letter dated November 3, 1999, respondent confirmed: "I've made you a promise and I'll do what ever is legal and possible to help you like I promised. . . ." In response, Geyer wrote: "I promise to follow through with my word and come to [testify at] your trial."

Respondent also provided legal advice to Geyer in the November 3d letter: "I've prepared some research on your parole hearing already, and included it with this letter. As you can see, there are many factors that you'll be reviewed on then." In yet another letter, respondent advised Geyer: "I've talked with several of the people at [San Quentin]. Here are many things that you may do there. . . . I'll be able to do more for you down the road if you begin to send me promising things about you." He also informed Geyer that he had consulted with the D.A. about the effect of his appeal on the length of his sentence, and advised Geyer that the D.A. "agrees that you should do your best to make your first parole hearing count." Geyer expressed his gratitude for their relationship in a letter to respondent: "It means a lot to me to have someone believe in me and to give me hope for the future."

Respondent succeeded in supplanting Geyer's relationship with his attorney, Quigley, and instilled in Geyer the belief that he – not Quigley – had Geyer's best interests at heart. Geyer testified that he believed that respondent "was a good person and I thought he was looking out for me." He also thought that respondent was "just being nicer than Mr. Quigley was . . . which led me to believe that he was probably the more honest one at the time." He further testified, "And he, you know, make it sound peachy like everything was going to be great, and that if I did this, it was good for me."

[7b] " '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.' [citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent assumed a fiduciary duty towards Geyer, a vulnerable criminal defendant, when he used his superior knowledge and position as an attorney to create a confidential relationship of trust and dependancy. In so doing, he caused Geyer to reject his attorneys' advice and accede to respondent's wishes.

[8a] Having assumed a fiduciary duty, respondent owed Geyer "the same high duty of honesty and obedience to fiduciary duty as if he were acting as [his] attorney. [Citations.]" (*In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr. 70, 80; see also *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.) This duty of honesty and obedience required that

respondent ensure that all of the risks and consequences of Geyer's actions were fully known and understood by him. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 242.) This duty also required that respondent ensure that Geyer's interests were fully protected and that the disparity in bargaining power be equalized. This clearly is not what happened in this case.

[8b] "[W]hen 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* [1952] 39 Cal.2d [161,] 166)." (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 384; accord, *In the Matter of Hultman, supra*, 3 Cal. State Bar Ct. Rptr. 297, 307.) The Supreme Court reaffirmed this position in *Beery v. State Bar, supra*, 43 Cal.3d at p. 813: "An attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney–client relationship." (Accord, *Galardi v. State Bar* (1987) 43 Cal.3d 683, 691; *Worth v. State Bar* (1976) 17 Cal.3d 337, 341; *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713.) Accordingly, we find respondent culpable as charged in Count Three of breaching his fiduciary duty to Geyer, thereby violating section 6068, subdivision(a).

III. DISCIPLINE DISCUSSION

To properly assess the degree of recommended discipline, we first consider each case on its own facts as well as the evidence in mitigation and in aggravation. (See, e.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.)

A. Mitigation

The hearing judge found that respondent's five years of practice without a history of discipline was too short a time period to constitute mitigation. We agree. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[14]

Respondent presented seven character witnesses, who testified that he is honest and forthright. Among these witnesses were three attorneys who all worked with respondent and had opportunity to observe respondent's interactions with his clients. (Std. 1.2(e)(vi).)

Howard Spector, an attorney for nine years, specializes in personal injury and workers' compensation cases. Spector met respondent while attending the same law school, and they shared space in the same office suite. Spector testified that respondent is professional with his clients and that he is an extremely moral and honest person and an attorney of the highest caliber. Spector was aware of the charges against respondent and was of the opinion that respondent would never intentionally violate a rule of professional conduct.

Alexander Perez, an attorney for ten years, is admitted to practice in California, New Jersey, and New York. Perez also met respondent while attending the same law school and they shared office space. Perez remained friends with respondent while practicing law in Los Angeles and after returning to the Bay Area, Perez had almost daily contact with respondent. He had great admiration for respondent and testified that he was one of the most honest people Perez knew. Perez also testified that respondent was very hardworking and served the legal community by publishing and maintaining the California Drunk Driving treatise.

David Uthman, an attorney for eight years, initially met respondent at the police academy over twenty years ago. The two men have a professional as well as personal relationship. Respondent helped Uthman establish a law practice when he was first admitted, they previously shared office space, and they have had at least monthly contact with each other over the last five years. Uthman testified that the respondent is an honest, earnest, and zealous

14. All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct.

attorney. He further stated that he has never observed respondent to lie to other people, and that it was his opinion that it was not within respondent's character to lie in order to induce a client to sign a confession.

David Hunt, a general contractor for twenty–six years, has known respondent since 1997, when he retained respondent as his attorney. They developed a friendship and Hunt provided construction services to respondent. Hunt testified that over the years he asked respondent for legal advice and respondent was always very forthright and that he trusted respondent's opinions.

Mary Clark, a retired pension analyst, has known respondent for eight years and considers him to be a very good friend. Clark testified that respondent is very kind, a noble man, a gentleman and that he was incapable of making false and misleading statements.

John Newmeyer, an epidemiologist for thirty–three years, holds a Ph.D. from Harvard University. The two men had known each other for five years and were house mates at the time of the hearing. Newmeyer testified that respondent is a man of great trustworthiness and that he has never witnessed respondent misleading anyone that they have mutually known.

Finally, Dale Fisher, who is a customer relations person for a hardware company, met respondent when he was working as a bartender while attending law school. Fisher and respondent have remained friends for twelve years, and they speak with each other two to three times a week. Fisher testified that respondent is a very honest and loving person and that he would go out of his way to help anybody. He based his opinion on past help respondent has given him and other friends throughout the years. Fisher further testified that respondent had never lied to him and was always honest and up–front.

These character witnesses not only knew respondent well, they came from a wide arena within the community. Accordingly, we give great weight to this testimony.

Respondent cooperated with the State Bar by entering into a comprehensive stipulation of facts, which is deserving of significant mitigation credit. (Std. 1.2(e)(v).)

B. Aggravation

The hearing judge found respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) We agree. Respondent communicated with Geyer over the express objections of his attorneys, not once or twice, but repeatedly. These were not innocuous conversations, but were purposely designed to groom Geyer as a witness for respondent's trial.

[9] Although respondent's misconduct was surrounded by concealment and overreaching (std. 1.2(b)(iii)), the hearing judge did not consider this in aggravation because such a finding would be duplicative of the misconduct comprising acts of moral turpitude. We agree and do not consider this in aggravation.

We adopt the hearing judge's finding in aggravation that respondent's misconduct significantly harmed the administration of justice. (Std. 1.2(b)(iv).) In actuality, his conduct undermined Geyer's relationship with his attorneys and compromised his Fifth and Sixth Amendment rights.

[10] Lastly, the hearing judge found as aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) We would characterize respondent's attitude towards his conduct not as indifference, but rather a failure to recognize the serious consequences of his misbehavior, which we find to be an aggravating circumstance. (Std. 1.2(b)(v).)

C. Degree of Discipline

The hearing judge's analysis of the appropriate discipline relied on cases involving rule 2–100 violations, which range from reproval to ninety days' actual suspension. (*Abeles v State Bar* (1973) 9 Cal.3d 603; *Turner v. State Bar*, *supra*, 36 Cal.2d 155; *Carpenter v. State Bar* (1930) 210 Cal. 520; *Mitton v. State Bar, supra*, 71 Cal.2d 525.) However, as we discussed *ante*, the focus of this case is on respondent's misconduct involving moral turpitude and breach of fiduciary duty.

Under standard 2.3 (moral turpitude) discipline can range from actual suspension to disbarment. Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person or of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Respondent's misconduct involved concealment, overreaching and it was closely aligned with his practice. Since the standards are to be construed in light of decisional law (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30), we look to those cases involving overreaching resulting in prejudice to a vulnerable client or third party.

Although we uncovered no cases setting forth facts similar to the instant case, we found two cases where attorney misconduct constituting moral turpitude resulted in the compromise of the rights of criminal defendants. In both instances the attorney involved was a prosecutor. In *Price v. State Bar* (1982) 30 Cal.3d 537, a prosecutor with nearly 12 years' experience, received two years' actual suspension for committing acts of moral turpitude involving his alteration of exculpatory evidence in a trial of a defendant charged with two murders. The defendant ultimately was convicted of second degree murder. Without either the knowledge or consent of the defendant's counsel, the prosecutor visited the defendant in jail to obtain a promise from him that he would not pursue an appeal in exchange for a lighter sentence. His sole motivation was to keep the issue of his alteration of the evidence from being revealed on appeal. When the prosecutor's superior learned of the incident, he reported the misconduct.

In rejecting the Review Department's recommendation of disbarment, the court considered in mitigation the prosecutor's cooperation with the State Bar investigators, his stipulation to the essential facts, his emotional stress due to a heavy workload, and that he was remorseful. Additionally, the court considered the testimony of seven witnesses who attested to the petitioner's integrity.[15]

The other case, *Noland v. State Bar* (1965) 63 Cal.2d 298, involved prosecutorial misconduct that prejudiced the rights of criminal defendants in a more general sense. In *Noland*, the State Bar recommended public reproval of an assistant district attorney who conspired with a clerk of the court to remove 65 names of pro–defense jurors from a list of prospective jurors. By tampering with the selection of potential jurors to gain advantage at subsequent trials, the prosecutor compromised the basic Sixth Amendment guarantee of a trial by an impartial jury. (*Id.* at p. 302.) His misconduct thus constituted a calculated interference with the administration of justice amounting to moral turpitude. (*Ibid.*) The Supreme Court in rejecting the recommended discipline, imposed 30 days' actual suspension because of the prosecutor's "dismaying lack of appreciation of the impartiality required in our traditional jury system." (*Id.* at p. 303.) Such discipline was deemed minimally necessary because "As an active prosecutor, he must be discouraged from attempting any further zealous abuses of judicial administration." (*Ibid.*)

In the remaining cases, an attorney was found culpable of overreaching involving vulnerable individuals, but the misconduct arose in a civil context. In *In the Matter of Johnson, supra,* 3 Cal. State Bar Ct. Rptr. 233, we imposed two years' actual suspension as the result of an attorney who exploited her superior knowledge and position of trust to the detriment of a vulnerable relative by borrowing funds from the relative's personal injury settlement and not repaying them. In addition to moral turpitude, we found a violation of former rule 8–101 for the failure

15. Justice Richardson, dissenting, urged disbarment. Joined by Justices Bird and Kaus, the dissent echoed the concerns present in the instant matter: "The setting in which petitioner's misbehavior occurred was the prosecution of a defendant charged with multiple murders, the most serious of criminal offenses." (*Price v. State Bar, supra,* 3 Cal.3d at p. 551.) The dissent concluded that it was "self evident" that the misconduct "strikes directly at the very integrity of the judicial process. Such conduct is so violative of every sense of duty and honor as to justify amply the State Bar's recommendation of disbarment." (Ibid.)

to place the settlement funds in a trust account and pay the remainder promptly. In mitigation we found she had 11 years of practice without discipline and the lack of any other charges filed since the inception of the matter. In aggravation we found multiple acts of wrongdoing that significantly harmed her client. Further aggravation was the attorney's indifference towards rectification or atonement and her failure to make restitution.

In *Glickman v. State Bar* (1973) 9 Cal.3d 179, an attorney was given five years' suspension, stayed, five years' probation, and one year actual suspension for taking advantage of a client for financial gain and committing an act involving moral turpitude. The attorney offered a client a one–half interest in three lots located in San Francisco. This was done to obtain funds that the petitioner needed to purchase an apartment building. The attorney told the client that the lots were unencumbered but he subsequently obtained a loan using the lots as security. Eventually the attorney defaulted on his loan payments and the lots were foreclosed causing injury to the client. The court concluded that the petitioner intentionally deceived his client and abused the trust and confidence his client placed in him in order to gain a financial advantage.

In the case of *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, an attorney sold his residential property to his client in exchange for a portion of settlement proceeds respondent had obtained for that client as the result of a settlement of a claim for the wrongful death of the client's son. We imposed six months' actual suspension for culpability in a single client matter under rule 3–300 arising out of his failure to disclose the many potential problems and risks inherent in the sale and the circumstances of the sale which were unfair and partially for his own benefit, thereby involving a breach of fiduciary duty and acts of moral turpitude. We found an additional act of moral turpitude because Gillis deliberately attempted to mislead the State Bar investigator, and a violation of section 6068, subdivision (e) (failing to maintain a client's confidences). Gillis' acts were not intentional, (except for misleading State Bar investigation) but we did find gross negligence. In aggravation we found multiple acts of misconduct. We gave mitigative weight to the respondent's 26 years of practice without prior discipline.

We find the *Price* and the *Noland* cases to be the most comparable, indicating a broad range of possible discipline from two years' to 30 days' actual suspension. The civil cases such as *Johnson* and *Gillis* reflect an equally wide range of possible discipline. Respondent's misconduct was serious, but it was directed towards a single individual and respondent has no other record of discipline. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 451–452; *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36–37, 39.) We are also impressed with the strength of his good character testimony and his cooperation with the State Bar in entering into a broad Stipulation of Facts. Also, his misconduct occurred more than five years ago without any evidence of additional misconduct, which may be considered as a factor in deciding the appropriate discipline. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132.)

Nonetheless, respondent's failure to understand how severely he compromised Geyer's rights and how seriously he subverted the interests of justice cause us serious concern. The primary purposes of the disciplinary proceedings 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; *In re Morse, supra*, 11 Cal.4th at p. 205.) In view of his lack of recognition of the serious nature of his wrongdoing, there is a risk that he may again commit similar misconduct. Were it not for his mitigation evidence, and in particular his character witnesses and his cooperation with the State Bar, we would recommend at least six months' actual suspension for the misconduct that occurred here. We adopt the discipline recommended by the hearing judge of four months' actual suspension as both necessary and appropriate in this case.

IV. RECOMMENDATION

[11] We recommend that respondent Joshua M. Dale be suspended from the practice of law in the State of California for one year, that execution of this

suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first four months of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation 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 his 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that 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.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. 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 such completion to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from

the practice of law for one year will be satisfied, and the suspension will be terminated.

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 one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

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 that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar 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.

We concur:

STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARK HAMILTON SALYER

Petitioner for Reinstatement

No. 02–R–15797

Filed May 6, 2005

SUMMARY

Following a felony conviction for possession of methamphetamine and revocation of probation stemming from a felony embezzlement conviction, petitioner resigned with charges pending in 1987. In December 2002, petitioner sought reinstatement, and the hearing judge recommended that the petition for reinstatement be granted.

The State Bar sought review contending that petitioner failed to establish his rehabilitation from methamphetamine addiction, failed to make timely restitution, and failed to comply with rule 955 of the California Rules of Court. The State Bar also maintained that the hearing judge erred in denying the State Bar's motion to have petitioner submit to an independent medical evaluation.

The review department rejected the State Bar's contentions and recommended that the petition for reinstatement be granted.

COUNSEL FOR PARTIES

For State Bar: Wonder J. Liang

For Petitioner: Mark H. Salyer

HEADNOTES

[1] **148 Evidence–Witness**
2504 Reinstatement–Burden of Proof
Since petitioner presented no medical or expert evidence supporting his course of recovery and the State Bar offered expert testimony in rebuttal, the credibility determinations of the hearing judge are particularly important because reformation is a state of mind which may be difficult to establish affirmatively and may not be disclosed by any certain or unmistakable outward sign. Where there

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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.

is not sufficient basis to overturn the hearing judge's findings of fact with respect to the testimonial evidence offered by petitioner, the question upon independent review is to determine if the quality and quantity of petitioner's evidence are sufficient to meet his heavy burden of proof.

[2 a, b] **148 Evidence–Witness**
2509 Reinstatement–Procedural Issues
Where character witnesses, who had long–term as well as current knowledge of petitioner, uniformly attested to petitioner's good character and honesty and gave specific, convincing reasons for holding favorable opinions of petitioner's rehabilitation or present moral fitness, their testimony is heavily weighed as evidence of petitioner's rehabilitation and good moral character.

[3] **148 Evidence–Witness**
2509 Reinstatement–Procedural Issues
Significant weight is given to the testimony of judges and officers of the court because these witnesses have a strong interest in maintaining the honest administration of justice.

[4 a, b] **2504 Reinstatement–Burden of Proof**
2510 Reinstatement Granted
Where petitioner's testimony that he had not used methamphetamine for over seventeen years was uncontroverted and where there was no evidence that petitioner's weekly drink of alcohol led to alcohol abuse or ever caused him to relapse into methamphetamine use and where petitioner participated in a professional in–house substance abuse treatment program, participated in after–care group therapy, maintained ongoing participation in A.A. and supplemented his showing of recovery with favorable testimony from several, critical character witnesses, petitioner established his rehabilitation from his methamphetamine addiction.

[5] **2504 Reinstatement–Burden of Proof**
2510 Reinstatement Granted
Petitioner's acknowledgment of his drug abuse, his commitment to abstinence, and his active and regular participation in his personal recovery program positively reflect his sustained rehabilitation. Petitioner's nontraditional recovery program and the absence of independent medical or psychological evidence regarding petitioner's recovery from methamphetamine addiction do not outweigh petitioner's clear and convincing proof of rehabilitation and sustained exemplary conduct over an extended period of time.

[6] **2590 Reinstatement–Miscellaneous**
Restitution is neither mandatory, nor in and of itself determinative of rehabilitation. Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim.

[7] **2510 Reinstatement Granted**
Although petitioner's noncompliance with rule 955 was wilful, this fact alone would not require denial of his reinstatement. Given the other strong evidence of rehabilitation, petitioner's noncompliance with rule 955 is not determinative of petitioner's rehabilitation where the violation occurred over 18 years ago, petitioner had only two cases pending and made arrangements for other attorneys to take over the cases, and there is no evidence that the violation either injured clients or impaired any disciplinary proceedings against petitioner.

[8 a, b] **113 Procedure–Discovery**
2590 Reinstatement–Miscellaneous
Generally the standard to apply to the review of a discovery order on appeal is abuse of discretion. There was no abuse of discretion in denying the State Bar's request that the hearing judge order petitioner to submit to an independent medical examination because petitioner continues to consume alcohol when there is no evidence that petitioner presently abuses alcohol or suffered from a previous alcohol addiction or that petitioner's present consumption of alcohol caused any relapse into drug use.

[9] **2504 Reinstatement–Burden of Proof**
Since petitioners have the heavy burden of proof in reinstatement proceedings they are looked upon to amass and present the evidence necessary to sustain their evidentiary burden. Thus petitioners failing to introduce expert evidence or an independent evaluation, when it appears to be important, bear the risk of failing to sustain their evidentiary burden.

[10] **2510 Reinstatement Granted**
Although the record contains an infirmity due to petitioner's noncompliance with rule 955, reinstatement has been recommended in other cases where there have been similar, isolated weaknesses in the evidentiary showings. Petitioner offered impressive evidence of his rehabilitation and present moral character sufficient to warrant reinstatement.

OPINION

STOVITZ, P.J.:

The State Bar asks us to review the decision of a hearing judge recommending the reinstatement of petitioner Mark H. Salyer, who resigned with charges pending in 1987. The State Bar contends that petitioner has not established his rehabilitation from the misconduct related to his methamphetamine addiction. The State Bar also asserts that petitioner has not made timely restitution and that petitioner's failure to comply with rule 955 of the California Rules of Court should preclude his reinstatement. Finally, the State Bar maintains that the hearing judge erred in denying the State Bar's motion to have petitioner submit to an independent medical examination.

Our independent review of the record establishes that although petitioner's self–created recovery program is untraditional, it has nevertheless given petitioner the ability to abstain from methamphetamine use for over seventeen years. We further note petitioner's record of rehabilitation is not a perfect one; however, perfection is not what is required for reinstatement. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.) With minor modifications, we adopt the hearing judge's factual findings and endorse her recommendation that petitioner be reinstated to practice law in California.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's Background and History of Substance Abuse

Petitioner was admitted to the practice of law in California on April 13, 1978, and had a general practice as a solo practitioner from 1978 through 1985 in the small, close–knit legal community surrounding Marysville, California. Petitioner also worked with the Yuba County Public Defender's Office on a part–time basis beginning in 1985.

Petitioner has a long history of substance abuse beginning as early as 1966 when he started smoking marijuana recreationally in high school. In 1967 he used physician–prescribed amphetamines for the purpose of weight loss and began using non–prescription amphetamines in 1969 while attending junior college. Petitioner's use of non–prescription amphetamine continued through college and law school.

In 1980 petitioner began using methamphetamine as a means of coping with self–esteem issues, and as his practice grew, methamphetamine became his drug of choice when dealing with the stress of operating his practice and meeting responsibilities to his six children and spouse. As his use increased, petitioner came to believe that he lacked the ability to be a successful husband, father, and lawyer without the methamphetamine.

Petitioner hid his drug use from his spouse and children, but by 1982 petitioner realized he was addicted to methamphetamine. Petitioner confessed his addiction to his wife and repeatedly attempted to stop his drug use but could not do so for longer than a few months before resuming use. By 1984 petitioner was using an eighth of an ounce of methamphetamine daily in conjunction with alcohol which he used to "take the edge off" the drug. After several unsuccessful attempts to terminate use on his own, petitioner admitted himself to an in–patient chemical abuse treatment center in June 1985.

B. Petitioner's Misconduct

We must examine petitioner's current evidence of rehabilitation in light of the misconduct which led to his resignation. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Within a few years of his introduction to methamphetamine, petitioner's use had progressed to the point that it seriously affected his demeanor and ability to practice law.[1] By August 1982 petitioner's need for the drug was so out of control that he began diverting funds from a client account to finance his methamphetamine addic-

1. Petitioner's behavior was abrasive and he would become irritable for no apparent reason. During a criminal trial, petitioner was unable to ask focused questions germane to the proceedings and was observed making facial expressions uncontrollably, leading the trial judge to comment that he believed petitioner was taking drugs.

tion.[2] By November 1983 petitioner depleted the account after misappropriating $52,430.46. In order to hide his wrongdoing, petitioner used his own funds to pay the client's expenses, but by March 1984, after depleting his personal funds, petitioner informed the client's conservator that there were no more funds in the account due to his mismanagement.

In July 1985, petitioner sent a letter to the State Bar admitting to ethical violations regarding his representation in the client matter.

Petitioner was charged and pled guilty to a felony violation of Penal Code section 506 (embezzlement). In October 1986, the superior court suspended imposition of a two–year prison term and placed petitioner on probation for five years with conditions including, inter alia, restitution in the amount of $26,236.89,[3] prohibition of possession or use of any controlled substances not prescribed by a physician, and submission to chemical testing for the detection of alcohol/drug use.[4]

Three months into his probationary term, petitioner suffered a relapse, and on January 15, 1987, submitted a urine sample which tested positive for the presence of methamphetamine. A week later law enforcement personnel arrested petitioner at his home, and, after conducting a search of the premises, seized 1.8 grams of a white powder from petitioner's bedroom which was later determined to be methamphetamine.

Petitioner tendered his resignation with charges pending which the Supreme Court accepted, effective February 20, 1987. He had no prior record of discipline at that time.

Petitioner was charged with and pled guilty to a felony violation of Health and Safety Code section 11377 (possession of methamphetamine) and his probation was revoked in the embezzlement matter. In March 1987 petitioner was sentenced to two years in state prison on the original embezzlement charge as well as two years in state prison on the possession conviction to run concurrently with the sentence imposed in the embezzlement matter.

C. Petitioner's Rehabilitation

As noted *ante*, in June 1985 petitioner voluntarily admitted himself into a drug rehabilitation program. Specifically, petitioner participated in a month–long in–patient treatment plan at Starting Point rehabilitation center in Orangevale, California. Following in–patient treatment, petitioner attended weekly meetings for approximately six months as part of Starting Point's after–care program consisting of group counseling based on the twelve–step principles of Alcoholics Anonymous (A.A.).[5]

Petitioner last used methamphetamine in January 1987. Notwithstanding petitioner's participation in Starting Point in 1985, it was not until petitioner's incarceration in March 1987, that his rehabilitation program began in earnest. While in county jail awaiting transport to state prison, petitioner began a physical fitness program involving, walking, jogging, and weight lifting. Petitioner continued this physical fitness pro-

2. In March 1982 petitioner successfully negotiated a policy limit settlement for Bryan Poe who was severely brain–damaged due to an automobile accident. A conservatorship was established for Bryan, with his mother, Jeanne Poe, appointed as conservator and petitioner named as attorney of record for the conservatorship. Jeanne Poe requested that petitioner administer the remaining settlement proceeds in order to pay Bryan's recurring monthly medical bills and the funds were placed in an unblocked trust account with petitioner solely authorized to make withdrawals.

3. This figure ($22,341.47 + $3,895.42) represents the net amount in principal and interest petitioner owed the conservatorship of Bryan Poe after crediting petitioner $30,088.99 in conservatorship expenses which petitioner paid with his own funds.

4. Although petitioner was required to submit to alcohol/drug testing, petitioner's probation conditions did not proscribe his use of alcohol or require him to stay away from places or persons serving alcohol.

5. Alcoholics Anonymous is a fellowship of men and women who assist one another to stay sober. Members are encouraged to follow the "Twelve Steps" to recovery which suggest ideas and actions intended to assist members in developing healthy emotions in order to remain sober.

gram during his imprisonment and thereafter upon his release.[6]

After his release from prison in 1988, petitioner once again participated in Starting Point's after–care program, attending weekly meetings for approximately six weeks. At this time, petitioner also began attending A.A. meetings. Petitioner consumes an alcoholic beverage approximately once a week and emphasizes that his attendance at A.A. meetings is not due to any problem with alcohol. Rather, petitioner attends A.A. meetings because he is a recovering methamphetamine addict who finds a level of wisdom in A.A. meetings, especially with his home group in Marysville, that provides a greater benefit to him than Narcotics Anonymous (N.A.) meetings do.[7]

Petitioner's recovery program involves not only his physical fitness regimen, which he continues to the present, but also includes components of the A.A. twelve steps which petitioner incorporates into his daily life. Petitioner no longer regularly attends A.A. meetings but will occasionally attend such meetings monthly or every two months as a "refresher course" so that he can continue to maintain a way of life in which methamphetamine is not desirable to him. Petitioner's A.A. attendance might also increase after experiencing stressful triggers in life.[8]

Petitioner has been employed as a law clerk, contract paralegal and administrative manager since his prison release, and his performance of these services has been excellent according to the attorneys and colleagues who worked with him on a regular basis. Petitioner took reasonable steps to fully pay restitution he owed and made amends to his family,[9] which continues to be supportive and a mainstay in his life. Presently, petitioner is active in community service, exercises regularly, and conducts a daily self–evaluation in order to maintain a frame of mind less susceptible to relapse.

D. Reinstatement Proceedings

Petitioner filed his petition for reinstatement on December 4, 2002. A three day hearing commenced on December 9, 2003. Petitioner and nine witnesses, including a superior court judge and several attorneys, testified on petitioner's behalf. In addition, petitioner submitted 19 good character letters from attorneys, former employers, friends, and petitioner's spouse and children. In rebuttal, the State Bar presented an addiction expert who, while not permitted to examine petitioner, testified that petitioner is in relapse and not in recovery due to his use of alcohol. Petitioner presented no medical evidence, expert or otherwise, attesting to his prospect of recovery from methamphetamine addiction and his risk for relapse. Instead, petitioner relied solely on his self assessment and the observations of his character witnesses.

The hearing judge filed her decision on February 25, 2004, finding that petitioner's personal recovery program was successful in keeping him off of drugs for more than seventeen years and that his use of alcohol did not cause him to suffer any drug relapse. Concluding that petitioner had demonstrated by clear and convincing evidence that he was rehabilitated, that he possessed the present moral qualifications for readmission, and that he had the requisite learning and ability in the general law, the hearing judge recom-

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6. Petitioner was placed on parole for three years after his release from prison in February 1988 and was randomly tested at least twice monthly for controlled substances during the first year of parole. All tests were negative, and petitioner was discharged from parole after the first year due to good behavior.

7. Petitioner attended two Narcotics Anonymous meetings after release from prison but did not continue because the participants had not attained a length of sobriety which assured petitioner that continued attendance would benefit him. In contrast, attendees of A.A. meetings had lengths of sobriety spanning 20 to 35 years.

8. After petitioner's daughter died in an automobile accident in 1995 and while petitioner's employment required him to reside away from his family in Marysville, petitioner regularly attended A.A. meetings to relieve his sense of isolation and to share with members of the group the feelings he was experiencing.

9. As will be discussed in greater detail, *post*, petitioner's wife divorced him after learning of his drug addiction but remarried him approximately six years later after petitioner's release from prison.

mended petitioner's reinstatement to the practice of law. The State Bar here seeks review of that decision and recommendation.

II. DISCUSSION

A. Requirements for Reinstatement

Although petitioner resigned with disciplinary charges pending, he must meet the same requirements for readmission as if he were disbarred. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092.) In order to be reinstated, petitioners must pass a professional responsibility examination, establish present ability and learning in the law, and demonstrate their rehabilitation and present moral qualifications. (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673.) To prove rehabilitation, "a petitioner needs to show a recognition of his or her wrongdoing . . . ." (*id.* at p. 674), as well as proof of sustained exemplary conduct since his resignation. (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 468.)

B. Learning and Legal Ability

It is undisputed that petitioner satisfied in November 2002 the requirement that he pass a professional responsibility exam. The parties stipulated, and the hearing judge found, that petitioner has demonstrated requisite learning and ability in the law. Based on our review of the record, we adopt the hearing judge's finding.

C. Petitioner's Burden of Proof Regarding Rehabilitation and Moral Qualifications

Petitioner bears a heavy burden of proving his rehabilitation and fitness for practice. (*Hippard v. State Bar, supra,* 49 Cal.3d at p. 1092 [a petitioner "must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful."]; *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547 [" ' "[O]verwhelming, proof of reform" ' " is required].) Moreover, petitioner's evidence of present character must be considered in the light of his prior misconduct, which in this case was very serious. (*Tardiff v. State Bar, supra,* 27 Cal.3d at p. 403; *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 553.) However, the law favors rehabilitation, and even egregious past misconduct does not preclude reinstatement. (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 316.)

[1] We have independently reviewed the record, and reweighed the evidence in order to pass on its sufficiency. (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 315.) Nevertheless, we have given the hearing judge's determinations of testimonial credibility great weight because she saw the witnesses and observed their demeanor. (*Ibid.*) Since petitioner presented no medical or expert evidence supporting his course of recovery and the State Bar offered expert testimony in rebuttal, the credibility determinations of the hearing judge are particularly important in this case because "[r]eformation is a state of mind which 'may be difficult to establish affirmatively' and 'may not be disclosed by any certain or unmistakable outward sign.' [Citation.]" (*Ibid.*) The hearing judge clearly believed petitioner's testimony and found that the testimony of critical character witnesses corroborated his testimony. On this record, we are not presented with a sufficient basis to overturn the hearing judge's findings of fact with respect to the testimonial evidence offered by petitioner. That leaves us with the task of determining if the quality and quantity of petitioner's evidence are sufficient to meet his heavy burden of proof. (*Ibid.*)

D. Petitioner's Evidence

1. Good Character Witnesses

[2a] The hearing judge found petitioner's favorable character witnesses "demonstrate Petitioner's rehabilitation and good moral character." We agree. Although " 'character testimony, however laudatory,' does not alone establish the requisite good character" (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939), we have nevertheless observed that "in determining whether an erring attorney has proved rehabilitation and present moral qualifications, the California Supreme Court has heavily weighed 'the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct

and mode of living' of such an attorney. [Citations.]" (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 317–318.)

[2b] Nine character witnesses testified on petitioner's behalf. All were aware of the serious nature of petitioner's misconduct, his imprisonment and his underlying substance abuse. They uniformly attested to petitioner's good character and honesty. Most of these witnesses "gave specific, convincing reasons for holding favorable opinions of petitioner's rehabilitation or present moral fitness." (*In the Matter of Bodell*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 465.) Many of the witnesses had long–term as well as current knowledge of petitioner. For example, Frederick Schroeder, who was the District Attorney for Yuba County who filed the charges resulting in petitioner's imprisonment and is currently the assistant district attorney for Sutter County assigned to drug court cases, has known petitioner for approximately 25 years. He tried a number of cases against petitioner and found him to be an excellent attorney, albeit surly and abrasive. After petitioner's release from prison, Mr. Schroeder repeatedly interacted with petitioner at the local grocery and at social occasions and was struck hy the stark change in petitioner who was no longer hostile but very pleasant instead. Mr. Schroeder testified that as a prosecutor for twenty–nine years, he has observed that approximately 95 percent of those committed to prison from his area are drug users addicted to methamphetamine and that the recidivism rate is very high. He has sent friends to jail and noticed that, for some, incarceration has not changed them at all. Mr. Schroeder does not believe that petitioner falls into that category of individuals and truly believes petitioner learned from his prison experience and has changed to become an individual of good moral character who no longer takes illegal drugs.

Steven Roper, the Chief Probation Officer for Yuba County who approved the probation department's prison recommendation for petitioner's embezzlement conviction, has known petitioner for 25 years, interacting with petitioner professionally when petitioner's clients were being investigated and socially at PTA meetings, school plays and little league events. Between 1988 and 1993 Mr. Roper would see petitioner a minimum of one night per week. Like Mr. Schroeder, Mr. Roper has firsthand knowledge of the facts surrounding petitioner's misconduct and imprisonment. Although he firmly believes petitioner deserved to be imprisoned for his embezzlement and probation violation, he acknowledges that petitioner has taken full responsibility for his misdeeds. Based on his observations of petitioner, Mr. Roper believes that, since his release from prison, petitioner is on the path to recovery and has not relapsed.

Kathleen Burgess is Chief Deputy County Counsel for Yuba County and petitioner's wife. Ms. Burgess married petitioner in 1976, but separated from him in 1986 and eventually divorced him in 1987. She is intimately familiar with petitioner's misconduct and has experienced firsthand the suffering caused by petitioner's drug addiction. After petitioner confessed to her that he was a drug addict, she was able to associate his behavioral traits such as his short–temper with the children, unreliability, and volatile irritability with his use of controlled substances. Because of their shared custody of the children, Ms. Burgess has continually observed petitioner since his prison release and believes petitioner is a changed man. Unlike his behavior before imprisonment, she noticed that petitioner is now reliable, sensitive to others, engaging and funny, and able to discuss issues calmly. Since his release from prison, she has not noticed any behavior of petitioner that would indicate to her that he was using drugs. She remarried petitioner in 1993 and testified that she would not have done so if she had any suspicion that petitioner was using drugs or in danger of relapsing. She believes petitioner to be a moral person and is convinced that his problem with drugs is a thing of the past.

The Honorable James L. Curry, the Presiding Judge of the Yuba County Superior Court, has known petitioner for over 20 years. Judge Curry has been on the bench since January 1997 primarily handling criminal cases. Before becoming an attorney, he was a probation officer. Early in their legal careers, Judge Curry would see petitioner at least once weekly due to their respective criminal law matters. Judge Curry is familiar with petitioner's substance abuse and subsequent misconduct. After petitioner's release from prison, Judge Curry became reacquainted with petitioner through petitioner's volunteer work with

little league and juvenile hall. He has observed petitioner candidly discuss with at–risk youth his former drug problem, his theft of client funds and subsequent imprisonment and recognizes the difficulty involved in openly discussing such matters. Judge Curry believes that over the years he has developed the experience to observe signs indicative of drug abuse and based on his observations believes that petitioner is no longer engaged in such conduct. He would not support petitioner's reinstatement if he thought it was likely that petitioner would do anything to embarrass the local bar again.

Petitioner's current and former employers, three of whom were attorneys, attested to petitioner's excellent work habits. None of them observed behavior in petitioner that they would associate with drug use or alcohol abuse. One employer found petitioner so trustworthy that he provided petitioner an office key within two months of hiring petitioner, and another employer entrusted petitioner with fiduciary responsibilities.[10] Although evidence that petitioner occupied positions of trust is not a requirement of reinstatement, where evidence about the manner in which a petitioner has handled positions of trust is available, such evidence is of probative value. (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 319.)

[3] Favorable testimony from members of the bar and members of the public held in high regard is entitled to considerable weight. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 431.) Accordingly, we give significant weight to the testimony of judges and officers of the court because "[t]hese witnesses have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 319.) The State Bar did not present rebuttal evidence to the favorable good character references. But, as noted *ante*, even this quality and quantity of favorable character evidence is not itself determinative of petitioner's rehabilitation. (*In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 5.) We accordingly look to other factors as indicia of petitioner's rehabilitation and present moral character.

2. Community Service

We agree with the hearing judge's findings that petitioner has engaged in community service activities which aid his rehabilitative showing. Petitioner has devoted significant time volunteering his services to the youth of his community and has worked extensively with the Marysville Little League from 1988 through 1993. Additionally, since 2002, petitioner has led and coordinated guest speakers for weekly discussions designed to steer at–risk juvenile offenders away from further criminal conduct. At these weekly sessions petitioner candidly discusses the fact that he is a felon who stole money from a client to support a drug habit which resulted in his imprisonment.

3. Recovery from Substance Abuse

[4a] The State Bar argues that petitioner failed to establish his rehabilitation from his methamphetamine addiction. We disagree. Petitioner's testimony that he has not used methamphetamine since January 1987 was uncontroverted. Without hesitation, petitioner acknowledged his methamphetamine abuse, which he has worked diligently to overcome. Although petitioner suffered a relapse after initially completing a drug rehabilitation program in early 1987, prior to imprisonment, he has since adhered to a personally developed recovery program which combines exercise with elements of A.A.'s "Twelve Steps" to recovery and A.A. attendance as needed. This program has successfully prevented any further drug relapse for over seventeen years. Although petitioner readily admits that he continues to drink alcohol once a week, there is no evidence that such use has ever caused petitioner to relapse into methamphetamine use or that petitioner abuses alcohol.[11]

10. Craig Thurber, the former California operations manager for Menasha Corporation testified that, as an administrative manager between 1996 to 2001, petitioner was responsible for the company's accounts receivable and accounts payable and had sole responsibility to authorize payments for the company's California operation.

[4b] The State Bar relies on *In the Matter of Kirwan* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 692 to support its argument that petitioner's failure to offer any medical or other expert opinion attesting to his recovery and prognosis necessarily renders petitioner's evidence of rehabilitation insufficient. In *Kirwan*, the petitioner's showing of recovery from a history of alcohol abuse persisting since adolescence rested entirely on his own efforts at abstinence for approximately seven years as supplemented by the favorable testimony of only a few favorable character witnesses. Further, the petitioner never participated in any professional substance abuse treatment program or any supporting recovery program since he felt he did not need any therapy or outside program to refrain from drinking. (*Id.* at pp. 698–700.) We believe petitioner's facts are substantially distinguishable from those in *Kirwan*. Unlike *Kirwan*, petitioner has participated in a professional in–house substance abuse treatment program, has participated in after–care group therapy before and after his incarceration, has maintained ongoing, although sporadic, participation in A.A., and supplemented his showing of recovery with favorable testimony from several, critical character witnesses. Importantly, unlike the petitioner in *Kirwan*, petitioner did not downplay the importance that therapy plays in a successful recovery program or indicate that he did not need any therapy or an outside program to control his substance abuse. For these reasons as well as others discussed, *post*, the State Bar's reliance on *Kirwan* is unpersuasive.

Petitioner's dedication to his personalized recovery program has given him the ability to competently and punctually complete his work, manage financial and other fiduciary duties as an administrative manager, take care of his health and foster his personal relationships, all of which suffered due to his drug abuse. These fundamental changes in his values and life–style have allowed petitioner to deal with stresses in life, such as the loss of his daughter, and minimize the risk of relapse.

The State Bar also argues on review that its expert witness rebutted petitioner's showing of rehabilitation. We disagree. Prior to trial, the State Bar's expert in the area of addiction medicine and addiction recovery reviewed petitioner's deposition and a criminal probation report but never evaluated petitioner.[12] The State Bar's expert did not specifically testify as to whether petitioner's behavior with alcohol was addictive or whether petitioner is still suffering from drug addiction. Despite the absence of an evaluation, the State Bar's expert opined that petitioner is not in the process of recovery from the point of view of a 12–step recovery program because petitioner does not attend N.A. meetings and continues to drink alcohol. He also believes petitioner is actually in relapse due to his use of alcohol, a mood–altering substance.

We are not inclined to adopt such a broad definition of relapse particularly since there is no evidence that petitioner has a history of alcohol abuse. Furthermore, such a broad definition would be of little assistance in the context of reinstatement proceedings because a recovering substance abuser petitioning for reinstatement would always be in relapse, for example, if he continued to smoke cigarettes or drink coffee — habits which involve ingesting the mood–altering substances of nicotine and caffeine. Since we find no evidence in the record that petitioner expressed disdain of, or unwillingness to pursue a more traditional program of recovery,[13] we do not conclude that his decision to forego N.A. meetings detracts from his overall showing of rehabilitation and find credible his rationale for attending A.A. meetings instead.

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11. Witnesses who have observed petitioner drink stated that they have never seen petitioner inebriated. In fact one witness testified that at a Super Bowl party where each table had a keg of beer, petitioner was the only person the witness observed abstaining from alcohol and drinking only bottled water. On the other hand, the State Bar presented no evidence that petitioner suffered any criminal arrest, conviction, job loss, marital dissolution, or other negative consequence associated with petitioner's alcohol consumption.

12. We shall discuss, *post*, the State Bar's motion for an independent medical evaluation of petitioner.

13. On the other hand, it appears that petitioner's development of his own recovery program stems from the fact that he was incarcerated at the time he initiated it and only had gym facilities and his prior knowledge of the 12 steps at his disposal.

Rather than lower the persuasiveness of petitioner's evidence, we find that the expert's testimony aids petitioner's showing of rehabilitation. The State Bar's expert testified that there are several ways of recovering from a drug or alcohol problem, and, theoretically, an individual could personally develop a completely eccentric form of recovery program which successfully allows the person to recover from substance abuse. In situations involving such self–help recovery programs, the State Bar's expert believed that others should be able to test the program to ascertain whether it truly is working. The State Bar's expert further testified that recovery can be achieved by involvement in a program that requires honesty, self–disclosure, reality checking with peers and self–evaluation of character flaws. We find that petitioner's personal recovery program satisfies these requirements since he has disclosed the details of his misconduct to multiple employers and continues to candidly disclose, on a weekly basis, the details of his drug abuse, theft, and incarceration to juvenile offenders. Petitioner has a means of reality checking through his wife and family as well as the group members who attend A.A. in Marysville. Additionally, petitioner has completed a moral inventory and self–evaluation on a daily basis. These facts combined with petitioner's nearly 17–year abstinence from methamphetamine use are sufficient to overcome any concern raised by the absence of independent medical or psychological testimony regarding petitioner's recovery from methamphetamine addiction.

The State Bar's concerns over the uniqueness of petitioner's recovery efforts would be more persuasive in a case where only a few years had passed after disbarment or resignation. In this case, however, the State Bar's persistent refusal to acknowledge the adequacy of petitioner's efforts at rehabilitation is not only unmeritorious but fails to recognize the diversity of human experience tested by the critical witnesses in this case.

[5] Indeed, the State Bar's expert stated that a methamphetamine addict is less likely to relapse after 16 years of abstinence than after five years of abstinence and acknowledged that petitioner's extended period of abstinence from methamphetamine use, the absence of subsequent misconduct, and continued gainful employment all evidence rehabilitation. We agree. The passage of an appreciable period of time is an appropriate consideration in determining whether a petitioner for reinstatement has made sufficient progress towards rehabilitation. (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 316.) Moreover, we are particularly mindful of the fact that petitioner's sustained period of exemplary conduct and abstinence from drugs exceeds by eightfold the benchmark period of two years' abstinence used by behavioral professionals as a persuasive indicator of recovery. (*In re Leardo* (1991) 53 Cal.3d 1, 7–8.)[14] Furthermore, petitioner's acknowledgment of his drug abuse, his commitment to abstinence, and his active and regular participation in his personal recovery program that incorporates tenets of A.A.'s "Twelve Steps" to recovery coupled with occasional A.A. attendance positively reflect his sustained rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368.) We conclude that petitioner's nontraditional recovery program and the absence of independent medical or psychological evidence regarding petitioner's recovery from methamphetamine addiction do not outweigh petitioner's clear and convincing proof of rehabilitation and sustained exemplary conduct over an extended period of time.

4. Restitution

The State Bar argues that petitioner had the financial means to pay the Client Security Fund (CSF) much earlier than four months before filing his petition for reinstatement and that this evidences petitioner's lack of rehabilitation. We disagree. The parties stipulated, and the hearing judge found, that in February 1989 the Client Security Fund was directed to reimburse $22,341.47 to the conservator for Bryan T. Poe. In April 1989 that amount was reduced to $9,833.42 in recognition of petitioner's restitution of $12,508.05 to the conservator. Petitioner paid all sums owed to the

14. This is not to say that a future petitioner recovering from substance abuse need only surpass this benchmark, with evidence of nothing more, in order to establish rehabilitation.

CSF in August 2002, almost four months before filing his petition for reinstatement. We adopt the hearing judge's findings and note that at trial the State Bar did not develop any evidence regarding petitioner's ability to pay restitution after his prison release but instead merely argues on appeal that petitioner's gainful employment and his joint tax returns clearly show he had the ability to pay CSF as early as 1999.

[6] "[R]estitution is neither mandatory, nor in and of itself determinative of rehabilitation. [Citation.] Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim. [Citations.]" (*In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at p. 674.) Although we cannot determine from this record whether petitioner truly had the financial means to pay CSF much earlier, the record is far more clear and convincing with respect to petitioner's attitude toward the importance of restitution. Even before CSF was ordered to pay the conservator, petitioner had already reduced the amount owed by $12,508.05. This, coupled with petitioner's full reimbursement to CSF for the claim it paid to his client, adequately demonstrates a proper attitude and sincerity toward restitution. (*In re Andreani* (1939) 14 Cal.2d 736, 750.)

5. Noncompliance with Rule 955

Effective December 19, 1986, the Supreme Court ordered petitioner to comply with rule 955 of the California Rules of Court.[15] At the time, petitioner had only two clients and arranged for other attorneys to handle the clients' matters; however, petitioner never filed a 955 affidavit. Petitioner's non–compliance is problematic since the failure to comply with rule 955 may be a ground for denial of reinstatement. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227.) Rule 955(d) provides "A disbarred or resigned member's willful failure to comply with the provisions of this rule constitutes a ground for denying his or her application for reinstatement or readmission."

The hearing judge excused petitioner's noncompliance with rule 955 without explanation. Other than petitioner's belief that he might have been incarcerated at the time he was required to comply with rule 955, his testimony offers little insight as to why he continued to fail to file a rule 955 affidavit.

[7] Although the record indicates that petitioner's noncompliance with rule 955 was wilful, this fact alone would not require denial of his reinstatement. As the Supreme Court has observed, to so conclude "would effectively foreclose petitioner from ever being readmitted regardless of the showing of rehabilitation otherwise made. The violation occurred more than 10 years ago, and does not appear to have caused any injury to clients or to have significantly impaired the State Bar's disciplinary proceedings against petitioner." (*Hippard v. State Bar, supra*, 49 Cal.3d at pp. 1096–1097 [denying reinstatement on other grounds].) Similarly under petitioner's facts, the rule 955 violation occurred over 18 years ago, petitioner had only two cases pending at the time of his resignation, he made arrangements for other attorneys to take over the clients' matters, and there is no evidence that the violation either injured clients or impaired any disciplinary proceedings against petitioner. Given the other strong evidence of rehabilitation, we find that noncompliance with rule 955 under these facts is not determinative of petitioner's rehabilitation.

E. The Hearing Judge Did Not Err in Denying the State Bar's Request for an Independent Medical Examination

[8a] The State Bar requested the hearing judge to order petitioner to submit to an independent medical examination by a physician certified in addiction medicine to evaluate whether petitioner has any current unresolved addictions or whether there was any likelihood of relapse. The State Bar cited as good cause for its request the fact that petitioner continues to

15. Unless otherwise noted, all further references to "rule 955" are to rule 955 of the California Rules of Court.

consume alcohol.[16] Finding that the State Bar's evidence was insufficient to require such an examination, the hearing judge denied the State Bar's request.

[8b] Generally, the standard to apply to the review of a discovery order on appeal is abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695.) As mentioned, *ante*, our review of the record reveals no evidence that petitioner presently abuses alcohol, or suffered from a previous alcohol addiction. Further, there is no evidence that petitioner used any illicit drug since January 1987 or that his present consumption of alcohol caused any relapse into drug use. Accordingly, we conclude that the hearing judge did not abuse her discretion in denying the State Bar's request.

[9] Moreover, although the State Bar may seek an independent medical examination in reinstatement proceedings, it is important to recall, as we noted *ante*, that petitioner has the burden of proving by clear and convincing evidence that he meets all the requirements for readmission to the practice of law. This contrasts with a disciplinary proceeding in which the State Bar bears the burden of proof. Since petitioners have the heavy burden of proof in reinstatement proceedings, they are looked upon to amass and present the evidence necessary to sustain their evidentiary burden. Thus, petitioners failing to introduce expert evidence or an independent evaluation, when it appears to be important, bear the risk of failing to sustain their evidentiary burden.

III. CONCLUSION

[10] Having viewed the evidence in its totality, we conclude that petitioner's showing is sufficient to warrant reinstatement by the Supreme Court. Petitioner offered impressive evidence of his rehabilitation and present moral character. The evidence of his present ability to practice law is equally impressive. Moreover, "[a]bundant critical witnesses established petitioner's success in overcoming the weaknesses that led to his earlier . . . behavior and showed his success in establishing himself . . ." as a competent paralegal, caring husband and father and as an important contributor to his community. (*In the Matter of Bodell*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 468.) Although the record contains an infirmity due to petitioner's noncompliance with rule 955, we have recommended reinstatement in other cases where there have been similar, isolated weaknesses in the evidentiary showings. (Cf. *In the Matter of Salant*, *supra*, 4 Cal. State Bar Ct. Rptr.1 [failure to comply with rule 955 until seven years after disbarment not a bar to reinstatement]; *In the Matter of Miller*, *supra*, 2 Cal. State Bar Ct. Rptr. 423 [petitioner's failure to be forthcoming with his clients about the circumstances of his resignation, suggesting to them that he was retiring and concealing his discipline was not a bar to reinstatement]; *In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. 546 [DUI conviction after resignation not a bar to reinstatement].)

The hearing judge who presided over the trial in this proceeding concluded that petitioner had made the very high showing which reinstatement demands. We agree.

IV. RECOMMENDATION

For the foregoing reasons, we therefore recommend that Mark Hamilton Salyer's petition for reinstatement be granted and that he be reinstated as an active member of the State Bar of California upon his paying the required fees (Bus. & Prof. Code, § 6063) and upon his taking the oath of an attorney at law. (Bus. & Prof. Code, § 6067).

We Concur:

EPSTEIN, J.
WATAI, J.

16. Rule 184(b) of the Rules of Procedure of the State Bar of California provides in part: "In any proceeding in which the mental or physical condition of a member is at issue, and to the extent that discovery is permitted by rule or order of the Court: [¶] (1) The State Bar may move for an order requiring the member who is the subject of the proceeding to undergo a mental and/or physical examination pursuant to Business and Professions Code section 6053. The motion and supporting evidence must demonstrate that there is good cause to require the examination. . . . [¶] . . . [¶] (d) The Court may hold a hearing to determine whether the need for the examination outweighs the member's right to privacy. If so, appropriate limitations or conditions should be included in the order so as to minimize the intrusiveness of the examination. . . ."

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOSEPH LEIB SHALANT

A Member of the State Bar

No. 01–O–04627

Filed May 18, 2005; reconsideration denied June 27, 2005.

SUMMARY

Respondent was found culpable of charging and collecting an illegal fee during his representation of a client in a medical malpractice case and of committing an act involving moral turpitude by demanding in an abusive manner a modification of the original fee agreement with the client. The hearing judge recommended a five–year stayed suspension, a four–year probation, and a two–year actual suspension. (Hon. Alban I. Niles, Hearing Judge.)

Respondent requested review. The review department agreed with the hearing judge that respondent committed an act involving moral turpitude and entered into an agreement for, charged, and collected an illegal fee. Upon considering all of the relevant factors, particularly the fact that this was respondent's fifth disciplinary proceeding, the review department recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: Joseph Leib Shalant, in pro. per.

HEADNOTES

[1a–c] 290.00 Rule 4–200 [former 2–107]
Where respondent entered into a contingent fee agreement in a medical malpractice case for the maximum fee allowed under Business and Professions Code section 6146, subsequently modified that fee agreement to require an additional non–refundable minimum $25,000 fee, which would constitute credit against the contingent fee, and collected the $25,000 portion of the fee, respondent entered into an agreement for, charged and collected an illegal fee.

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–d] **221.00 State Bar Act–Section 6106**
Where respondent demanded a modification of an oral contingent fee agreement in a manner that was abusive of his client due to the timing of and circumstances surrounding the demand, the demand of a modification constituted a coercive act involving moral turpitude. Moreover, moral turpitude was involved even if respondent did not intend the demand to be abusive, since respondent was at least grossly negligent in timing the demand and respondent's fiduciary duties to a client were involved.

[3] **525 Aggravation–Multiple Acts–Declined to Find**
Where misconduct involved only two counts, and both counts arose from a single transaction of modifying a contingent fee agreement with a client, review department did not find aggravation on account of multiple acts of misconduct.

[4a–e] **806.10 Standards–Disbarment After Two Priors**
Where respondent had four prior disciplinary proceedings, his involvement with the disciplinary system had spanned every decade over nearly 30 years, and all of his prior and current misconduct reflected an inability to fully appreciate the fiduciary nature of his relationship with clients, there was a grave risk that additional harm would result to clients. In view of the substance and nature of respondent's disciplinary history as well as the facts and circumstances of the current misconduct, the review department recommended disbarment.

ADDITIONAL ANALYSIS

Culpability
Found
221.12 Section 6106–Gross Negligence
221.19 Section 6106–Other Factual Basis
290.01 Rule 4–200 [former 2–107]
Aggravation
Found
511 Prior Record
582.10 Harm to Client
591 Indifference
Declined to Find
545 Bad Faith, Dishonesty
565 Uncharged Violations
Mitigation
Found but Discounted
765.31 Pro Bono Work
Declined to Find
740.51 Good Character
740.59 Good Character
Standards
831.90 Moral Turpitude–Disbarment
Discipline
1010 Disbarment
Other
192 Due Process/Procedural Rights

OPINION

WATAI, J.:

Respondent Joseph Leib Shalant has requested review of a hearing judge's decision recommending a five–year stayed suspension, a four–year probation, and a two–year actual suspension. The hearing judge found respondent culpable of charging and collecting an illegal fee (Rules Prof. Conduct, rule 4–200(A))[1] and committing an act involving moral turpitude (Bus. & Prof. Code, § 6106).[2]

Upon our independent review (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we agree that respondent was culpable of committing an act involving moral turpitude as well as entering into an agreement for, charging, and collecting an illegal fee. Nevertheless, upon considering all of the relevant factors, including the fact that this is respondent's *fifth* disciplinary proceeding, we do not adopt the hearing judge's disciplinary recommendation, but instead recommend that respondent be disbarred as necessary to adequately protect the public and the courts.

FACTS

Respondent was admitted to the practice of law in California in June 1967 and has been a member since that time. As we discuss *post*, respondent previously has been disciplined four times.

Stuart Smith is a retired businessman who resides in Indian Wells, California. Sometime in early 1998, a neighbor who was a former Olympic champion, referred him to respondent regarding a possible medical malpractice action against Smith's doctors. Smith met with respondent, who told Smith that for a fee of $5,000, respondent would spend four or five months researching the case to see whether or not Smith had a viable case. At that time, Smith asked respondent what would happen if respondent decided to take the case, and respondent replied that if he decided the case was meritorious, he would take the case on a contingency fee basis.

Smith returned to his home and discussed the matter with his wife, and within approximately a week sent respondent a check for $5,000. On February 18, 1998, respondent and Smith signed a written agreement providing for respondent to research the case in exchange for $5,000.[3]

Without first discussing it with Smith, on June 23, 1998, respondent sent a document entitled Notice of Claim for Medical Malpractice (notice) to Dr. Robert W. Murphy and Dr. Donald Drew, notifying them that respondent was representing Smith for damages sustained as a result of their negligent practice of medicine. The notice specified that Dr. Murphy negligently prescribed an intrathecal injection of Depo–Medrol for Smith's low back condition and that Dr. Drew negligently administered the intrathecal injection. The notice further stated that Smith was seeking damages against both doctors in the amount of ten million dollars.

Also without first discussing it with Smith, on August 31, 1998, respondent filed a complaint for medical malpractice and lack of informed consent in the Riverside County Superior Court on behalf of Smith against Drs. Murphy and Drew.

Respondent testified at trial in this matter that he served the notice and filed the lawsuit only to protect Smith's case against the running of the statute of limitations and that he had not at that point determined whether Smith's case was meritorious or whether he would be willing to represent Smith in the case. Smith, on the other hand, testified that respondent called him in August 1998 and informed him that respondent had concluded that the case was meritorious and had

1. All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. We note that no claim has been made that this agreement was improper.

served the notice and filed the lawsuit against the doctors. Smith testified that he was uneasy with the fact that respondent had sought ten million dollars in Smith's name without first discussing the matter with Smith, as Smith lived in a small community and felt that he would look, within his community, like he "was shooting for the lottery." Contrary to respondent's testimony, Smith further testified that at that time, he asked respondent to explain the fee basis for respondent's services in representing him in the medical malpractice case, and respondent informed Smith that he would represent Smith in the case on a contingency basis. According to Smith, respondent orally explained the contingent fee at some length, including the limits placed upon this type of fee by section 6146.[4] As Smith testified, this oral agreement was never reduced to writing. In his decision in this matter, the hearing judge explicitly found that Smith's version of the facts surrounding the filing of the lawsuit was credible. We give great weight to this credibility determination. (Rules Proc. of State Bar, rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)

In December 1998, Smith received a letter from respondent questioning whether Smith had the condition, arachnoiditis, which Smith claimed he had as a result of the allegedly negligent acts of his doctors and whether the lawsuit should proceed. In response, Smith spent over a month researching medical treatises and sent to respondent his research results as well as a history of Smith's illness in an attempt to verify Smith's claims regarding his illness and the cause of it.

After several continuances, Smith's deposition was scheduled for Tuesday, June 22, 1999. On Friday, June 18, 1999, three business days before his deposition, Smith received a faxed letter from respondent informing Smith that, based upon respondent's interpretation of Smith's medical records, "it appears that you may have an impossible time attributing any meaningful physical symptoms to the intrathecal injection of Depo–Medrol." The letter requested that Smith carefully consider, in consultation with Smith's new doctor, Dr. Byrd, whether the case should be dismissed. The letter also stated that respondent and Smith had previously entered into an agreement only for respondent to investigate the case in exchange for $5,000, and that respondent had performed well beyond the investigation, such that "additional arrangements are necessary if I am to continue being your attorney." Respondent continued in his letter by stating that "I am obviously more flexible and responsive to your wishes if my time is being paid for, as compared to proceeding on a contingency basis where the merits of your case are less than clear." Respondent requested Smith to call him to discuss this issue of respondent's compensation and ended the letter with this post–script: "As you know, your deposition is scheduled for next Tuesday at 10:00 a.m. It is important, therefore, that we resolve these aforementioned issues today if possible."

On Monday, June 21, 1999, Smith faxed a letter to respondent in response, noting that respondent "would prefer to change the fee agreement that you and I agreed to at the time of our initial consultation, and, more importantly, last summer when you decided that the case had merit and you subsequently filed suit." Smith objected to respondent's letter on the ground that it was an "inappropriately late" date for respondent to question the merits of the lawsuit and request a modification of the fee agreement, giving them "only one working day until [my] deposition" to resolve the issues raised in the letter. Smith stated that he did not intend to submit to changes in the fee agreement, questioned whether respondent was prepared to represent him in his deposition because neither respondent nor anyone in respondent's office had spoken with Dr. Byrd, and requested that respondent postpone the deposition scheduled for the following day. However, Smith spoke with someone in respondent's office that day who informed Smith that it would be impossible to postpone the deposition in that "there were a lot of costs, [a] lot of lawyers involved."

4. Section 6146 is part of the Medical Injury Compensation Reform Act, often known, and sometimes referred to herein, as MICRA.

The deposition went forward as scheduled, and respondent represented Smith at the deposition. At lunch on the day of the deposition and during the next few days, respondent and Smith discussed the fee agreement. Respondent insisted that Smith pay respondent an additional $25,000 nonrefundable fee, which would be credited against the contingent fee should Smith prevail in the case, as well as $10,000 for costs. Respondent told Smith that if Smith did not pay the $25,000, respondent would ask to be relieved as counsel in the case. Although Smith's wife wanted to fire respondent, Smith was worried about his health, so he initially attempted to reach a compromise with respondent. On June 24, 1999, Smith sent respondent a letter asking respondent to accept a nonrefundable fee of $12,500 and a greater percentage as a contingent fee. Smith also requested that respondent evenly share the cost of the defense's experts if Smith should lose the case and be required to pay defense costs. Respondent turned down Smith's offer.

Also on June 24, 1999, respondent sent a partly handwritten letter/retainer agreement to Smith. That letter/retainer agreement spelled out respondent's modifications to the original oral contingent fee agreement, specifically that Smith would "pay $25,000 towards what is otherwise a contingent fee – as set forth in the also inclosed retainer agreement, as modified. This will be non–refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal." The last paragraph on page 3 of the June 24, 1999, letter/retainer agreement stated that "[t]his memo will become part of the retainer agreement. See said document included herein." The document which forms the fourth page of the letter/retainer agreement was entitled Medical Malpractice–Modified Contingency Retainer Agreement. The letter/retainer agreement required Smith's signature to indicate his acceptance of the terms. Smith did not sign these documents.

At the end of June 1999, Smith and his wife went to stay with Smith's brother in northern Virginia so that Smith could obtain medical treatment from Dr. Donion Long, a neurosurgeon at Johns Hopkins University Hospital in Maryland. It had taken Smith four months to obtain the appointment with Dr. Long, and Smith was to be in that area for six to eight weeks for treatment. On July 1, 1999, Smith and his wife sent respondent the $25,000 respondent was requesting, and respondent received their check and deposited the funds into his general account.

On July 13, 1999, Smith faxed a letter to respondent seeking clarification regarding the partly handwritten letter/retainer agreement. On August 11, 1999, respondent sent Smith a letter in reply, stating that the $25,000 check would "constitute credit against the contingent legal fee, on the assumption that we prevail. If we do not prevail, it will have, nonetheless, paid for my services through trial and for an appeal if we win and the other side appeals." Respondent also enclosed a typed version of the partly handwritten retainer agreement (slightly modified from the partly handwritten version sent June 24, 1999) entitled Retainer Agreement and a Modified Proposal dated June 24, 1999, both of which the parties signed on September 1, 1999. The agreement, like the earlier partly handwritten letter/retainer agreement, provided for the maximum contingent fee allowed under section 6146 as well as a nonrefundable fee of $25,000. The newest Retainer Agreement contained the following fee provision: "Except as set forth in the Modified Proposal attached hereto as Exhibit 'A,' the attorney shall receive in consideration for such professional services 40% of the first $50,000.00 recovered, 33 1/3% of the next 50,000.00 recovered, 25% of the next $500,000.00 recovered and 15% of any amount recovered in excess of $600,000.00. Fee is based on the total sum recovered. This fee has been negotiated and agreed to by the parties hereto. IF NO RECOVERY IS OBTAINED, NO FEE IS PAYABLE TO THE ATTORNEY. Should the law change with respect to attorney's fees, the fee shall be adjusted upward so as to be in compliance with the maximum fee permitted at that time. However, the fee shall not under any circumstances exceed 40% of the gross recovery obtained at trial or arbitration. Credit is to be allowed for all payments by Client made pursuant to the Modified Proposal attached hereto as Exhibit 'A.' [¶] Not included in the above fee schedule are appeals, for which this law firm shall not be responsible, except as set forth in the Modified Proposal attached hereto as Exhibit 'A.' The attorney will, however, if requested by client assist in the retention of appellate counsel at client's expense. Any appel-

late costs or fees will be separate and in addition to the fees described herein to and including the trial level." The Modified Proposal stated as to fees (as opposed to costs) that "You will pay $25,000 towards what is otherwise a contingent fee – as set forth in the also enclosed Retainer Agreement, as modified. This will be non–refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal."

In December 2000, Smith called respondent to find out about the trial date. During that phone call, respondent put Smith on hold several times and shouted at him. Smith decided to terminate respondent's services and to that end had an attorney write a letter to respondent asking him to turn over Smith's file. Respondent replied to the letter by faxing a letter and a substitution of attorney form to Smith. In that letter, dated December 20, 2000, respondent stated that Smith would "owe me no more money for services rendered." A substitution of attorney form was filed January 2, 2001, substituting Smith in propria persona in the place of respondent as attorney of record.

On March 6, 2001, Attorney Steven Weinberg sent respondent a letter on Smith's behalf in which Weinberg asserted that respondent's modified retainer agreement with Smith signed September 1, 1999, violated MICRA limits. Weinberg demanded that respondent return the $25,000 retainer he had collected from Smith. However, respondent refused to return the $25,000 and to date has not returned any portion of the fee Smith paid. In a responsive letter to Weinberg dated March 15, 2001, respondent asserted that his fee did not run afoul of the applicable MICRA limits.

Weinberg referred Smith to Attorney Robert Warford. On March 8, 2001, Warford substituted into the case as Smith's counsel. During the time Warford was handling Smith's case, Warford had no contact with respondent. He saw no reason to contact respondent, in that he saw no claim of an attorney lien on behalf of respondent in the file. In early 2002, Warford decided to cease his relationship with his firm, and since he was the only lawyer in the firm handling medical malpractice cases, he substituted out of all of the cases he was handling.

On March 6, 2002, Richard Booth substituted into the case as Smith's counsel. On June 2, 2002, Booth settled Smith's case for $500,000.[5] On December 17, 2002, respondent wrote to Booth demanding additional attorney fees and costs in connection with Smith's case.

On September 25, 2002, the State Bar filed a two–count notice of disciplinary charges (NDC) in the instant case. In this NDC, the State Bar charged respondent with (1) entering into an agreement for, charging, and collecting an illegal and unconscionable fee; and (2) committing an act involving moral turpitude, dishonesty, or corruption.

On February 11, 2003, respondent wrote directly to Smith demanding that Smith and his lawyers agree to arbitrate respondent's claimed quantum meruit fee entitlement. The offer to arbitrate was not accepted.

CULPABILITY

Count One – Rule 4–200(A) – Illegal or Unconscionable Fee

Rule 4–200(A) provides that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."

The hearing judge concluded that respondent was culpable of charging and collecting a fee which was illegal because it was in excess of the MICRA limits set forth in section 6146. Respondent contends on review that section 6146 applies by its terms only to contingent fees and therefore does not apply to, and

5. The amount of the settlement is set forth in the State Bar's Voluntary Settlement Conference Statement, admitted as part of the State Bar's exhibit 36 at trial in this case. Because the hearing judge admitted this exhibit without limitation, we may and do consider it for the truth of the matter stated. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 523, fn. 32 and cases discussed therein.)

does not prohibit, the flat fee portion of his contract with Smith. The State Bar asserts that the intent of section 6146 is to prohibit, in a medical malpractice case involving a contingent fee, the charging of any fee in excess of the limits set forth in that section and that respondent's flat fee in addition to a contingent fee was an illegal attempt to evade those limits.

[1a] We must first clarify respondent's fee agreement in order to determine whether that fee is prohibited by section 6146. As previously stated, in about August 1998, respondent initially entered into an oral agreement to represent Smith in the malpractice case for a contingent fee within the MICRA limits.[6] Subsequently, in June 1999, approximately ten months after Smith's complaint was filed, respondent informed Smith that he required a nonrefundable $25,000 fee in addition to the contingent fee. In August 1999, respondent clarified in writing that Smith would receive a credit for the $25,000 nonrefundable fee against the contingent fee *if* Smith prevailed in his case. The Retainer Agreement itself provides for a contingent fee equal to the maximum allowed under MICRA "[e]xcept as set forth in the Modified Proposal attached hereto as Exhibit "A." The Modified Proposal attached to the retainer agreement provides in part that Smith would "pay $25,000 towards what is otherwise a contingent fee – as set forth in the also enclosed Retainer Agreement, as modified. This will be non–refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal." The $25,000 was thus included within the contingent fee. We agree with the hearing judge's determination that there is clear and convincing evidence that respondent undertook representation of Smith in a medical malpractice case and entered into a contingent fee agreement subject to maximum MICRA limits.

"Contingent fees are dependent upon the result achieved in the matter (i.e., the attorney's right to a specified fee is *contingent* on obtaining a successful result for the client) and the agreed–upon percentage or contingency factor. If the attorney is unsuccessful or there is no recovery, no attorney fee is payable. [Citation.]" (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 5:77, p. 5–10.)

Section 6146, subdivision (a) provides as relevant that "[a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in *excess* of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty–three and one–third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty–five percent of the next five hundred thousand dollars ($500,000) recovered. [¶] (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000)." (Italics added.)

As was the hearing judge, we are guided by *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583 (*Yates*). There, in a medical malpractice wrongful death case, Shore entered into a contingent retainer fee with his clients, the plaintiffs. Among other things, the fee agreement provided that the contingent fee did not include any services in connection with any appeal in the case. Upon the plaintiffs' success in the case, Shore deducted from the judgment funds paid to an outside attorney engaged by Shore to handle the appeal at an hourly rate. (*Id.* at pp. 585–587.) The appellate court noted that the statutory language of MICRA limited the contingent fee chargeable in an action and that Code of Civil Procedure section 1049 deemed an action to be pending from its commencement until the final determination on appeal. The court therefore determined "that Shore was limited to the section 6146 contingent fee for the entire case [including appeals]. He could not enhance that fee by truncating his contingent representation at the appellate threshold and charging

6. We note that section 6147 requires, among other things, that a contingency fee contract be in writing.

additional, ostensibly noncontingent amounts for the appeal." (*Id.* at p. 591.)[7] "In sum, section 6146 did not permit Shore to charge additional fees for the appeal, either for himself or for his chosen associated counsel." (*Id.* at p. 592.)[8]

[1b] Similarly, we conclude in the present case that, in view of the determination that respondent entered into a contingent fee agreement which was subject to MICRA limits, respondent's modification of that fee agreement providing for an amount above those limits clearly violated section 6146. That section specifies the maximum fees to which an attorney is entitled under a medical malpractice contingent fee agreement depending on the amount recovered, and we hold that an attorney cannot evade the limitations of that section by contracting for a non–refundable minimum fee or a flat fee *in addition to* the statutory maximum contingent fee. Such a contract provides for a total fee in excess of the statutory maximum.[9]

[1c] While respondent claims that it would have been impossible for Smith to have recovered less than $60,000, such that respondent's total fee would have been in compliance with section 6146, we conclude that the fee was illegal *at the time he entered into it* simply because section 6146 does not allow a contingent fee agreement in a medical malpractice case to provide for a non–refundable flat fee *in addition to* the statutory *maximum* contingent fee.[10] Even if an attorney's total fee at the conclusion of a case may not constitute an illegal amount, that fact would not prevent the contract from being illegal at the time it is entered into. We conclude, as did the hearing judge, that under the facts of this case respondent violated rule 4–200(A) by entering into an agreement for, charging, and collecting an illegal fee.

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7. We note that the Retainer Agreement signed on September 1, 1999, expressly excluded appeals from the services covered by the fee schedule, which is directly contrary to the holding in *Yates* interpreting section 6146. (*Id.* at pp. 591–592.) The Retainer Agreement also required attorney fees to be calculated on the "total sum recovered," contrary to the plain language of section 6146, subdivision (c)(1) which requires that fees be calculated based on "the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim." However, the parties have raised no issues regarding these provisions, and we need not and do not discuss the provisions further.

8. Because *Yates* held that an attorney cannot charge another fee *in addition to* the section 6146 contingent fee in a medical malpractice case, we reject respondent's assertion that, because the law in this area is unsettled, it would violate due process to find him culpable of charging an illegal fee in this case. We also reject respondent's invitation for us to be guided by the comment accompanying Florida's rule of professional conduct limiting contingent fees in personal injury and other tort cases, apparently including medical malpractice cases. First, we note that the rule to which respondent refers in his briefs does not provide for a strict limit on contingent fees, as does section 6146, but rather provides for a rebuttable presumption that a contingent fee exceeding the standards set forth in the rule is excessive. Second, we find the comment to which respondent refers to be ambiguous, and in any event, absent a similar comment accompanying section 6146 or other legislative history indicating that section 6146 is to be interpreted in the same manner as Florida's rule, we determine that Florida's rule is irrelevant to the interpretation of section 6146.

9. In an order dated August 16, 2004, we granted respondent's motion to augment the record with the legislative history of section 6146, reserving consideration of the issue of the weight that may be accorded the additional evidence. Because respondent had not attached the legislative history to his motion to augment, in an order dated January 4, 2005, we ordered respondent to lodge the legislative history with this court.

Upon this court's examination of the documents respondent lodged with this court, the documents appear to be in complete disarray. The original document contains slightly over 200 pages, while at least one of the copies appears to contain over 300 pages. Additionally, a comparison of the original with one of the copies yielded the discovery that the Bates stamp numbers on the pages do not match; for example, page 175 of the original is not the same as page 175 of the copy which we examined. Further, the Bates stamp page numbers in the copy are themselves out of order, requiring a search through the document for consecutive pages as the document is read. Because respondent failed to lodge an original and two exact, comprehensible copies with this court pursuant to this court's order of January 4, 2005, we give no weight to the legislative history documents which respondent lodged with the court.

Moreover, in view of our independent determinations regarding respondent's motions to augment the record in the review department, respondent's assertion that the hearing judge abused his discretion in refusing to reopen the record in the hearing department is moot. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 436.)

10. We are not presented in this case with, and therefore do not address, the issue of whether an attorney could legally charge a fee in addition to a contingent fee less than the statutory maximum, where the total fee did not exceed the MICRA limits.

Count Two – Section 6106 – Moral Turpitude

Section 6106 provides in relevant part that "[t]he 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."

In count two of the complaint, respondent was charged with committing an act involving moral turpitude, dishonesty, or corruption by insisting on modifying the oral contingent fee agreement to include a $25,000 nonrefundable fee ten months after the case had been filed and only three business days before Smith's deposition, and threatening to withdraw if Smith did not pay this additional fee.

In *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, this court found an attorney culpable of violating section 6106 in part due to the attorney's acts of exploiting her "position of trust to the detriment of her vulnerable client." (*Id.* at p. 244.) There, the client, Johnson's sister–in–law, was severely injured when a hair spray product she was using ignited while she was cooking. (*Id.* at p. 238.) After settling the personal injury suit on her client's behalf, Johnson had the funds electronically transferred to her personal account, then borrowed almost the entire settlement proceeds from her client. The terms of the loan agreement were unfair to the client, and the testimony of the client's daughter indicated that the client was in need of the settlement funds. (*Id.* at pp. 238–240.) The review department there agreed with the hearing department's conclusion that Johnson "obtained the loan in a manner 'so egregious and so abusive of her obviously vulnerable client as to constitute moral turpitude.' " (*Id.* at p. 242.)

[2a] Similarly, we conclude in the present case that respondent obtained the modification of the original oral contingent fee agreement in a manner that was abusive of his client. Respondent waited until the Friday before Smith's deposition, to be held the following Tuesday, to fax Smith a letter informing Smith that they needed to work out a new fee agreement *before* the deposition. Moreover, respondent stated in the letter that "I am obviously more flexible and responsive to your wishes if my time is being paid for, as compared to proceeding on a contingency basis where the merits of your case are less than clear," implying that Smith would not receive respondent's best efforts on Smith's case if Smith did not agree to modify the oral contingent fee agreement. Additionally, because Smith spoke with someone in respondent's office that day who told Smith that it would be impossible to postpone the deposition, Smith was under pressure to make a decision quickly.

[2b] Although respondent represented Smith at his deposition without having first obtained additional funds, on the day of the deposition and for several days thereafter respondent insisted that Smith pay an additional $25,000 nonrefundable fee, to be credited against the contingent fee should Smith prevail in the case, and conditioned respondent's continued representation of Smith on payment of this amount.

[2c] Importantly, all of these discussions took place approximately one week before Smith was to leave California to stay in Virginia with his brother for a six–to eight–week period to obtain treatment at Johns Hopkins University Hospital. Because it had taken Smith four months to obtain the appointment with the neurosurgeon at this hospital, it appeared that rescheduling the treatment would be extremely difficult. As Smith testified during respondent's cross–examination of him, if he did not accede to respondent's demands, "my case would be in abeyance for two months while I worried back there about, one, my progressive spinal disease, and two, trying to find another attorney."

[2d] In view of all of these circumstances surrounding respondent's demand for the additional $25,000 fee from Smith, we conclude that the demand was abusive of Smith and constituted a coercive act involving moral turpitude. Although we agree with the hearing judge's assessment that respondent intentionally timed the demand for an additional fee in order to force his client's compliance, we note that, even assuming that respondent did not intend to place his client in a difficult position as a result of the timing of respondent's demand, it is well established that when an attorney's fiduciary duties are involved, a

finding of gross negligence will support a moral turpitude charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) Here, respondent was at least grossly negligent in waiting to demand additional fees until just before Smith's deposition and soon before Smith was to be out of the state for medical treatment. We therefore conclude that these facts present a clear violation of section 6106.

LEVEL OF DISCIPLINE

Aggravation

The hearing judge found four factors in aggravation: a prior disciplinary record; multiple acts of wrongdoing; significant harm to respondent's client; and indifference toward rectification of or atonement for the consequences of his misconduct. In its responsive brief on review, the State Bar asserts that this court should additionally find that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, overreaching, and uncharged acts of misconduct.

Respondent has been the subject of four prior disciplinary proceedings during his legal career (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std.1.2(b)(i)),[11] a factor which weighs heavily in aggravation.

In January 1979, respondent was privately reproved for failing to perform all services for which he was retained and for failing to use reasonable diligence and his best judgment in an effort to accomplish, with reasonable speed, the purpose for which he was employed. The hearing panel in that matter found that, in the course of representing a couple and their minor children in a personal injury matter, respondent obtained a settlement on their behalf. However, after the couple refused to sign the releases sent by the defense, respondent failed to take further action in the case, including failing to appear or to notify the clients to appear at an order to show cause re dismissal. As a result, the action was dismissed for failure to prosecute; however, the hearing panel determined that there was no financial loss in that the clients received a good settlement.

In February 1983, the Supreme Court publicly reproved respondent for failing to communicate with a client and indirectly communicating with an opposing party represented by counsel. There, respondent failed to inform a personal injury client that the client's former attorney had sued both respondent and the client for the former attorney's claimed fee. The client did not learn of the lawsuit until she was personally served a year after respondent learned of the suit. Subsequently, the client retained other counsel to represent her in the fee dispute with former counsel. Knowing that the client was now represented by other counsel, respondent suggested to the client's father, while meeting with him concerning other matters, that the father have the client meet with him to resolve issues in the case of the fee dispute with the former attorney.

In August 1994, in a six–client matter, the Supreme Court ordered a two–year stayed suspension, and a two–year probationary period with no actual suspension based on a stipulation. In one count, respondent advanced funds to a client directly from respondent's trust account. The stipulation specified that respondent had recently earned these funds as fees in other cases but had not yet withdrawn them from the trust account and that the advance of these funds from the trust account constituted commingling of funds. In a second count, while respondent represented a client in a bad faith lawsuit against Farmer's Insurance Group, respondent conversed about the case with an individual he knew to be a claims manager with the insurance company, thereby communicating with a represented party. In a third count, respondent represented a client in an application for workers' compensation benefits but failed to reply to a request from the State Compensation Insurance Fund that respondent designate an Agreed Medical Examiner, thereby failing to perform legal services

11. All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct unless otherwise indicated.

competently. In the fourth, fifth, and sixth counts, respondent settled clients' personal injury cases after the client was deceased. In the fourth count, respondent witnessed the client's signature on the release without informing the defense of the death of the plaintiff, thereby failing to employ only means consistent with truth. In the fifth count, respondent disbursed settlement funds to the daughter of his deceased client without verifying she was entitled to received the funds, thereby failing to perform legal services competently, and in the sixth count, respondent disbursed settlement funds without verifying the appropriate identity of the recipient of the funds, thereby failing to perform legal services competently.

In May 2000, respondent was privately reproved based on a stipulation. There, respondent settled the personal injury claims of three minors and dismissed their complaints without obtaining required court approval of the settlement and payment of all liens, thereby violating section 6103.

[3] We disagree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Respondent has been found culpable of entering into an agreement for, charging and collecting an illegal fee and committing acts involving moral turpitude. This misconduct involved only two counts, and both counts arose from the one transaction of respondent's modification of the contingent fee agreement with Smith. Under these circumstances, we do not find aggravation on account of multiple acts of misconduct. (See *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170 [misappropriation, failure to pay out client's funds upon request, and entering into an improper business transaction with a client in a one–client matter coupled with failure to timely report court–ordered sanctions to the State Bar in another matter; court did not see case as "strongly presenting aggravation on account of multiple acts of misconduct"].)

We agree with the hearing judge's finding that respondent's client was harmed in this case (std. 1.2(b)(iv)), in that Smith forfeited $25,000 in fees which were in excess of the MICRA limits. (Cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518 [harm to client resulted both from loss of use of $3,000 for over a year and from the emotional distress caused by not having the money during the time when client's husband had died and her two children were seriously injured].)

We agree with the hearing judge's finding that respondent showed indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)), as respondent showed a lack of remorse and indifference toward atonement for the consequences of his acts involving moral turpitude. Respondent implied in cross–examining Smith at trial that Smith could have simply fired respondent if Smith did not want to modify the contingent fee contract. Further, respondent testified that, at the time respondent charged the $25,000, respondent knew that Smith was a successful businessman and felt that Smith could "well afford" the $25,000 up–front fee. We determine that this implication and testimony shows respondent's indifference toward the dilemma in which he placed Smith and toward the difficulties Smith faced at the time respondent demanded the modification.

We reject the State Bar's assertion that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, overreaching (other than the overreaching we relied upon in finding a moral turpitude violation), or other uncharged misconduct. (Std. 1.2(b)(iii).) The State Bar contends that these factors were present in (1) respondent's failure to inform Smith that the modified fee agreement was, or might be, illegal and (2) respondent's suggestion to Smith in his letter of August 11, 1999, that he had the right to keep sanctions imposed against the defense in Smith's malpractice case.

As to the first contention, the State Bar relies upon *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283. We view *Harney* as distinguishable, since Harney was "self–described as the top medical malpractice attorney" in the United States, was a recognized expert in medical malpractice cases, had "testified before the California Legislature in 1975 during its committee hearings on [MICRA]" and had "filed a number of amicus curiae briefs unsuccessfully challenging the constitutionality of [MICRA]" (*Id.* at pp. 273–274.) We there specifically relied upon Harney's recognized expertise when

we rejected his claim that he was not obligated to discuss "every law . . . with his client and the judge." (*Id.* at p. 283.) Here, in contrast, although respondent has extensive experience in the practice of law and, as we have noted, some experience in medical malpractice litigation, we have no evidence before us that respondent was an expert in medical malpractice law, or had nearly as great knowledge of MICRA, as did Harney. We therefore decline to find as additional aggravation respondent's failure to inform his client that the modified fee agreement was, or might be, illegal.

As to the second contention, it appears that the State Bar is asserting that we should find culpability of uncharged misconduct due to respondent's retention of the sanctions imposed against the defense in Smith's medical malpractice case. Evidence of uncharged misconduct may be considered in aggravation where the evidence is elicited for a relevant purpose and where the determination of uncharged misconduct is based on the attorney's own evidence. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35–36.) Here, the evidence of respondent's retention of fees apparently awarded to Smith in the medical malpractice case is based on the State Bar's exhibit. If the State Bar wished to penalize respondent for improperly retaining money awarded to Smith, the correct procedure would have been for the State Bar to charge respondent with an additional violation based on respondent's statements in this letter. However, in view of the State Bar's failure to charge respondent with an additional violation, or even to raise the issue during trial to afford respondent the opportunity to explain or justify his statements in the letter, we decline to use the evidence at this point in the proceedings as a basis for enhanced discipline.

Mitigation

The hearing judge found minimal evidence of mitigation resulting from respondent's character witnesses and respondent's community service.

We agree with the State Bar's assertion in its brief on review that the testimony of respondent's two witnesses (his secretary, Leslie Flowers, and an associate attorney in his office, Ronald Cher) did not constitute evidence of respondent's good character. Rather, these two witnesses merely rebutted Smith's testimony that respondent had yelled at or had been verbally abusive to Smith. Moreover, even if these two witnesses had testified as to respondent's good character, their testimony would not constitute an extraordinary demonstration of respondent's good character from a wide range of references in the legal and general communities. (Std. 1.2(e)(vi); *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133.)

We agree with the hearing judge's determination that respondent presented some evidence, via his own testimony, as to his community service. Such evidence is entitled to some weight in mitigation, although the weight of the evidence is limited because respondent's testimony was the only evidence on the subject, and therefore the extent of respondent's service is unclear. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647–648; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 & fn. 22.)

Discussion

The primary purposes of the disciplinary proceedings 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; *In re Morse*, *supra*, 11 Cal.4th at p. 205.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The Standards for Attorney Sanctions for Professional Misconduct provide us with guidelines in determining the appropriate degree of discipline to be recommended. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) When, as here, there are two or more acts of misconduct in one proceeding, the sanction shall be the most severe of the applicable sanctions. (Std. 1.6(a).) We have found respondent culpable of violations of rule 4–200(A) (illegal fee) and section 6106

(moral turpitude), and of the two acts of misconduct, standard 2.3, which applies to moral turpitude, is the more serious, with sanctions ranging from actual suspension to disbarment. However, standard 2.3, and the cases applying this standard, must be considered in conjunction with standard 1.7(b), which under the facts and circumstances of this case provides the focus of our discipline analysis.

[4a] Standard 1.7(b) states that where an attorney who is found culpable of disciplinable misconduct "has a record of two prior impositions of discipline . . . , the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." Respondent's four prior disciplinary proceedings constitute serious aggravation to the misconduct present in this case. We are mindful that "under guiding case law, we look to the standards not reflexively, but, with regard to standard 1.7, with an eye to the nature and extent of the prior record." (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.) In that regard, we note that although respondent has been disciplined on four previous occasions, he received no actual suspension, but only a two–year stayed suspension, together with a two–year probationary period, in addition to various private and public reprovals. But, when we view the course of his previous misconduct in toto, we find that respondent's involvement with the disciplinary system has spanned every decade over nearly thirty years, beginning in early 1976, and that his past disciplinary proceedings involved 9 separate matters where at least 13 clients were adversely affected, of whom at least 5 were minor children. Put another way, respondent has been involved with the State Bar's disciplinary process for 28 of his 38 years of practice.

In our search to recommend the proper discipline, we also consider prior decisions imposing discipline based on similar facts. (*In re Morse*, *supra*, 11 Cal.4th at pp. 206–207; *In the Matter of Taylor, supra*, 1 Cal. State Bar Ct. Rptr.at p.580.)

[4b] Looking to the case law, we find that when considering the applicability of standard 1.7(b), the Supreme Court has placed great weight on whether or not there is a "common thread" among the various prior disciplinary proceedings or a 'habitual course of conduct' which justifies disbarment. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 780 (*Arm)*.) Here respondent's prior record of four disciplines establishes a disturbing repetitive theme. In particular, the misconduct for which he was disciplined in 1979, 1983, 1994, and 2000 reflects a continuing inability to fully appreciate the fiduciary nature of his relationship with his clients in view of his continuing failure to fully perform his duties toward his clients. In the present case respondent has once again demonstrated his inability to recognize his duties, this time by placing his own interests above those of his client. Most of his prior misconduct was fee–related.

[4c] In one instance, when the clients refused to sign the releases upon a settlement of the case, respondent failed to take any further action in the case and it was dismissed. In another instance, respondent failed to inform his client that he and his client had been sued by the client's former attorney for attorney fees. In other instances, respondent settled cases of deceased clients, in one matter witnessing the signature of a deceased client on a release without informing the opposition of the client's death. In still other matters, respondent distributed deceased clients' funds without verifying the proper recipients of the funds, which action implies that respondent received his attorney fees in the distribution. In the most recent prior discipline, respondent settled a case and distributed funds on behalf of three minors without obtaining court approval of the settlement. In the instant case, respondent again viewed his interest in his fees as paramount, taking advantage of his client, a retired businessman, at a time when the client had neither the opportunity nor the stamina to resist respondent's overreaching. Respondent has had every opportunity during the last 28 years to learn from his past mistakes, and yet he has failed to do so. Either he fails to understand his professional duties or his prior discipline fails to impress upon him the importance of compliance with these duties.

The instant case thus is distinguishable from *Arm*, where the Supreme Court rejected a recommendation of disbarment pursuant to standard 1.7(b) even though Arm had been involved in three prior disciplinary proceedings in his 22 years of practice. (*Id.* at pp. 769–770, 778, 780.) But in *Arm* the court

found no common thread and no evidence that Arm had engaged in 'a repetition of offenses' for which he had previously been disciplined. (*Id.* at p. 780.) Furthermore, although Arm was found culpable of misleading a judge by failing to disclose his upcoming 60-day suspension, which misconduct involved moral turpitude, and commingling client and attorney funds (*id.* at pp. 774–777), the court found in mitigation a lack of significant harm resulting from Arm's misconduct and the absence of bad faith. (*Id.* at pp. 779–780.) The Supreme Court determined that an 18–month actual suspension was necessary to protect the courts, the public, and the legal profession. (*Id.* at pp. 768, 781.) Here, in contrast, there is minimal mitigation, significant client harm, and, most importantly, a disturbing continuation of the kind of misconduct for which respondent has been repeatedly disciplined.

We also are guided by *Morgan v. State Bar* (1990) 51 Cal.3d 598, wherein attorney Morgan was found culpable of one count of practicing law while on suspension and one count of entering into an unfair business transaction with a client pursuant to former rule 5–101. Although the attorney in *Morgan* received more serious prior discipline than respondent, the actual history of misconduct was similar to that of the instant case. Morgan was initially suspended for six months for misappropriation, and then for two more years, stayed, for engaging in the unauthorized practice of law while under suspension. He was given one more year of actual suspension when he settled two personal injury cases without the consent of his clients and misappropriated client trust funds. He again misappropriated funds in a personal injury matter, and in another matter he failed to communicate with a client and to perform services competently. Morgan offered more mitigation evidence than in the instant case, including five good character witnesses. In addition the attorney presented evidence that he was a founder of the Challengers Boys' Club and served on its board of directors. Finally, he contributed pro bono legal services to the Boys' Club and to the Youth Intervention Program, and he periodically spoke to children who were placed in that program. There also was evidence that the last instance of unauthorized practice was an isolated incident during his suspension.

Nevertheless, the Supreme Court concluded that disbarment was appropriate under standard 1.7(b) because the attorney had been found culpable in four prior disciplinary proceedings. In so concluding, the court found, "petitioner's behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders . . . ." (Morgan v. State Bar, *supra*, 51 Cal.3d at p. 607.)

[4d] Respondent's extended history of inattention to his fiduciary responsibilities to his clients, together with his failure to learn from his past misdeeds, creates a grave risk that additional harm will result to his clients. Furthermore, respondent's manifest indifference to the consequences of his actions and the absence of any significant mitigation evidence compel us to conclude that the two years' actual suspension and four years' probation recommended by the hearing judge is inadequate to protect the courts, the profession, and most importantly in this case, the public.

[4e] We therefore recommend disbarment as necessary to best serve the goals of attorney discipline in this case. We wish to emphasize that we did not arrive at our recommendation of disbarment based solely on the mere number of respondent's past disciplinary proceedings, but only after a careful examination of the substance and nature of his disciplinary history and with due regard to the facts and circumstances of his present misconduct.

RECOMMENDATION

We recommend that respondent Joseph Leib Shalant be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in paragraphs (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 Business and Professions Code section 6086.10 and that such costs be payable

in accordance with Business and Professions Code section 6140.7.

ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

We concur:

STOVITZ, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES CARLISLE REGAN

A Member of the State Bar

No. 00–O–10318

Filed August 5, 2005

SUMMARY

Respondent represented two clients whose unsuccessful claims of slander resulted in multiple awards for costs and attorney fees against respondent and his clients. Contrary to his clients' wishes, respondent pursued an appeal. The hearing judge found that respondent made appearances without authority, committed acts of moral turpitude, failed to communicate with his clients and failed to return their file upon request. In mitigation, respondent had no prior record of discipline in 17 years of practice. In aggravation, respondent committed multiple acts of misconduct, made disparaging remarks about his clients in his pleadings, and caused his clients undue stress. The hearing judge recommended two years' probation with conditions, including actual suspension of 75 days. (Hon. Robert M. Talcott, Hearing Judge.)

Respondent sought review contending that the State Bar failed to provide clear and convincing evidence of the asserted charges.

The review department adopted the hearing judge's culpability findings and found additional aggravation due to respondent's indifference toward rectification. The review department also adopted the hearing judge's disciplinary recommendation but added a recommendation that respondent be ordered to comply with California Rules of Court, rule 955.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: James C. Regan, 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] **220.30 State Bar Act–Section 6104**
Filing a complaint with a superior court constitutes an appearance within the meaning of Business and Professions Code section 6104. Similarly, respondent's filing of a notice of appeal initiated an appellate proceeding in the same way a complaint would initiate litigation. Furthermore, respondent's numerous extension requests to file an opening brief were associated with the perfection of the filing of an appeal, and each request constituted an appearance before the court.

[2 a–c] **220.30 State Bar Act–Section 6104**
Where respondent's clients decisively terminated his authority to pursue an appeal by expressly telling him in correspondence that they no longer wished the appeal pursued and where respondent thereafter filed requests for extensions and an appellate opening brief, the fact that respondent initially received authorization to initiate the appellate action did not insulate him from culpability for violating Business and Professions Code section 6104.

[3] **220.30 State Bar Act–Section 6104**
277.20 Rule 3–700(A)(2) [former 2–111(A)(2)]
Respondent's duty under Rules of Procedure of the State Bar, rule 3–700(A)(2) to not withdraw from employment until reasonable steps are taken to avoid foreseeable client prejudice did not exonerate respondent from culpability under Business and Professions Code section 6104 for his continued appearances on behalf of his clients after the clients had discharged him.

[4 a, b] **214.30 State Bar Act–Section 6068(m)**
Filing extensions and an opening appellate brief does not constitute a response to several letters from respondent's clients in which they expressly asked to be informed of respondent's intentions regarding his continued pursuit of an appeal. Where the clients' requests were reasonable given the perception that respondent was acting against their wishes and where there is no evidence that respondent made any communication as an answer to his clients' requests, respondent violated Business and Professions Code section 6068, subdivision (m).

[5 a, b] **277.50 Rule 3–700(D)(1) [former 2–111(A)(2)]**
A client's file, absent uncommunicated attorney work product, is the property of the client and must be surrendered to the client promptly upon request once the representation has been terminated. An express element of a Rules of Professional Conduct, rule 3–700(D)(1) violation is the client's request for return of the property. Where a client requested a case file approximately eight months before respondent's services were terminated, and where there was no request for the client file made after the date of termination, respondent was still obligated to follow the directives of rule 3–700(D)(1) because it is unnecessary for a client who has already requested return of papers and property prior to an attorney's discharge to be required to repeat that request after discharge occurs.

[6 a–c] **213.40 State Bar Act–Section 6068(d)**
221.00 State Bar Act–Section 6106
Where respondent filed a motion with the Court of Appeal misrepresenting that his clients wanted to pursue an appeal and where respondent failed to disclose to the Court of Appeal that he had been fired, respondent's actions violated Business and Professions Code section 6068, subdivision (d) as well as section 6106.

[7] **103 Procedure–Disqualification/Bias of Judge**
The burden of showing a claim of bias or prejudice rests on the complaining party. Respondent's assertion that the hearing judge made numerous legal errors to support his allegation of judicial bias was without merit because even if a judge makes numerous mistakes as to questions of law, that does not form a ground for a charge of bias and prejudice.

[8] **142 Evidence–Hearsay**
159 Evidence–Miscellaneous
Where respondent did not object to the admission of evidence, it is well settled that any objection on that point has been waived. Therefore, respondent's assertion that the hearing judge erroneously admitted hearsay evidence was not well taken because respondent failed to object to the admission of all but one of the objectionable items of evidence.

[9] **540 Aggravation–Bad faith, dishonesty, concealment (1.2(b)(iii))**
Where respondent made unsupported claims that his clients were mentally ill and senile, respondent's disparaging remarks were made in bad faith and were appropriately considered an aggravating factor.

[10] **175 Discipline–Rule 955**
1015.02 Actual Suspension–2 Months
Where respondent made appearances without authority, committed acts of moral turpitude, failed to communicate with his clients and failed to return their file upon request, where there was aggravation including multiple acts of misconduct, bad faith, significant client harm, and indifference towards atonement or rectification, and where there was mitigation for no prior record in over 17 years of practice, the appropriate discipline recommendation was two years' stayed suspension and two years' probation on conditions, which included 75 days' actual suspension and compliance with rule 955.

ADDITIONAL ANALYSIS

Culpability
Found
213.41 Section 6068(d)
214.31 Section 6068(m)
220.31 Section 6104
221.10 Section 6106
277.51 Rule 3–700(D)(1) [former 2–111(A)(2)]

Aggravation
Found
521 Multiple Acts
541 Bad Faith, Dishonesty
582.10 Harm to Client
591 Indifference

Mitigation
Found
710.10 No Prior Record–Found

Standards

802.61 Appropriate Sanction
833.90 Moral Turpitude–Suspension
863.90 Standard 2.6–Suspension
905.10 Miscellaneous Violations–Disbarment

Discipline

1013.08 Stayed Suspension–2 Years
1017.08 Probation–2 Years

Other

178.10 Costs–Imposed

OPINION

STOVITZ, P.J.:

A State Bar Court hearing judge recommended that Respondent, James Carlisle Regan, be suspended from the practice of law for two years, stayed on conditions including a seventy–five day actual suspension. The judge found respondent culpable of pursuing an appeal contrary to the wishes of his clients, misleading the appellate court about his clients' wisbes, failing to communicate with his clients and failing to return his client's file upon request.

On appeal, respondent contends that the Hearing Judge erroneously found culpability because the State Bar did not provide clear and convincing evidence to establish that he violated any of the asserted charges. Upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207) we adopt all of the Hearing Judge's findings with respect to culpability. We also find additional aggravation above that of the Hearing Judge. For the reasons below, we adopt the findings of culpability and adopt the Hearing Judge's disciplinary recommendation, adding a recommendation that respondent be ordered to comply with California Rules of Court, rule 955.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent has practiced law in California since 1981, and he has no prior record of discipline. He has had varied civil practice experience. His past work included general corporate work, labor law, creditor's rights, bankruptcy, international law, litigation, real estate, and some "film finance work." Over his legal career, respondent had the opportunity to work with many different clients.

Elodie McKee and Don Porco hired respondent to represent them in a claim against the City of Burbank (Burbank) and several Doe defendants in August 1997. Initially, McKee was the one who sought out respondent because he was a semi–prominent attorney in the Glendale and Burbank area. McKee was also aware of his work as the chairman of the Glendale–Burbank Republican committee. McKee believed she had a negligence and slander claim against Burbank. After discussing the merits of her claim, McKee introduced respondent to Porco. Porco had been active in appearing before the Burbank City Council to protest different acts by city officials. McKee believed that respondent could help Porco with a similar slander claim that he wanted to bring against Burbank and several individuals. Respondent undertook the representation believing his connections with the Burbank city council members would help the case come to an early settlement.

The main action arose from remarks made on a telephone hotline allegedly organized by a Burbank Police Lieutenant, Don Brown, designed to comment on local politics.[1] The hotline telephone number was publicized in the local press. Disparaging remarks concerning Porco's character were broadcast on the hotline, and respondent combined Porco's complaint with the separate negligence complaint McKee had against Burbank, making them co–plaintiffs in the same action. McKee and Porco sought damages for violations of their civil rights, defamation, conspiracy, negligence, and intentional infliction of emotional distress.

Porco and McKee signed respondent's contingency fee agreement letter on June 9, 1998, in which respondent outlined the percentages of any potential award to be paid to him as his fee.[2] The letter also set forth an hourly rate of $200 to be paid for any work related to an appeal. Concurrent with that letter, respondent had McKee and Porco sign a conflict of interest waiver.[3]

Respondent filed the initial complaint on September 12, 1997, which was amended on October 19,

1. There is no evidence before us to suggest that Don Brown operated the hotline for any purpose other than as an outlet for personal political views.

2. The record is unclear whether McKee and Porco signed an earlier fee agreement letter.

3. Respondent failed to outline any "actual and reasonably foreseeable adverse consequences" of a potential future conflict as required by California Rules of Professional Conduct, rule 3–310(A)(1)–(A)(2) and (C).

1998. The amended complaint substituted Don Brown and Charles Lombardo for the Doe defendants. After being named defendants, Brown and Lombardo moved to strike the amended complaint on the ground that it was a strategic lawsuit against public participation (SLAPP) by McKee and Porco.[4] The court granted the Brown and Lombardo motion to strike, as McKee and Porco had not met their burden to produce competent evidence that the statements made on the hotline were defamatory or otherwise actionable. An attorney fee award of $15,662.50 was entered against McKee and Porco. After the SLAPP award, Burbank filed a summary judgment motion to dismiss the original lawsuit filed by McKee and Porco, based on a lack of any causal connection between the alleged acts and conduct for which Burbank was legally responsible. Burbank's motion was granted on January 20, 1999.

Following the SLAPP award, but before the summary judgment that dismissed the original lawsuit was granted, McKee and Porco met with respondent on January 16, 1999. At this meeting, both McKee and Porco wrote a check to respondent in the amount of $250. Porco's check was delivered with the notation "Don Porco – Appeal" on the memo line, and McKee's check stated "For Appeal" on the memo line. The purpose of these checks was the subject of considerable dispute at respondent's disciplinary hearing. McKee and Porco both testified that the checks were written as a loan to respondent because he was having difficulty paying his home mortgage. Respondent testified that the checks were delivered as payment for fees associated with filing the appeal that his clients wanted to pursue.[5] The Hearing Judge resolved this issue in favor of respondent. Respondent also testified that he intended to use at least one of the checks for the filing fees associated with appealing the SLAPP award. The other check was to cover costs associated with appealing the subsequent summary judgment motion, which respondent believed was coming. Respondent testified that the checks were deposited into his client trust account and that the money was used to file the appeal and the supplemental notice of appeal.

No contact occurred between respondent and his clients for approximately one month after their January meeting. On February 18, 1999, McKee placed three telephone calls to respondent and testified that respondent hung–up on her several times after she informed him, during the initial call, that she and Porco did not want an appeal. McKee testified that when she telephoned respondent she said "Jim, we need to talk. Don and I don't want an appeal," and upon hearing that, respondent immediately hung–up the telephone.[6] The following day, February 19, 1999, respondent filed a Notice of Appeal on behalf of McKee and Porco appealing the SLAPP award.

Respondent conceded that he did not inform Porco or McKee in writing of his filing an appeal on their behalf, testifying that "I don't know that it's wise to put so many things in writing." Porco testified that he learned from respondent in a February 24, 1999, phone call that the appeal had been filed. Upon learning that information, Porco insisted that his name be withdrawn from the appeal. At respondent's disciplinary hearing, Porco testified that during this conversation he stated that "I told [respondent] to get my name off of it. I didn't want that appeal. I told him take my name off it." Porco also testified that respondent never had his approval to file an appeal on his behalf.

McKee filed a notice of substitution of attorney on March 1, 1999, in the Los Angeles Superior Court, which had jurisdiction over the original, and continuing, Burbank lawsuit. Her intention was to fire respondent and substitute herself in pro. per. Although the reason is unclear, the court continued to recognize respondent as the attorney of record.

4. See e.g., *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, 59–60, for the origin of the acronym SLAPP and the public policy involved in California's anti–SLAPP law invoked by those resisting SLAPP suits they deem chilling of their exercise of constitutional speech or petition rights.

5. The local filing fee for an appeal during this time period was $250.

6. Telephone records indicated that three calls were placed by McKee to respondent of less then one minute in duration on that date.

A hearing was held on March 5, 1999, to determine the amount of the award for costs and fees relating to the summary judgment granted on behalf of Burbank. Respondent had been served papers regarding the hearing, but testified that he failed to appear because Porco had told him the hearing had been removed from the calender. McKee represented herself as a pro se litigant and was the only person to appear at the hearing. McKee indicated to the judge that respondent had abandoned her case and failed to communicate with his clients. Because respondent was still the attorney of record, the hearing was postponed until April 15, 1999.

Respondent and Porco appeared without McKee at the subsequent hearing on April 15, 1999. The court questioned respondent regarding his status as McKee's attorney. Respondent represented to the court that he had sent McKee a substitution of attorney form, but that she had failed to return the form. Respondent further explained to the court that he was making a special appearance on her behalf. The court indicated that it was going to enforce any judgment on behalf of Burbank against respondent as well as his two clients. Respondent unsuccessfully protested that decision, and the ultimate result of the hearing was an award for attorney's fees in the amount of $62,928.38, against Porco, McKee, and respondent, jointly and severally.

Immediately following the hearing, Porco and respondent discussed the judgment outside the courtroom. Respondent testified at his disciplinary hearing that this conversation was the relevant conversation regarding their pursuit of the appeal. Respondent claimed that he explained to Porco how the judgment against them would actually help them on appeal, and that at no time did Porco state he did not want to be a part of the appeal. Also, respondent testified that he did not ask McKee and Porco to sign a new conflict of interest letter once they all became responsible for the judgment in favor of Burbank although, at that time, respondent understood that an actual conflict could exist between Porco and McKee.

Porco's recollection of the conversation on April 15, 1999, differed from that of respondent. Porco testified that, during this conversation, respondent stated he would not pay the judgment and instead would declare bankruptcy. Porco also testified that he requested his case file from respondent during this conversation. Respondent never complied with that request.

On April 30, 1999, respondent filed a supplemental notice of appeal on behalf of McKee, Porco, and himself to include the $62,928.38 award against all three parties. This was the same day the judgment awarding the attorneys fees to Burbank was entered. On May 6, 1999, the Notice of Entry of Judgment was filed regarding the awarded fees.

On May 6, 1999, McKee and Porco sent a certified letter to respondent, which he received on May 10, 1999, that expressed their disappointment with how respondent handled their case. McKee and Porco complained that respondent did not communicate with them, allow them to make the ultimate decisions regarding their case, or honor Porco's request to return their case file. Additionally, the letter stated that respondent never had his clients' express approval to pursue an appeal on their behalf. At the conclusion of the letter, McKee and Porco stated they would not interfere with a personal appeal by respondent in order to protect his own interests. Porco also stated that "as far as I am concerned [the Burbank lawsuit] was finalized on April 15, 1999 [*sic*] by Judge Ouderkirk." Further, McKee and Porco requested respondent notify them of his intentions as soon as possible.

Respondent never replied to this letter, and continued throughout 1999 to file several applications for an extension of time in which to file the Appellants' Opening Brief. McKee and Porco were named as appellants on each application, and respondent never notified either party that he had sought the extensions.

After several months without any contact from respondent, on November 17, 1999, Porco sent respondent a letter in which he reiterated that respondent did not have authority to file an appeal on behalf of himself or McKee. Porco also complained of respondent's failure to communicate, claiming he had not been contacted by respondent for seven months. On December 7, 1999, McKee sent respondent a similar letter, and on the same date McKee and Porco

also filed a motion in the Court of Appeal to dismiss respondent as the attorney of record along with a motion to dismiss the appeal.

Respondent did not contact his clients after receiving their letters; instead, he proceeded to file the appellant's opening brief on behalf of McKee, Porco, and himself on December 15, 1999. On December 23, 1999, McKee and Porco sent respondent a letter that unequivocally discharged respondent for failing to communicate.[7] The letter also requested that respondent sign and return a substitution of attorney form, which respondent did not complete or return.

On January 5, 2000, the Court of Appeal granted McKee and Porco's December 7, 1999, motion and issued an order dismissing the February 19, and April 30, 1999 appeals.

Respondent then filed a motion to vacate " 'Order Dismissing Appeal;' To Reinstate Appeal; To Strike 'Motion' Filed by Individual Plaintiffs–Appellants 'In Propria Persona;' " on January 20, 1999, on behalf of himself, McKee, and Porco. In the motion to vacate, respondent stated that McKee was mentally ill, and Porco was senile.[8] Respondent stated that McKee "imagines that she is a lawyer" and Porco "has no idea of what is happening [and] is under Ms. McKee's influence." Throughout the motion, respondent made repeated references to McKee's mental incompetence and stated that "[n]either Mr. Porco nor Ms. McKee actually want the appeal dismissed." (Emphasis in original.) Respondent also stated that "[McKee and Porco] specifically requested that counsel undertake these appeals." (Emphasis in original.) Respondent did not attempt to contact McKee or Porco regarding his written representations or their motion dismissing the appeals. McKee and Porco subsequently filed on January 25, 2000, a "Letter of Opposition" to respondent's January 20, 2000, motion with the Court of Appeal.

Respondent sent Porco a letter on January 28, 2000, urging him to continue with the appeal. So far as the record shows, this was the first communication made by respondent to either party since the April 15, 1999 conversation with Porco in the courtroom hallway. In the letter, respondent advised Porco that McKee was not acting in his best interests by attempting to dismiss the appeal, and that Porco should not have any further contact with her, and should only discuss the matter directly with respondent.

On February 4, 2000, Porco sent respondent a letter, in which he again stated that he did not want an appeal and that he was not acting under anyone's influence. Porco repeated that he no longer wanted representation by respondent, and that Porco had never given respondent express verbal or written consent to pursue an appeal. Porco made another request for respondent to sign a substitution of attorney form. McKee also sent a letter to respondent dated February 4, 2000, in which she reiterated that respondent had been terminated, that she did not want an appeal, and requested he sign and return the substitution of attorney form sent to him on December 23, 1999. Again, respondent failed to comply with that request.

Respondent did not make any attempt to communicate with either Porco or McKee following the February 4, 2000, letters. On that same date, and on behalf of himself, Porco, and McKee, respondent filed in the Court of Appeal a declaration in response to the "Letter of Opposition" that had been filed by McKee and Porco on January 25, 2000, and requested it be stricken. In this filing, respondent represented to the court that "Mr. Porco has never requested that his appeal be dismissed." Respondent

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7. This letter read in pertinent part as follows: "Today we learned that you filed an appendix and opening brief with the Second Appeal [*sic*] Court, and it should have been clear to you from the December 7, 1999 motions we filed to dismiss both you and the appeals that we sent you, and again you did not phone us or write to us what you were doing behind our backs and without our knowledge, that we want nothing more to do with you and your financial harm that you are continuing to try to cause us with your actions. . . . You are fired Mr. Regan and we told you in our previous correspondence that we did not want any more financial debt incurred to us with an appeal, and you never phoned us nor wrote to us as we asked you to do."

8. The record below reflects that, at the time of the State Bar Court hearing, Porco was elderly and his hearing was impaired. McKee also testified at the hearing that she was dyslexic.

also stated that the first time he became aware McKee might want the appeal dismissed was in December 1999, when he was preparing the Appellants' Opening Brief.

Also on February 4, 2000, the Court of Appeal issued an "Order Reinstating the Appeal of James C. Regan." That order vacated the order issued January 5, 2000, that had dismissed the entire appeal, but did not vacate the order dismissing McKee's and Porco's appeal. The court noted that because respondent was a named appellant, and was personally liable for the award against him, he should be permitted to pursue his own appeal. The Court of Appeal allowed respondent, within 30 days, to submit another brief on his behalf, as the previous brief presented issues that also pertained to McKee and Porco.

Subsequent to that order, Porco and McKee filed "Protest Letters" with the Court of Appeal on February 7, 2000, requesting the court to honor the December 7, 1999, motion to dismiss the appeal filed on February 19, 1999, and the supplemental notice of appeal filed April 30, 1999; which the court granted. McKee also sent a letter to respondent on February 21, 2000, in which she repeated her request for respondent to return a substitution of attorney form, and emphasized that she and Porco had fired respondent.

On February 22, 2000, respondent filed a Motion to Reinstate, Sever and Stay the appeals of appellants Porco and McKee. In the motion, respondent again stated that neither Porco nor McKee wanted the appeal dismissed and made further comments on McKee's mental capacity. In his declaration to this motion, respondent stated that he "honestly [did] not believe they want their appeals dismissed." Respondent did not notify either client that the motion had been filed, or attempt to make any contact with either party. At the State Bar Court hearing below, respondent continued to assert that he pursued the appeal on behalf of McKee and Porco because he believed it to be in the best interests of his clients.

Respondent had previously made attempts to collect his legal fees from Porco's insurance company for the work he conducted regarding the appeal. On March 24, 1999, respondent contacted Allstate Insurance regarding a new claim on behalf of Porco. Allstate informed respondent that he needed to forward a letter of representation to them, as well as a copy of the lawsuit and judgment. Respondent never complied with that request. In January 2000, an associate from respondent's office forwarded a letter to Allstate requesting payment for legal fees that had accrued in connection with the work conducted regarding Porco's appeal. In response, Allstate notified Porco that respondent never sent the letter of representation, and that it had not had any contact from respondent since the March 1999 request for payment.

Porco and McKee filed a complaint with the State Bar on January 12, 2000. After an investigation by the State Bar, a five–count Notice of Disciplinary Charges (NDC) was filed on March 20, 2002, alleging that respondent violated Business and Professions Code section 6104[9] by appearing for a party without authority when he pursued an appeal after being advised by his clients to cease pursuing the appeal on their behalf; that he violated section 6068, subdivision (m) when he failed to respond to his clients' inquiries regarding his pursuit of the unwanted appeal from May 6, 1999, until February 4, 2000, and failed to inform his clients that he requested numerous extensions of time to file the appeal, and the ultimate filing of the Appellants' Opening Brief; that he failed to release his clients' file upon termination of employment violating Rules of Professional Conduct, rule 3–700(D)(1);[10] that he violated section 6068, subdivision (d) by employing means inconsistent with the truth, and sought to mislead a judge when he stated in declarations, under penalty of perjury, that his clients wanted to pursue the appeal, and that he failed to advise the Court of Appeal that his clients had attempted to substitute him out of their lawsuit; and finally, that he violated section 6106 by committing an act involving moral turpitude when he falsely repre-

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

10. Unless otherwise noted, all further references to rules refer to provisions of the California Rules of Professional Conduct.

sented to the Court of Appeal that he had authority to pursue the appeal.

Both McKee and Porco testified at respondent's disciplinary hearing. Respondent was the only witness who testified on his behalf, and no evidence of any mitigating circumstances was offered at the time of the hearing. The Hearing Judge did consider in mitigation respondent's 17 years of practice free of any discipline. In aggravation, the Hearing Judge considered that respondent engaged in multiple counts of misconduct and that respondent had made disparaging remarks about his clients in his pleadings to the State Bar Court. The stress respondent caused to his clients by his misconduct was also considered.

The Hearing Judge found respondent culpable of all five counts and recommended that respondent be suspended for two years, stayed, and placed on probation for two years, with conditions, including seventy–five days of actual suspension.

II. DISCUSSION

A. Count One: Appearing for Party without Authority (Bus. & Prof. Code, § 6104)

Respondent was charged in count one of the NDC with appearing for a party in the Court of Appeal without authority in violation of section 6104. The section provides: "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."

Respondent argues that he did not violate section 6104 because 1) filing notices of appeal, requests for extensions, motions, and the Appellants' Opening Brief are not appearances; and 2) he had express authority to pursue the appeal on behalf of Porco and McKee.

Respondent claims that an "appearance" consists solely of answering, demurring, moving to strike or transfer, giving written notice of appearance, participating in a trial or hearing, or an order to show cause. Respondent cites to *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, as support that the above list is exhaustive, and therefore the filing of an appeal cannot be considered an appearance. However, the above list refers to actions that are considered appearances by a *defendant*. (See *Lyons v. State of California* (1885) 67 Cal. 380, 384.) Further, it is not exhaustive of what may constitute an appearance for either a defendant or a plaintiff.

An "appearance" is not limited to standing in front of a judge. (*Lyons v. State of California*, *supra*, at p. 384.) "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. [Citations.]" (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756.)

[1] It is settled that filing a complaint with a superior court constitutes an appearance within the meaning of section 6104. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 577.) Here, respondent filed a notice of appeal, initiating an appellate proceeding in the same way a complaint would initiate litigation. After initiating that process, respondent filed numerous extension requests, eventually leading to the filing of the Appellants' Opening Brief. Each request for an extension of time in which to file the Appellants' Opening Brief was associated with the perfection of the filing of an appeal and constituted an appearance before the court.

Respondent's second contention is that he had express authority to file and pursue the appeal. Respondent argues that the checks delivered to him by Porco and McKee with "For Appeal" on the memo line is prima facie evidence that he had his clients' approval to initiate and continue to pursue the appeal.

[2a] The Hearing Judge resolved the issue of credibility regarding the purpose of the checks in favor of respondent. The Hearing Judge was in the best position to determine witness credibility and great weight is given to his findings on this subject. (Rules Proc. of State Bar, rule 305(a); *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 143, fn. 7.) We agree with the judge's

finding on this issue. The explanation that Porco and McKee offered the checks as a loan to aid respondent with his mortgage is unlikely. The notations on the checks, the timing of the checks following the SLAPP suit award, and the fact that they were written for the exact amount of the filing fees, lead us to believe that Porco and McKee initially gave respondent authority to pursue the appeal. However, it is also clear that the clients terminated that authority and did so decisively.

We have the duty to independently review the record to make findings of fact and conclusions of law. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 346-347.) Although the Hearing Judge concluded that McKee's and Porco's testimony regarding initiating the appeal was not credible, he found clear and convincing evidence to establish that respondent had been notified to stop pursuing the appeal on behalf of his clients. We agree with the judge's assessment.

[2b] Receiving authorization to initiate an action does not insulate from culpability an attorney who continues to pursue the claim against a client's wishes. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 339.) McKee testified that she told respondent, during a phone call on February 18, 1999, that she did not want to pursue the appeal. While this conversation might not stand on its own, we find clear and convincing evidence to support that neither client wanted to continue pursuing the appeal.

[2c] On May 6, 1999, McKee and Porco wrote a letter to respondent in which they expressly told him they did not want to pursue the appeal. Respondent continued to file four requests for an extension of time though October 29, 1999. On November 17, 1999, Porco sent another letter stating he did not want to pursue an appeal. McKee followed with a similar letter to respondent on December 7, 1999. After receiving clear notification from his clients that they did not want to pursue the appeal, respondent filed the Opening Appellants' Brief on December 15, 1999.

[3] Respondent claims that he was bound by the prescripts set forth in rule 3–700(A)(2), and therefore is not culpable for continuing to make appearances on behalf of his clients. Rule 3–700(A)(2) requires that an attorney "shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." It is settled that an attorney's obligation to avoid prejudice also extends to an attorney who has been terminated. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 374.) It is also settled that an attorney has the duty to avoid foreseeable prejudice to the client's interest until a substitution of counsel is filed. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) Once respondent was discharged on December 23, 1999, his duty under rule 3–700(A)(2) was to properly remove himself as attorney of record as it was clear that his clients wanted to abandon their legal claim. Instead, he actively worked against the direction of his clients by attempting to have the appeal reinstated with his clients as named parties.

The right to pursue an appeal rests entirely with the client, and where it is shown that the attorney acted without authority, the appeal will be dismissed. (See *Title Ins. & Trust Co. v. California Development Co.* (1914) 168 Cal. 397, 401.) Porco and McKee made numerous express statements that they wanted no part of an appeal, yet respondent claims he pursued the appeal because he *believed* that, despite their express direction to the contrary, they really wanted to pursue the appeal. Porco and McKee had the prerogative to stop pursuing their appeal for any reason, including the desire to minimize their financial cost, whether or not respondent believed it to be in their best interests. By respondent's reasoning, no client would have the ultimate right to dismiss an attorney with or without cause as established by *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790. Extending his reasoning further, an attorney would be allowed to pursue legal claims over a client's objection if the attorney believed the client's reason to stop the claim was not legitimate. Manifestly, existing law fails to support such a position.

Moreover, this record shows by respondent's own testimony, his recognition in hindsight, that, at least, an ambiguity arose as to his authority to pursue the appeal for Porco and McKee and that he failed to timely resolve that ambiguity. However, this was not an ambiguity but was the express direction by

respondent's clients to cease pursuit of the appeal on their behalf.

We find clear and convincing evidence that respondent continued to pursue an appeal on behalf of clients who had expressly asked him to stop. Respondent is therefore culpable for violating section 6104.

B. Count Two: Failure to Communicate (Bus. & Prof. Code, § 6068, subd. (m))

Section 6068, subdivision (m) states that an attorney must "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."

[4a] Respondent violated this section when he failed to respond to several letters from his clients in which they expressly asked to be informed of their attorney's intentions regarding his continued pursuit of the appeal. Each letter reflected Porco's and McKee's increased frustration with their attorney regarding his actions and lack of communication. Their requests were reasonable, given the continued perception that their attorney was acting against their wishes. (Cf. *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 519.)

[4b] Respondent contends that he did respond to those status inquiries by filing extensions and the Appellants' Opening Brief. This is without merit. Each letter respondent received from his clients specifically requested respondent to inform them of his actions. There is no evidence that documents any communication made by respondent as an answer to his clients' requests.

Further, respondent undercuts his position as to this count by asserting that he continued pursuing the appeal because he believed that was what his clients really wanted, even though he had received several express and written demands to stop the appeal. Assuming, *arguendo*, that to be the case, then respondent had all the more reason to inform his clients' that he intended to continue to pursue the appeal on their behalf.

If respondent was concerned that his clients were incapable of making informed decisions because of alleged mental challenges, that alone should have provided additional incentive to respondent to maintain regularized, documented communications with his clients. Respondent made no attempt to discuss with his clients why it would be in their interests to continue the appeal, or to find out why they wanted the process stopped until the January 28, 2000, letter to Porco, over ten months after their April 15, 1999, conversation.

We agree with the Hearing Judge's conclusion that respondent violated section 6068, subdivision (m).

C. Count Three: Failure to Return Clients' Property (Rule 3–700(D)(1))

Rule 3–700(D)(1) provides that an attorney "whose employment *has terminated* shall. . . [¶]. . .promptly release to the client, at the request of the client, all the client papers and property." (Emphasis added.) Respondent asserts that he was under no obligation to return the file to his clients until he received notice that he was terminated on December 23, 1999, and that no culpability can be found because the charge against him was based on Porco's request for the file on April 15, 1999. We disagree.

[5a] A client's file, absent uncommunicated attorney work product, is the property of the client and must be surrendered to the client promptly upon request once the representation has been terminated. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655.) Porco testified that he requested the case file on April 15, 1999, and both Porco and McKee requested the file in subsequent letters before they fired respondent. An express element of a rule 3-700(D)(1) violation is the client's making of a request for the return of the property. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536.)

[5b] Porco and McKee were clearly dissatisfied with respondent, and McKee had made an attempt to substitute herself in pro. per. as early as March 1, 1999. While it is conceivable that respondent frustrated the attempts by his clients to substitute him out

as their attorney by ignoring their requests, we find that the evidence supports that respondent's services were terminated on December 23, 1999. Although no request for the clients' file was made after that date, respondent was obligated to follow the directives of rule 3–700(D)(1) on and after December 23, 1999. It should be unnecessary for a client who has already requested return of papers and property prior to the attorney's discharge to be required to repeat that request after discharge in circumstances such as the ones before us. Accordingly, we uphold the hearing judge's conclusion that respondent is culpable of a wilful violation of rule 3–700(D)(1).

D. Counts Four and Five: Employing Means Inconsistent with the Truth; Misleading a Judge (Bus. & Prof. Code, § 6068, subd. (d)), and Commission of Act Involving Moral Turpitude (Bus. & Prof. Code, § 6106)

Respondent was charged in count four of employing means inconsistent with the truth and seeking to mislead a judge in violation of section 6068, subdivision (d), and he was charged in count five of committing an act involving moral turpitude in violation of section 6106. Section 6068, subdivision (d) provides: "To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." We agree with the Hearing Judge's conclusion that respondent violated section 6068, subdivision (d).

Respondent's violation of section 6068, subdivision (d) provides the basis for his culpability regarding section 6106. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Section 6106 is violated when an attorney commits "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."

[6a] The presentation to a court of a statement of fact known to be false "presumes an intent to secure a determination" based upon the statement and is a violation of this section. (*Davis v. State Bar* (1983) 33 Cal.3d 231, 239–240; citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144.) Here, respondent made a representation in his motion to vacate filed on January 20, 2000, that Porco and McKee did not actually want the appeal dismissed. By that date, respondent had received written confirmation that his clients did not want to pursue an appeal, and that they had terminated his services as of December 23, 1999. In spite of that knowledge, respondent proceeded to file the motion with the intention to have the appeal reinstated.

In addition, respondent stated to the Court of Appeal in his February 4, 2000, declaration that "Mr. Porco has never requested that his appeal be dismissed." Clearly, respondent intended the court to consider the assertion that his clients wanted to pursue the appeal, and that Porco had never asked the appeal to be dismissed, in making its decision whether or not the appeal should be reinstated. Respondent's representations to the Court of Appeal that his clients wanted to pursue the appeal are, at a minimum, deceptive. A member of the State Bar "should not under any circumstances attempt to deceive another person," whether or not any harm is done, and an attorney's practice of deceit involves moral turpitude. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 252–253.)

[6b] Respondent also failed to disclose to the court that he had been fired as of December 23, 1999, making a further false representation to the appellate court. (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709 [concealment of a material fact misleads a judge just as effectively as a false statement].)

Respondent contends that, because the Hearing Judge found respondent's actions were misguided, and that he did not pursue the appeal with malicious intent, he cannot be found culpable for violating section 6016. Respondent asserts that a finding of good faith cannot co–exist with moral turpitude.

The Hearing Judge concluded that respondent honestly believed he was acting in his clients' best interests. However, the Hearing Judge also concluded that respondent's honest belief was unreasonable and "clouded" his conduct regarding his role as an attorney. An attorney who makes a false statement to a judge is not exculpated based merely on an intuitive belief that he is acting in his clients' best interest.

We acknowledge that the nature and scope of the representation undertaken by respondent drastically changed. We also acknowledge that Porco and McKee were difficult clients. However, we find that respondent did not act in good faith when he attempted to have Porco's and McKee's appeal reinstated after he was allowed to pursue the appeal on his own behalf. At that point, the only legitimate reason respondent could have had to include Porco and McKee in the appeal was to reduce respondent's financial burden of responsibility for the judgment and to offset the costs associated with the appeal. This is demonstrated by respondent's attempt to recover the costs from Porco's insurance company as late as January 4, 2000. Respondent had already been fired, and had been directed to stop pursuing the appeal on behalf of his clients as of May 6, 1999, because they did not want to bear any of the costs associated with an appeal.

[6c] We find clear and convincing evidence that respondent violated sections 6068, subdivision (d) and 6106. Although the facts are the same supporting the section 6068, subdivision (d) and section 6106 (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221) we will not ascribe additional discipline based on respondent's section 6106 violation.

E. Respondent's Claim of Judicial Misconduct

Respondent claims that the Hearing Judge was tainted by bias and participated in an ex parte communication with the State Bar's trial attorneys. Respondent contends that this misconduct resulted in a denial of due process.

[7] Respondent has offered no evidence and hardly any specifics to support his allegations of bias. The burden of showing a claim of bias or prejudice rests on the complaining party. (*Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893; cf. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 228–229.) Further, respondent asserts that the Hearing Judge made numerous errors of law based on this alleged bias. This is without merit. Even if a judge makes numerous mistakes as to questions of law, that does not form a ground for a charge of bias and prejudice. (*Ryan v. Welte*, *supra*, 87 Cal.App.2d at p. 893.)

[8] Respondent also asserts that the Hearing Judge erroneously admitted hearsay evidence and relied on false statements contained within that evidence to make his findings of fact. Respondent has not identified what evidence was admitted as hearsay over his objections. Upon our review of the record, we find respondent failed to object to the admission of all but one of the letters written to him by Porco or McKee. Where respondent did not object to the admission of evidence, it is well settled that any objection on that point has been waived. (*In the Matter of Kaplan*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 522.) Porco's November 17, 1999, letter to respondent was admitted for all purposes over respondent's objection. However, we do not find the admission of this letter to be erroneous. Porco identified himself as the author of that letter. Further, Porco testified at length on direct and cross examination regarding the contents of all his letters, including the November 17, 1999, letter. (See Evid. Code, § 1237, subd. (a) [past recollection recorded exception to hearsay rule].)

III. DISCUSSION OF DISCIPLINE

A. Levels of Discipline

In making a recommendation of discipline, our primary concern is the protection of the public and maintaining high professional standards by attorneys (*King v. State Bar* (1990) 52 Cal.3d 307, 315; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.3.)[11] We look to the Standards for Attorney Sanctions for Professional Misconduct and relevant case law for guidance in determining the appropriate level of discipline. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) The

11. Unless otherwise noted, all further references to standards refer to provisions of the Attorney Sanctions for Professional Misconduct.

standards are guidelines which must be construed in relation to decisional law. (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) The standards applicable to the culpability found in this case are standards 2.3[12], 2.6[13], and 2.10[14]. These standards provide for a range of misconduct from reproval to disbarment. However, standard 1.6(a) provides in part that "[i]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions." Thus, standards 2.3 and 2.6, providing for suspension or disbarment, should be applied in this case.

The gravamen of respondent's misconduct is his repeated appearances on behalf of his clients without their authority and respondent's attempts to mislead a judge. Standard 2.6 provides: "Culpability of a member of a violation of [sections 6068, subdivision (d) and 6104] shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. . . ."

In the following cases of an isolated false statement or misrepresentation to a court, prior to the adoption of the Standards, public reproval has been imposed.

In *Mushrush v. State Bar* (1976) 17 Cal.3d 487, the attorney had no prior record of discipline. He made false statements during a bankruptcy proceeding when he failed to inform the bankruptcy court regarding the amount of a payment made to a debtor from the sale of real property. The court concluded that the attorney's denial of knowledge of the size of the check involved moral turpitude.

In *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, the attorney misled a bail commissioner by failing to disclose the facts surrounding his attempts to obtain bail for a client in a criminal case. The court concluded that the concealment of a material fact was as misleading as explicit false statements and required discipline; however, the court considered that the attorney had no prior record of discipline in mitigation.

In *Mosesian v. State Bar* (1972) 8 Cal.3d 60, the attorney knowingly made false statements during his testimony as a witness in a civil action regarding the general reputation of his aunt. He named several people with whom he allegedly had discussions about his aunt as the basis for his testimony, which was later controverted by every person he identified. While the court only imposed a public reproval, it took particular notice of the heightened duty of an attorney to be candid and never seek to mislead. (*Id.* at p. 66.)

Finally, in *Grove v. State Bar* (1965) 63 Cal.2d 312, an attorney concealed from a judge, in court, that the absent opposing attorney had requested a continuance. The court found that the concealment of the request was a violation of sections 6068, subdivision (d) and 6106, because it misled the judge just as effectively as a false statement conveying that there was no request for a continuance would have done. However, the court did not find that the attorney planned to mislead the judge and it appeared that Grove's conduct may have been spur of the moment and overzealous.

Other cases of misrepresentation have resulted in greater discipline.

In *Drociak v. State Bar* (1991) 52 Cal.3d 1085, the Supreme Court imposed an actual suspension of thirty days for violating sections 6068, subdivision (d) and 6106. In *Drociak*, an attorney was hired in March 1985 to represent a woman in a personal injury

12. Standard 2.3 provides in relevant part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

13. Standard 2.6 provides that violations of sections 6068 and 6104 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ."

14. Standard 2.10, which applies to violations of rule 3-700(D)(1), provides for "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ."

action. The attorney had the client sign undated and blank verification forms. During 1986, the defendant sought discovery through interrogatories. After a long period without contact with his client, the attorney answered the interrogatories himself and attached one of the pre–signed verifications. The suit was dismissed in November 1986. When the client's husband inquired as to the status of the lawsuit in late 1986 or early 1987, the attorney informed him the suit had been dismissed because of his wife's failure to cooperate. The attorney was then informed that his client had been dead since October 1985. In aggravation, the court considered the attorney's practice of having other clients sign blank verifications and that his use of pre–signed verifications posed a threat to the administration of justice. The court also considered the attorney's lack of remorse for his actions. In mitigation, the court considered the attorney's twenty–five years of practice free of discipline.

In *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, we recommended two years' suspension, stayed, on conditions including six months' actual suspension. In *Farrell*, the attorney, inter alia, wilfully misled a judge by stating that a witness had been subpoenaed to appear when the witness, in fact, had not yet been subpoenaed. We considered the attorney's prior act of misconduct in aggravation, which involved appearing without authority on behalf of a client, in making our recommendation.

Increased discipline was imposed on an attorney who violated sections 6068, subdivision (d) and 6106, among other violations, in *Levin v. State Bar* (1989) 47 Cal.3d 1140. In *Levin*, while attempting to settle a lawsuit, an attorney made false statements of fact to an opposing counsel, settled a second lawsuit without his client's permission, and failed to deliver the settlement funds to the client. In making its recommendation, the court considered that Levin's multiple acts of misconduct outweighed the mitigating effect of his eighteen years of practice prior to discipline and warranted higher discipline. The Supreme Court of California placed the attorney on three–years' suspension, stayed, and imposed six months' actual suspension.

Past cases finding a violation of section 6104 have resulted in disbarment, as the past cases here involved other misconduct which was extremely serious and often aggravated. (See, e.g., *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 [attorney culpable of thirteen counts of aggravated misconduct over a four year period which began less than two years after admitted to practice law and involved considerable dishonesty and overreaching]; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390 [attorney engaged in multiple acts of aggravated dishonest misconduct over a several-year period starting just four years after her admission to the State Bar]; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96 [attorney's misconduct included a misappropriation of a large amount of funds and had a prior suspension for trust account misconduct]; *In the Matter of Taylor*, *supra*, 1 Cal. State Bar Ct. Rptr. 563 [attorney's misconduct included misconduct in four matters and concealment from clients that he was not entitled to practice law; attorney defaulted and pending disciplinary proceedings resulting in disbarment rendered our disbarment recommendation moot].) Although the above cases all involve a violation of section 6104, they also involve other acts of far more serious misconduct with more egregious aggravation than respondent's conduct in the present case.

B. Mitigation

In order to assess the degree of discipline, we cannot rely on a fixed formula. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.) We must consider each case on its own facts as well as the evidence in mitigation and aggravation. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 24.) The Hearing Judge found respondent's 17 years of practice without discipline in mitigation of his conduct. We agree. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over ten years of practice before first act of misconduct given significant weight]; std. 1.2(e)(i).) Respondent offered no other mitigating evidence.

C. Aggravation

In aggravation, we find that respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii); see *Davis v. State Bar* (1983) 33 Cal.3d 231, 241.) Respondent, in furtherance of pursuing the appeal,

made numerous appearances on behalf of his clients without their authority, and at the same time failed to respond to his clients' reasonable status inquires. Under any version of the facts, respondent's misconduct was not isolated.

[9] We also find that respondent engaged in bad faith tactics by making disparaging remarks about his clients in his pleadings to the Hearing Department. (Std. 1.2(b)(iii).) Respondent made unsupported claims that his clients were mentally ill and senile. Respondent's unsupported assertions demonstrate a lack of appreciation for his conduct and obligations as an attorney. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.)

We also find that respondent's conduct significantly harmed his clients. (Std. 1.2 (b)(iv).) Respondent's persistence in pursuing an unwanted claim created a situation in which his clients were unduly burdened emotionally by the fear of increased costs connected with an appeal that they did not want to pursue.

In addition, respondent has demonstrated a lack of insight regarding the seriousness of his misconduct. (Std. 1.2(b)(v).) Respondent continues to claim that he pursued the appeal because he knew what was best for his clients despite express demands by his clients to stop. Respondent has also failed to understand that filing requests for an extension of time to file the appeal without notification to his clients was not an appropriate response to his clients' requests to inform them of his actions.

[10] In severity, the present case is in between the isolated false statement reproval cases and the six-month actual suspension cases of *Levin* and *Farrell*, discussed, *ante*. We agree with the Hearing Judge that 75 days' actual suspension on the conditions stated below is adequate and appropriate to impress upon respondent the seriousness of his actions. Accordingly, we adopt the Hearing Department's recommendation, although we additionally recommend compliance with the provisions of rule 955, California Rules of Court.

IV. FORMAL RECOMMENDATION

We recommend that respondent James Carlisle Regan be suspended from the practice of law in the State of California for two years, that execution of this suspension be stayed, and that respondent be placed on probation for two years on the following conditions: that he be actually suspended for the first seventy–five (75) days of the period of his probation and comply with the remaining conditions of probation adopted by the hearing judge in his decision.

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 one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

VI. RULE 955

We recommend that respondent be required to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar 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.

We concur:

WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LISA D. COPREN

A Member of the State Bar

No. 04–O–10584

Filed August 31, 2005

SUMMARY

Respondent, who had failed to appear in the State Bar Court proceedings and whose default had been entered, was found culpable in a single client matter of failing to perform legal services competently, committing an act of moral turpitude, improper solicitation of a prospective client, failure to return $750 in unearned fees, and failure to cooperate with the State Bar. The hearing judge recommended, among other things, a one–year stayed suspension and an actual suspension of 60 days and until respondent made restitution of unearned fees and until the State Bar Court granted respondent's motion to terminate her actual suspension under Rules of Procedure of the State Bar, rule 205. (Hon. Patrice E. McElroy, Hearing Judge.)

The State Bar sought summary review of the hearing judge's recommendation. The review department granted summary review and agreed with the State Bar's contention that the State Bar Court should additionally recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 if her actual suspension exceeded 90 days.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Lisa D. Copren, in pro. per.

HEADNOTES

[1a, b] 175 Discipline–Rule 955

California Rules of Court, rule 955 performs the critical prophylactic function of ensuring that all concerned parties learn about an attorney's discipline and keeps the disciplinary authorities apprised of the location of the attorney subject to discipline. While in isolated cases compliance with this rule has not been recommended for an attorney actually suspended for 90 days or more, the rule does not require a minimum actual suspension before recommending that an attorney comply with it, and

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it has on occasion been ordered by the Supreme Court in cases of 60 days' actual suspension; thus, judges have discretion to recommend compliance with the rule.

[2a, b] **107 Procedure–Default/Relief from Default**
135.50 Procedure–Revised Rules of Procedure–Division V–Defaults and Trials
171 Discipline–Restitution
175 Discipline–Rule 955
Where the hearing judge recommended for a defaulting attorney, among other things, an actual suspension of 60 days and until the attorney made restitution of unearned fees and until the State Bar Court granted the attorney's motion to terminate her actual suspension under Rules of Procedure of the State Bar, rule 205, the hearing judge should also have recommended compliance with paragraphs (a) and (c) of California Rules of Court, rule 955 if the actual suspension exceeded 90 days.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
221.10 Section 6106
270.31 Rule 3–110(A) [former 6–101(A)(2)/(B)]
277.61 Rule 3–700(D)(2) [former 2–111(A)(3)]
490.01 Miscellaneous Misconduct

Aggravation
Found
521 Multiple Acts
582.10 Harm to Client
591 Indifference
611 Lack of Candor–Bar

Mitigation
Found
710.10 No Prior Record

Discipline
1013.06 Stayed Suspension–1 Year
1015.02 Actual Suspension–2 Months
Probation Conditions
1021 Restitution

OPINION

THE COURT:*

The State Bar seeks summary review of a single issue regarding the hearing judge's discipline recommendation in this case. Respondent Lisa D. Copren did not file a response to the notice of disciplinary charges, her default was entered, and she has not participated in this proceeding in either the hearing or review departments.

The hearing judge found respondent culpable in a single client matter of failing to perform legal services competently, committing an act of moral turpitude, improper solicitation of a prospective client, failure to return $750 in unearned fees and failure to cooperate with the State Bar. The hearing judge recommended, inter alia, that respondent be actually suspended for 60 days and until she made restitution of the unearned fees and until the State Bar Court granted her motion to terminate her actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar.

The State Bar contends only that the discipline recommendation should include a requirement that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court if her actual suspension exceeds 90 days.[1] We agree and will so modify the discipline recommendation.

FACTS, FINDINGS AND CONCLUSIONS

Briefly, the facts of this case are as follows. In April 2003, respondent sent an "Advisory Letter," addressed to "Dear Homeowner," to Barbara Swing, offering assistance to stop the foreclosure process of her property by filing a Chapter 13 bankruptcy petition. The letter contained numerous guarantees, warranties and predictions regarding the result of any representation by respondent. After receiving the letter, Swing hired respondent and paid her $750 as advanced attorney fees. Swing was given a package of documents, which included a blank bankruptcy court amendment cover sheet and an undated bankruptcy petition, to be signed and returned to respondent's office as soon as possible. Two days later, Swing returned the signed documents as instructed. In July 2003, respondent filed Swing's bankruptcy petition and schedules without verifying the accuracy of the factual information contained in them with Swing. They contained inaccurate information regarding Swing's income and expenses.

The bankruptcy trustee filed a motion to dismiss Swing's bankruptcy because respondent did not file a completed "Class 1 Checklist" form. A hearing on the motion was set for September 2003. Swing attended the hearing; respondent did not.[2] Respondent also never provided to Swing a required authorization form which was to have been signed by Swing and given directly to the trustee.

In September 2003, Swing sent respondent a certified letter terminating her services. In October 2003, Swing sent respondent a certified letter requesting the refund of her legal fees. Respondent did not respond to the letter or refund any of the advanced legal fees. Respondent performed work that had no value to Swing.

In January and March 2004, a State Bar investigator wrote to respondent regarding the Swing matter and requested a written reply. Respondent did not respond to the letters. In March 2004, the State Bar investigator

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* Stovitz, P. J., Watai, J., and Epstein, J., participating.

1. We granted the State Bar's request to designate this matter for summary review pursuant to rule 308 of the Rules of Procedure of the State Bar. That rule provides that upon request the review department may summarily review matters raising limited issues which can be decided without a transcript of the hearing department proceedings. Matters eligible for summary review include cases were there is no challenge to the hearing judge's material findings of fact and the issues on review are contentions that the facts support conclusions of law different from those reached by the hearing judge, or disagreement as to the appropriate discipline, or other questions of law. The very limited contention raised by the State Bar falls squarely within the parameters of rule 308.

2. Swing eventually hired new counsel. The trustee later withdrew the motion to dismiss as a result of the efforts of Swing's new counsel.

telephoned respondent to remind her to respond to the January letter. Respondent told the investigator that she would send a response, but she did not do so.

The hearing judge found respondent culpable of: (1) failing to perform legal services competently in violation of rule 3–110(A) of the Rules of Professional Conduct,[3] in that respondent failed to file the required "Class 1 Checklist" form, failed to provide Swing with the required authorization form, failed to appear at the dismissal hearing, and failed to verify with Swing the accuracy of the information in the bankruptcy petition before filing it; (2) committing an act of moral turpitude in violation of section 6106 of the Business and Professions Code[4] in that respondent had Swing sign a blank bankruptcy petition form and then completed and filed the petition without first confirming with Swing the accuracy of the information; (3) improperly soliciting Swing in violation of rule 1–400(E)(1) in that respondent's advisory letter to Swing promised her that the foreclosure process could be stopped, that the Chapter 13 plan would allow Swing to keep her home, that the Chapter 13 bankruptcy would create an automatic stay, and that the garnishment of Swing's wages, if any, would automatically stop; (4) failing to return unearned fees in violation of rule 3–700(D)(2) in that respondent failed to refund the $750 advanced fees; and (5) failing to cooperate with the State Bar in violation of section 6068, subdivision (i) in that respondent failed to respond to the State Bar's letters or participate in the investigation of the Swing matter.

The hearing judge found that respondent's lack of a prior record of discipline in nine years of practice was a mitigating factor. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[5] In aggravation, the hearing judge found that respondent committed multiple acts of wrongdoing (std. 1.2(b)(ii)); that respondent harmed her client by depriving her of her funds (std. 1.2(b)(iv)); that respondent's failure to return unearned fees demonstrated indifference toward rectification of or atonement for the consequences of her misconduct (std. 1.2(b)(v)); and that respondent failed to participate in this disciplinary matter before the entry of her default (std. 1.2(b)(vi)).

After considering the discipline provided for by the Standards for Attorney Sanctions for Professional Misconduct and relevant case law, the hearing judge recommended that respondent be suspended from the practice of law for one year, that execution of that suspension be stayed, and that respondent be actually suspended for 60 days and until she made restitution in the amount of $750 to Swing and until the State Bar Court granted her motion to terminate her actual suspension if it exceeded two years. Without explanation, the hearing judge did not recommend that respondent be ordered comply with rule 955 of the California Rules of Court if the actual suspension exceeded 90 days. The State Bar sought reconsideration of the hearing judge's decision, arguing that respondent should be required to comply with rule 955 if the actual suspension exceeded 90 days. The hearing judge denied the motion without explanation.

DISCUSSION

Rule 955 requires, among other things, that the suspended or disbarred attorney notify his or her clients, co–counsel, opposing counsel, or, in the absence of counsel, adverse parties, and any court where litigation is pending of the attorney's suspension and consequent inability to act in the matters, return client papers and property as well as any unearned legal fees, and file an affidavit with the State Bar Court showing compliance with the rule. The affidavit must also set forth an address where communications with the suspended or disbarred attorney may thereafter be directed.

[1a] As the Supreme Court has noted, "rule 955 performs the critical prophylactic function of ensur-

3. All further references to rules are to these Rules unless otherwise noted.

4. All further references to sections are to this Code unless otherwise noted.

5. All further references to the Standards are to these Standards unless otherwise noted.

ing that all concerned parties – including clients, cocounsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending – learn about an attorney's discipline." (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) The rule also functions to keep the disciplinary authorities apprised of the location of the attorneys subject to discipline. (*Ibid.*) In this latter regard, the rule is also critical to the administration of disciplinary proceedings, proceedings which are designed to protect the public, courts and legal profession. (Cf. *Durbin v. State Bar* (1979) 23 Cal.3d 461, 468.)

The importance of rule 955 to the over–all goal of the discipline system is reflected in the discipline imposed for an attorney's failure to comply with its provisions. "[D]isharment is generally the appropriate sanction for a willful violation of rule 955." (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Furthermore, an attorney's failure to comply may also be punished as a contempt or a crime. (Cal. Rules of Court, rule 955(d); *Lydon v. State Bar, supra*, 45 Cal.3d at p. 1187.) The criminal punishment for a violation of the rule is imprisonment in the state prison or county jail. (§ 6126, subd. (c).)

[2a] Ordinarily, compliance with rule 955 is ordered where the period of actual suspension is 90 days or more. (*In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 341.) The hearing judge in the present case recommended that respondent be actually suspended for 60 days and until she made restitution and until the State Bar Court granted her motion to terminate her actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. In view of respondent's failure to participate in this proceeding, respondent may not timely pay the restitution or file her Rules of Procedure of the State Bar, rule 205 motion. Thus, her actual suspension may very well exceed 90 days. The hearing judge apparently recognized this possibility as she recommended that if respondent's actual suspension exceeded two years, respondent be ordered to demonstrate her fitness to resume the practice of law pursuant to the provisions of standard 1.4(c)(ii).

[2b] As the State Bar has pointed out, in isolated cases, we have in the past not recommended to the Supreme Court that an attorney suspended for 90 days or more be ordered to comply with rule 955, (see, e.g., *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 161 [attorney had not lived in the state for several years and did not practice law]; *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108 [attorney continuously suspended for approximately 5 years prior to current proceeding].) However, none of the factors involved in those prior cases are present here. On the other hand, rule 955 of the California Rules of Court does not require a minimum actual suspension before recommending that an attorney comply with it,[6] and it has on occasion been ordered by the Supreme Court in cases of 60 days' actual suspension (e.g., *Conroy v. State Bar* (1990) 51 Cal.3d 799, 806). Thus, the hearing judge would have had discretion to recommend respondent's compliance with rule 955 of the California Rules of Court, without regard to restitution.

The hearing judge did not explain why she declined to recommend that respondent be ordered to comply with California Rules of Court, rule 955 if the actual suspension exceeded 90 days. She may have believed that imposing this condition would have been at odds with the purpose of Rules of Procedure of the State Bar, rule 205, which we have observed "is to eliminate the necessity of multiple proceedings against an attorney who is unwilling to participate in the disciplinary process and evidences no interest in maintaining his or her membership in the bar." (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110.) As we explained in *Stansbury*, the "frequent scenario of a defaulting attorney in a case not involving serious misconduct, prior to the adoption of rule 205, was suspended suspension conditioned on the attorney complying with modest conditions of probation. Upon the attorney's failure to comply with those conditions of probation, a second separate proceeding based on the failure to comply with the conditions of probation

6. For practical reasons, compliance with rule 955 is not typically recommended for actual suspensions of less than 60 days. (But see *Wren v. State Bar* (1983) 34 Cal.3d 81, 83, 90–91 [45 day actual suspension].)

frequently resulted in discipline requiring actual suspension and a requirement that the disciplined attorney notify his or her clients of that discipline under rule 955 of the California Rules of Court. Upon the attorney's failure to comply with California Rules of Court, rule 955, a third additional separate proceeding commenced, frequently resulting in disbarment for that failure." (*Id.* at p. 110, fn. 9.)

[1b] Ordering respondent to comply with California Rules of Court, rule 955 in this proceeding in which she has not participated could result in a subsequent disciplinary proceeding based on alleged failure to comply. Nevertheless, we believe that the importance of California Rules of Court, rule 955 to the goals of attorney discipline far outweighs these considerations. For the protection of the public, courts and legal profession, we must ensure that all concerned courts and parties are apprised of respondent's suspension and are thereby afforded an opportunity to take steps to protect their respective interests. We find no discernable reason on this record to not include this critical requirement.

CONCLUSION

For the foregoing reasons we modify the hearing judge's discipline recommendation to add the following to page 10 of her decision: "If respondent remains actually suspended for 90 days or more, it is further recommended that respond be ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within one hundred twenty (120) and one hundred thirty (130) days, respectively, from the effective date of the Supreme Court order herein." With this modification, the hearing judge's decision is the final decision of the State Bar Court in this matter. (See Rules Proc. of State Bar, rule 308(c).)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRADFORD ERIC HENSCHEL

A Member of the State Bar

No. 04–V–12725

Filed January 6, 2006, reconsideration denied and opinion modified February 3, 2006

SUMMARY

In an earlier case, the attorney had stipulated to an 18–month actual suspension and until compliance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. This discipline was due to the attorney's misconduct involving four clients, which misconduct included, among other things, failing to provide legal services competently, failing to comply with court orders, improperly withdrawing from legal representation, and committing an act involving moral turpitude. Upon the attorney's filing of a petition for relief from the actual suspension, the hearing judge determined that he had demonstrated by a preponderance of the evidence his rehabilitation, present fitness to practice, and present learning and ability in the general law as required by standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Hon. Robert M. Talcott, Hearing Judge.)

The State Bar requested review. The review department determined that the record contained insufficient evidence of the attorney's rehabilitation, fitness to practice, and learning and ability in the general law and reversed the decision granting the petition for relief from actual suspension.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon, Gordon L. Grenier

For Respondent: David Alan Clare

HEADNOTES

[1a, b] 2451 Standard 1.4(c)(ii) Proceedings–Suspension Not Lifted–Rehabilitation
In a proceeding to be relieved of actual suspension, in view of the hearing judge's findings that the attorney had engaged in an objectively unsupportable crusade to discredit State Bar employees, consciously embarked on a baseless campaign against the State Bar Court's jurisdiction, and asserted numerous other meritless challenges to the disciplinary process, it was an abuse of

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discretion for the hearing judge to find that the attorney's conduct was exemplary. Because the attorney's prior misconduct involved pursuing meritless claims and showing disrespect for the interests of his clients and the judicial system by filing frivolous objections and appeals and disregarding lawful court orders, the attorney's actions since the imposition of discipline showed that the attorney's conduct was not aberrational.

[2] **2402 Standard 1.4(c)(ii) Proceedings–Burden of Proof**
2451 Standard 1.4(c)(ii) Proceedings–Suspension Not Lifted–Rehabilitation
In a proceeding to be relieved of actual suspension, the numerous declarations presented by the attorney from his family, friends, and colleagues attesting to his good character and exemplary conduct were insufficient as a matter of law to establish rehabilitation. While many of the declarations contained laudatory descriptions of the attorney's capabilities and effectiveness in resolving difficult problems, a close reading of the declarations showed that with few exceptions, the declarants were unaware of the specific nature of the attorney's wrongdoing, and almost all were under the misapprehension that the attorney's tumor operation in 1996–1997 was the cause of his misconduct resulting in prior discipline. Therefore, the declarations did not constitute substantial evidence to support the finding of exemplary conduct.

[3a–c] **2451 Standard 1.4(c)(ii) Proceedings–Suspension Not Lifted–Rehabilitation**
In a proceeding for relief from actual suspension, where (1) the attorney continued to reject the truth of the facts and legal conclusions contained in his stipulation in a prior disciplinary case, claiming that trial counsel had illegally coerced him to sign it; (2) the attorney had testified recently in a deposition that he was not culpable of prior misconduct because an illness precluded a finding that he had acted willfully, although much of his wrongdoing either pre–dated or post–dated his health problems; and (3) there was no basis for the attorney's assertion of a good faith belief in his innocence, the attorney showed an unwillingness to accept responsibility for his prior misconduct that rendered unreasonable a finding that he was rehabilitated. The attorney's ongoing lack of accountability for his previous wrongdoing was particularly troubling because it mirrored the aggravating circumstances found in prior disciplinary proceedings that he was indifferent toward the consequences of his misconduct.

[4a–d] **2452 Standard 1.4(c)(ii) Proceedings–Suspension Not Lifted–Fitness to Practice**
In a proceeding for relief from actual suspension, where the attorney mounted a relentless and meritless offensive against certain State Bar employees, indiscriminately making baseless charges against them in letters, e–mails, facsimiles, pleadings filed with the Supreme Court and the State Bar Court, and telephone calls to various individuals and departments of the State Bar, his behavior rose to the level of harassment and was indicative of his lack of respect for State Bar employees and for the disciplinary process. Moreover, the attorney's censure of the State Bar extended beyond specific employees to the judicial branch itself. These actions demonstrated that the attorney was unable or unwilling to conduct himself in a manner consistent with the settled definition of good moral character. Under these facts, the hearing judge abused his discretion when he found that the attorney established by a preponderance of the evidence his present fitness to practice.

[5a–f] **2453 Standard 1.4(c)(ii) Proceedings–Suspension Not Lifted–Learning in Law**
Where the attorney (1) repeatedly attempted to challenge his membership status; (2) repeatedly challenged the constitutionality of Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) proceedings based on his faulty legal analysis of his own membership status; (3) made jurisdictional challenges first to the Supreme Court and then to the State Bar Court on the same grounds; and (4) made meritless attempts to remove his disciplinary record from the State Bar's

website, his behavior demonstrated an inability to evaluate facts and the law competently and to draw appropriate inferences and conclusions from them. In view of these facts, despite the attorney's having completed more than 100 hours of continuing legal education, the hearing judge abused his discretion when he found that the attorney possessed learning and ability in the general law.

[6a, b] **2509 Reinstatement–Procedural Issues**

In a proceeding for relief from actual suspension, in taking into account the attorney's prior misconduct, the hearing judge erroneously discounted the aggravating factor of dishonesty as duplicative and added mitigation where there had been none; however, the error was harmless because it was appropriate for the hearing judge to consider aggravating factors in considering the amount and nature of the evidence required to justify terminating suspension and to consider stipulated facts that may have shed light on the cause of misconduct, even if identified as other circumstances, in assessing the likelihood that misconduct could recur.

[7] **147 Evidence–Presumptions**

2402 Standard 1.4(c)(ii) Proceedings–Burden of Proof

In proceedings for relief from actual suspension, an attorney's compliance with the terms of suspension and conditions of probation does not create a presumption of the attorney's rehabilitation; instead, in addition to such compliance, the attorney must show by a preponderance of the evidence his rehabilitation, present fitness to practice, and present learning and ability in the general law to be relieved of actual suspension under Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).

OPINION

BY THE COURT:*

The State Bar seeks review of a decision of a hearing judge granting petitioner Bradford E. Henschel's petition for relief from 18 months of actual suspension pursuant to Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[1] Petitioner was admitted to practice in November 1989. Beginning in 1993, petitioner committed serious misconduct in four client matters resulting in 1997 in a stipulated four–month actual suspension (*Henschel I*). While on probation, petitioner committed additional misconduct in 2003 in four client matters, resulting in a second stipulated discipline of 18 months' suspension (*Henschel II*). Both disciplinary proceedings involved, inter alia, the repeated failure to perform competently, failure to obey court orders, failure to cooperate with the State Bar and a demonstrated indifference to atoning for the consequences of his misconduct.

Our previous concerns with petitioner's competence and ability to handle serious legal matters in a reasoned and reasonable manner, as well as with his capacity to understand the duties owed to the courts, the public and his clients, remain of equal importance today. We are particularly troubled by the hearing judge's finding that "shortly after Petitioner filed his petition for relief from actual suspension, Petitioner consciously embarked on a course of action in which he repeatedly made meritless challenges to this Court's jurisdiction and authority to adjudicate his petition. . . ." We also are concerned with petitioner's relentless letter writing and e–mail campaign challenging the State Bar's description of his status as "not entitled to practice" on its website and in his membership records, which the hearing judge found was "meritless, incorrect and misguided." Perhaps most troubling is petitioner's protracted campaign to disparage various trial counsel and other State Bar employees involved with his disciplinary proceedings, accusing them of criminal misconduct, conspiracy and other acts of moral turpitude, which the hearing judge found was based upon "meritless legal arguments and objectively unsupportable allegations. . . ."

These findings by the hearing judge, as well as additional evidence in the record, compel the conclusion that petitioner has not sustained his burden of proving his rehabilitation, present fitness to practice, and present learning and ability in the general law. Accordingly, we conclude the hearing judge abused his discretion when he granted the petition for relief from actual suspension, and we reverse his decision.

I. PROCEDURAL AND FACTUAL HISTORY

A. Petitioner's Prior Misconduct

1. Henschel I

Effective October 3, 1997, petitioner was placed on three years' probation and suspended from the practice of law for 18 months, stayed upon conditions including a 120–day actual suspension for ethical misconduct involving four client matters.[2]

Petitioner stipulated that while representing a client in a family law matter in 1993, a trial court sanctioned petitioner for filing frivolous objections. Petitioner appealed, and the Court of Appeal not only affirmed the sanction award but also sanctioned petitioner for filing a frivolous appeal. Petitioner failed to pay any of the sanctions. Petitioner stipulated that he presented a claim not warranted under existing law in violation of rule 3–200(B) of the Rules of Professional Conduct,[3] failed to obey court orders in violation of Business and Professions Code section

* Before Stovitz, P. J., Watai, J. and Epstein, J.

1. The standards are found in title IV of the Rules of Procedure of the State Bar of California. All further references to standards are to this source.

2. In accordance with Evidence Code section 452, subdivision (e), we take judicial notice of petitioner's prior record of discipline.

3. Unless otherwise noted, all further references to "rule" refer to the Rules of Professional Conduct.

6103,[4] and failed to cooperate with the State Bar's investigation in violation of section 6068, subdivision (i).

In another matter, petitioner failed to perform work for and communicate with a client who employed him with regard to a marital dissolution and income tax matter in 1995. Petitioner did not keep the client apprised of developments in the case and due to his neglect, default was entered against the client. Petitioner failed to return unearned fees to the client even after a fee arbitrator ruled against petitioner. Petitioner agreed that he failed to perform competently in violation of rule 3–110(A), failed to communicate significant information to the client in violation of section 6068, subdivision (m), failed to return client papers in violation of rule 3–700(D)(1), failed to refund unearned fees in violation of rule 3–700(D)(2), and failed to cooperate with the State Bar's investigation in violation of section 6068, subdivision (i).

In a third matter, petitioner neglected to file an amended petition resulting in dismissal of the client's bankruptcy matter that same year. In January 1996, a court ordered petitioner to pay sanctions to the client in the amount of $300, which he did not pay, thereby failing to obey a court order in violation of section 6103.

Finally, while representing clients in a civil matter in 1995, petitioner failed to appear at a scheduled court hearing, failed to file a timely answer on behalf of his clients resulting in entry of default, and failed to inform his clients that default had been entered against them. Petitioner stipulated that he failed to perform competently in violation of rule 3–110(A).

Petitioner's misconduct was aggravated because he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, he displayed a lack of candor and cooperation, and his misconduct caused significant harm.

2. Henschel II

On February 26, 2002, petitioner stipulated to several acts of misconduct involving four clients. He agreed to five years' probation and an 18–month actual suspension that would continue until he showed satisfactory proof to the State Bar Court of his rehabilitation, fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii).

All but one of petitioner's acts of misconduct in *Henschel II* occurred while petitioner was either subject to disciplinary proceedings or on probation in *Henschel I*. In June 1997, petitioner filed a bankruptcy petition for Robbie Peron that was dismissed the following month due to failure to file required schedules. The dismissal order barred Peron from filing another bankruptcy petition until January 1998. Nevertheless, petitioner filed a second bankruptcy petition on Peron's behalf in October 1997. Petitioner stipulated that by doing so, he committed acts involving moral turpitude, dishonesty or corruption in violation of section 6106. Additionally, while petitioner was suspended from the practice of law in October 1997, he negotiated a claim with one of Peron's creditors without informing the creditor that he was suspended from the practice of law, thereby unlawfully holding himself out as practicing or entitled to practice law when he was not permitted to do so.

Between September 1996 and January 1997, petitioner violated rule 3–110(A) when he failed to appear at four separate bankruptcy hearings on behalf of Victor Merhaut. The bankruptcy court ordered petitioner to disgorge the advanced fees Merhaut paid him, but he failed to comply with the order in violation of section 6103.

In September 1995, petitioner violated rule 3–110(A) when he failed to file a timely opposition to a summary judgment motion, failed to appear at the hearing of said motion, and failed to appear at a

4. Unless otherwise noted, all further references to "section" refer to the Business and Professions Code.

pretrial conference while representing Elias and Shahrzad Rohbani in a civil proceeding. In early 1996, the Rohbanis requested that petitioner return their client file but petitioner refused, claiming he was too busy. Almost two years later, petitioner's wife explained to the Rohbanis that petitioner could neither locate their file nor afford to return it. Petitioner stipulated he violated rule 3–700(D)(1) and section 6103 since he was required to comply with rule 955[5] of the California Rules of Court as a result of a California Supreme Court order suspending petitioner from the practice of law.

In October 1999, Blanca Echeverria employed petitioner to represent her and her son in a personal injury matter resulting from an automobile accident. In February 2000, petitioner misrepresented to a clinic providing treatment to Echeverria and her son that their injuries were not the result of the automobile accident. In March 2000, petitioner's paralegal informed Echeverria that petitioner withdrew from the case. Petitioner agreed that he improperly withdrew from representation in violation of rule 3–700(A)(2).

Petitioner further stipulated his misconduct was aggravated because he had a prior record of discipline (*Henschel I*), he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, he displayed a lack of candor and cooperation, he committed multiple acts of wrongdoing, and his misconduct caused significant harm and was surrounded by dishonesty. The parties did not stipulate to any mitigating circumstances but in a section designated "OTHER CIRCUMSTANCES" they noted that petitioner "suffered severe depression" as a result of events occurring in 1996 and 1997 including a car accident, nose surgery, his wife's job loss, and his reduced income due to his actual suspension in October 1997. The parties also acknowledged that petitioner implemented changes in his office practices by regularly meeting with clients, utilizing a new tickler system, and changing the type of cases he accepted from bankruptcy and personal injury to criminal defense.

B. Petitioner's Post–Stipulation Actions

1. Disavowal of Stipulation

Almost immediately after petitioner signed the stipulation in *Henschel II,* he sought to set it aside, asserting that it was an illegal adhesion contract containing as many as 32 errors. The Supreme Court denied review and filed its order in case No. S108811 on November 13, 2002, imposing the stipulated discipline. Petitioner requested rehearing, asking the court to consider his charges of criminal conduct by the prosecuting attorneys during the proceedings in *Henschel II.* Rehearing was denied by the Supreme Court on January 15, 2003, and his actual suspension began on that date.

2. Claims of State Bar Misconduct

a. Charges of criminal conduct by deputy trial counsel

Less than one month after the Supreme Court denied review of his petition, petitioner commenced a protracted crusade against the prosecutors and other State Bar employees who were involved in his disciplinary proceedings. Between December 2002 and January 2004, petitioner telephoned and wrote numerous letters and e–mails to various State Bar employees, department heads and the Office of Chief Trial Counsel asserting that trial counsel suborned the perjury of a witness and withheld evidence of the felony arrest and conviction of another witness during the proceedings in *Henschel II.* Petitioner further claimed that deputy trial counsel committed criminal acts of moral turpitude when they "coerced" him to enter into a stipulation.

In one letter to the State Bar Membership Billing Services, petitioner noted his annual dues were erroneously computed and then, as a completely unrelated subject matter, he repeated the above–described complaints, concluding: "Dishonesty by State Bar Prosecutors constitutes MORAL TURPITUDE. The

5. This rule required petitioner to, inter alia, deliver any papers or other property to all clients he represented in matters pending at the time of his suspension, or to notify the clients where the papers and property could be obtained.

State Bar is charged with keeping the public safe from acts of Moral Turpitude by lawyers. In this case the State Bar has used Moral Turpitude as a trial tactic to win a case they should have never filed." Petitioner indicated that he was "preparing a bar complaint against [the State Bar prosecutors], and I am also preparing a criminal complaint against them for the crimes they committed against me during the State Bar Court hearing . . . ."[6]

After a member of the State Bar Intake Unit notified petitioner in writing on September 16, 2003 that there was no evidence to support his charges against the State Bar attorneys, petitioner wrote as follows: "I do not consider Jayne Kim's using perjury, suborning perjury, concealing material evidence, or inducing [my attorney] to not prepare a rebuttal witness, or having Ms. Kim 'instructing' official State Bar letters to be sent to me, threatening probation violation enforcement . . . to be a vendetta against me. I simply consider her actions to be dishonest, criminal, unethical, and a clear violation of her duties as a prosecutor in State Bar Proceedings."

In January of 2004, petitioner sent an e-mail to employees at the State Bar and the State Bar Court, asking to address the Regulation, Admissions and Discipline Oversight Committee (RAD) of the State Bar's Board of Governors on a number of topics, including, "Whether or not the use of perjury and subordination of perjury in my 2001 discipline case, by State Bar Prosecutors Kimberly Anderson and Jayne Kim, is a recurrent circumstance, tactics used by the State Bar discipline system . . . ."

b. Charges of criminal conspiracy by deputy trial counsel

Between August 30 and September 19, 2003, petitioner wrote at least six more letters of complaint to the State Bar regarding one of the same State Bar prosecutors, this time accusing her in her capacity as supervising attorney of the Office of Probation of "making a false threat of administrative enforcement and offering false evidence, preparing false evidence, or attempting to commit those crimes" because he maintained she intentionally directed a probation deputy to falsely notify petitioner that he was not in compliance with his probation conditions. The State Bar's notice had erroneously advised petitioner that he had failed to timely file a *monthly*, as opposed to a *quarterly*, report confirming his monthly visits to a licensed psychiatrist, psychologist, or clinical social worker.[7] Petitioner also made numerous telephone calls to various State Bar personnel, including the Chief Trial Counsel and the State Bar president, John Van de Kamp, to discuss the "misconduct" of the State Bar prosecutor.

Even after the supervising attorney informed petitioner that he was in compliance with his probation conditions, petitioner continued to write numerous letters to various State Bar personnel, accusing the supervising attorney of behaving dishonestly and committing a crime by falsely

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6. Although unrelated to his allegations of prosecutorial misconduct, petitioner also repeatedly asserted in his correspondence to the State Bar that it violated federal postal laws and regulations with respect to its use of a mailing permit.

7. The stipulation petitioner executed in *Henschel II* required petitioner to "obtain psychiatric or psychological help/ treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at [petitioner's] own expense a minimum of 1 times [sic] per month and. . . furnish evidence to the Probation Unit that [petitioner] is so complying with each quarterly report."

The probation deputy's notice, dated August 27, 2003, advised petitioner that "the Office of Probation did not receive a mental health report which was due on August 1, 2003. Please submit the required documentation immediately. [¶] Further, under advisement of my supervisor, Ms. Jayne Kim, I have been instructed to inform you that you are required to continue submitting these reports until the court has made its ruling on your motion. . . . [¶] The Office of Probation does not have the authority to extend compliance dates or modify the terms and conditions of the discipline order. **Failure to timely submit reports or any other proof of compliance will result in a non-compliance referral to the Enforcement Unit, Office of the Chief Trial Counsel.**" (Emphasis in original.)

threatening administrative action against him as part of a criminal conspiracy. Indeed, the supervising attorney's letter clarifying petitioner's probation status only served to exacerbate his ire.[8]

c. Challenge to his membership status

Petitioner took on a new challenge to the State Bar when he wrote 12 letters in rapid succession to the State Bar's Membership Records department on August 27, August 31, September 5, September 6, September 7, September 16, September 19, September 25, September 30, October 2, and October 4, 2003, claiming that his "membership record is incorrect and needs to be changed" because he was listed as "not entitled" when in fact he maintained he was an "inactive member." Typical of these is the letter of October 4th to the State Bar's executive director and Membership Records office asserting that "[t]here is no State Bar membership status, known as NOT ENTITLED TO PRACTICE." He continued: "Your online State Bar records for me state I am not entitled to practice as my status. . . . This is a false statement. I am an inactive member of the state bar and I should be listed that way in your records." He further complained that the Records department "appears to be prejudiced in the manner in which you display members records for the public to access" comparing his listing to that of James Heiting (currently president of the State Bar). He closed with a warning: "[I]f my State Bar records remain erroneous I will bring this matter before the State Bar Court Hearing Department to obtain an order, requiring you to change my status to inactive. . . . Please take notice that State Bar Court orders are enforceable in the Superior Court of Los Angeles County."

In October 2003, the Chief Assistant General Counsel for the State Bar wrote to petitioner, giving him a detailed explanation of the various membership status designations of the State Bar. He explained: "Whether a member is active or inactive, he or she may be 'suspended from practice' or 'suspended from membership.' A member who is suspended is not entitled to practice law. (See Bus. & Prof. Code sec. 6126(b).) Therefore, the term 'Not entitled to Practice' correctly identifies your status as a member who is not entitled to practice law in California. (See e.g., Bus. & Prof. Code sec. 6006 [Inactive members are not entitled to practice law]." In January 2004, the State Bar wrote to petitioner again advising him that describing himself as an inactive member of the State Bar was an inaccurate characterization of his membership status.

Notwithstanding this explanation, petitioner continued his quarrel with his status as "not entitled to practice." In a letter dated July 26, 2004, to a deputy trial counsel notifying the Bar of a change in his address, he listed himself as "Not a member of the State Bar." By way of explanation, he stated: "The law on State Bar membership clearly states that there are only two categories of State Bar membership, ACTIVE AND INACTIVE. Since I am not an active member of the State Bar Association due to my suspension from membership, and I am not an inactive member of the State Bar, I therefore am not a member of the State Bar of California." He continued: "As for my suspension from membership in the State Bar, while there is no State Bar membership status, known as NOT ENTITLED TO PRACTICE the State Bar General Counsel told me that the State can [sic] is not limited in any way in categorizing people, even those you [sic] are not members of the State Bar where for the long term or the short term. Since everyone in the world, who are [sic] not active members of the State Bar are NOT ENTITLED TO PRACTICE LAW IN CALIFORNIA, this designation is not

8. The supervising attorney wrote on August 28, 2003: "This letter confirms our telephone conversation this afternoon in which you advised me that you had submitted a mental health report to Probation Deputy Shuntinee Brinson for the month of August 2003. As I informed you this afternoon, I spoke to Ms. Brinson regarding your August 2003, mental health report, after receiving a message from you earlier today. Ms. Brinson advised me that upon further review of your file she did have a mental health report from Dr, [sic] Steven Schenkel, M.D. for the month of August 2003. As such, you are currently in compliance with the conditions of probation, including the mental health condition." Petitioner interpreted her letter as intending to mislead him "that I was required to report monthly, [which was] a false statement. . . ." He then wrote several more letters of complaint to the State Bar about the purportedly misleading statements made by the attorney in her August 28, 2003 letter.

only false and misleading but is so vague as to be meaningless. [Para.]. . . By withholding from the public, in my published profile, that I am not a member of the State Bar, the public is being misled and my profile appears to show that I AM A MEMBER of the State Bar when I am not during my suspension!!!!"

d. Charges of violations of Rules of Confidentiality by State Bar

In July 2004, petitioner wrote two letters to the State Bar's Director of Membership Records demanding that all references to his disciplinary record be removed from the State Bar's website, claiming that section 6002.1[9] forbids the State Bar from making his discipline records available to the general public unless required to do so by a condition of probation. Petitioner stated that "if my profile records are not changed . . . to eliminate all references to discipline which are now unlawfully available to the general public, I will seek a writ of mandate from the Supreme Court of California ordering those records be kept from the general public in compliance with the law."

e. Charges of deceit by deputy trial counsel

As recently as February 14, 2005, in connection with the instant proceedings, petitioner wrote letters to State Bar President Van de Kamp and the Acting Chief Trial Counsel, accusing three named deputy trial counsel of "further acts of misconduct" involving criminal acts of deceit. Petitioner claimed that three State Bar prosecutors made "false and frivolous accusations" against him in this matter when they "falsely asserted that I violated B&P 6002.1 by maintaining a PO box as my current bar address." According to petitioner, the trial counsel made this "direct accusation" while conducting his deposition."[10] Petitioner further stated in his letters that he had a written opinion from the State Bar that he could use a PO box as his official address, thereby "making the false assertions [by deputy trial counsel] a deceit and crime under B&P 6128, because the deceit was made to a party, me. I request that you look into this unethical conduct by your subordinates."

C. Commencement of Std. 1.4(c)(ii) Proceedings

1. Petitioner's Jurisdictional Challenges and Efforts to Transfer Proceedings

On June 24, 2004, petitioner filed his verified petition for relief from actual suspension in the State Bar Court pursuant to standard 1.4(c)(ii) and in accordance with Rules of Procedure of the State Bar, rules 630 and 631 (Petition). One month later, in July 2004, petitioner challenged this court's jurisdiction to hear this matter in his Initial Status Conference Memorandum (Memorandum), even though he had earlier invoked the jurisdiction of the court when he initiated these proceedings.[11]

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9. Section 6002.1 requires members of the State Bar to maintain, among other things, a current office address and telephone number with the membership records office of the State Bar. Subdivision (a)(5) of that section requires members to maintain on the official membership records "Such other information as may be required by agreement with or by conditions of probation imposed by the agency charged with attorney discipline," but section 6002.1 subdivision (d) states that "The State Bar shall not make available to the general public the information specified in paragraph (5) of subdivision (a) unless required to be made so available by a condition of probation . . . ."

10. The deposition questioning at issue is as follows: "Q Now, you said you had a home office at your house; correct? ¶ A Yes. I did say that. ¶ Q Why don't you list this as your official bar membership? ¶ A Why don't I? ¶ Q Yes. ¶ A I like my privacy. . . . ¶ . . . ¶ Q Okay. You're familiar, though, with Business and Professions Code 6002.1(a)1? I see you have your rules book in front of you. So you can take a look at it. ¶ A If you're asking me if I'm familiar with it, I have heard of it, and I couldn't recite it to you. 600 – what was that? ¶ Q 6002.1, Section (a)1? ¶ A Yeah. ¶ Q So you have an office, but you're not listing it on the records; is that correct? ¶ A That's not correct. The office that I have in the back of my house is a room that I had built that I use to do some work. It's not an official office. I call it an office. I could call it a den. . . . ¶ . . . ¶ Q Do you feel that that rule that we just cited, Rule 6002.1 does not apply to you? ¶ A I have been in compliance with this rule."

11. Petitioner attached several irrelevant exhibits to this pleading such as a newspaper article regarding a lawsuit against the State Bar by a former deputy trial counsel, petitioner's deposition notice, and substitution and association of counsel notices filed in this proceeding.

In support of his jurisdictional argument, petitioner asserted in his Memorandum, as he had repeatedly done in the past, that he was not a member of the State Bar due to his actual suspension. He maintained the proceedings were reinstatement proceedings and cited provisions governing reinstatement. He thus argued: "Since petitioner Henschel is NOT A MEMBER of the State Bar Rule [sic] 1.4 sanctions don't apply to him. . . .He won't be a member until he is re–admitted and his actual suspension from membership ends. But when his suspension from membership ends Rule [sic] 1.4(c)(ii) would have no practical or legal effect." Petitioner further argued that State Bar Court judges were referees, not judges, and therefore could not hear his Petition without his consent.[12] He also asserted that standard 1.4 was "unintelligible" and "unconstitutionally vague, ambiguous to the point of absurdity." He argued: "The Rule [standard 1.4(c)(ii)] doesn't make sense, was written by the State Bar. . . and because it is nonsense shows the public that the bar does not have sufficient competence to write a non–ambiguous rule."

Finally, petitioner argued that the State Bar had a long history of harm to the public and the legal profession, citing as examples a civil rights lawsuit (since dismissed by the federal court) by a former prosecutor, an "illegal lobbying contract giving a bonus to their lobbyist" and previous regulations governing attorney advertising (which were eliminated in 1977). He argued: "By enacting and enforcing these unconstitutional Rules against Attorneys to the detriment of legal consumers in California the Bar has shown a past History of not knowing what laws are proper and what laws are unconstitutional." He added: "Since the State Bar is an arm of the Supreme Court, these dishonest and unlawful acts reflect badly on the State Supreme Court's ability to supervise the State Bar of California from violating the political laws of the State." He thus questioned: "How can the public have confidence in a Supreme Court which unconstitutionally abdicates its judicial authority and violates the rights of a party?"

On September 3, 2004, petitioner filed with the California Supreme Court a "Motion to Transfer Readmission Petition from the State Bar Court to the California Supreme Court for Good Cause" (Motion to Transfer) raising the same arguments that he asserted in his Memorandum with respect to the unconstitutional vagueness of standard 1.4(c)(ii), lack of jurisdiction of the State Bar Court because he was not a member of the State Bar, and the absence of authority of State Bar "referees" (judges) to hear his case without his consent. He thus asserted: "[B]ecause of several and many improper actions by the State Bar, including but not limited to violating State Political Laws and forcing their Prosecutor to violate the Rules of Professional conduct. . . I do not consent to the use of general reference referees, commissioners or temporary judges, used in the State Bar Court. That leaves this court as the only forum remaining to hear a rule [sic] 1.4(c)(ii) readmission petition." The Supreme Court denied petitioner's Motion to Transfer on November 10, 2004.

On November 30, 2004, less than three weeks after the Supreme Court denied his Motion to Transfer, petitioner filed in this court a second motion to transfer the case to the Supreme Court (Second Motion to Transfer). Although he referenced the Motion to Transfer filed in the Supreme Court, petitioner did not advise this court that the Supreme Court had denied his previous Motion to Transfer. He again asserted essentially the same grounds for transferring the case to the Supreme Court: "(1) The State Bar Court cannot act without the direct consent of all parties. . ., (2) [he was not a member of the State Bar and therefore] the Rule [sic] 1.4 (c)(ii) proceedings are unconstitutional, and (3) The State Bar has committed acts, that if done by an attorney would be the basis of disbarment and that they refuse to concede that petitioner Henschel has complied with the order of this court and the State Bar probation unit."

Petitioner concurrently filed a separate motion requesting judicial notice (Motion for Judicial Notice)

12. On July 26, 2004, petitioner filed a Notice of Non–Consent to have a hearing judge (i.e., "referee") hear his case. In that pleading as well as in a "Notice of Discovery Objection" he filed with the State Bar Court on July 26, 2004, petitioner made additional references to himself as "not a member of the state bar" and to the hearing judge as a "referee."

seeking mandatory judicial notice of various facts outside the ambit of Evidence Code section 451 such as "Petitioner Henschel is neither an active nor inactive member of the State Bar," and "Petitioner Henschel is not an attorney and cannot hold himself out as an attorney under penalty of committing a felony."[13]

On January 5, 2005, the hearing judge denied petitioner's Second Motion to Transfer and his Motion for Judicial Notice.

At his deposition taken in this matter in January 2005, petitioner testified that with respect to *Henschel II*, he did not intend to stipulate to the truth of the facts and legal conclusions contained in the stipulation but merely agreed to end the proceedings as criminal defendants do under *People v. West* and that the hearing judge acknowledged this.[14] When asked whether he did anything wrong in the underlying disciplinary matter, petitioner replied that because he was sick, he did not believe he was acting willfully. Petitioner also contended that his rights were violated in *Henschel II* and that he was compelled to sign the stipulation because the State Bar withheld evidence and because the State Bar was "willing to put on somebody and allow them to perjure themselves."

2. Petitioner's Evidence of Rehabilitation, Present Fitness to Practice, and Present Learning and Ability in the General Law

Petitioner submitted unrebutted evidence that he complied with the conditions of his probation, including satisfactory completion of the State Bar's Ethics School and completion of continuing legal education (CLE) in the areas of law office management and client relations. In fact, petitioner completed more than 100 hours of CLE between March 2003 and June 2004. Petitioner also volunteered in mock trial competitions for middle and high school students and at two law schools. He donated computers to the Los Angeles Free Clinic, and gave presentations as a speaker for an environmental organization. Petitioner provided declarations from two psychiatrists who reported in May and August 2003 that petitioner did not at that time suffer from a significant mental disorder. (In 2003, petitioner obtained an order terminating a probation condition that required him to obtain psychiatric treatment.)

Petitioner also provided declarations from 28 individuals, including four attorneys, generally attesting to petitioner's good character, learning and ability in the law, and rehabilitation. Many declarants provided compelling descriptions of how petitioner's legal service was invaluable to them because it saved their business or home or kept them or a family member out of jail. Many also indicated that petitioner provided service free of charge or for a nominal fee. However, none of these declarations described the nature of petitioner's wrongdoing; rather, the vast majority of them contained the following formulaic language: "I am fully aware of Mr. Henschel's tumor operation in 1996–1997 that led to his discipline of 4 months and his recent discipline of 18 months. He informed me of these events." Virtually all of petitioner's misconduct in *Henschel I* occurred between 1993 and 1995 before his tumor operation, and some of the misconduct in *Henschel II* occurred between 1999 and 2000, which was well after his health problems.

Between March to December 2003, petitioner worked as an office manager and paralegal for attorney Harry Pike. From January 2004 to the present, petitioner has been working as a paralegal for the Law Office of Frank Williams, Jr.

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13. In virtually all of his pleadings filed in the Supreme Court and in this court petitioner denominated himself as a "former member of the State Bar."

14. *People v. West* (1970) 3 Cal.3d 595, 604, recognized that a plea of guilty or nolo contendere is not rendered involuntary merely because it is the product of a plea bargain. Petitioner's reliance on this case is misplaced since attorney disciplinary proceedings are unique and not governed by the rules of criminal procedure. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1115; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300–302.) Contrary to petitioner's assertion, we find no evidence that the State Bar Court judge who approved the stipulation in *Henschel II* acknowledged or referenced *People v. West*. Furthermore, petitioner did not enter a nolo contendere plea in *Henschel II*.

3. The State Bar's Opposition to Rehabilitation and Fitness to Practice

On February 22, 2005, the State Bar filed an opposition (Opposition) to petitioner's request to be relieved of actual suspension contending that petitioner failed to establish his rehabilitation and failed to show that he possesses present learning and ability in the general law. In support of its Opposition, the State Bar included, among other things, pleadings petitioner filed in connection with this proceeding, correspondence and e–mail messages petitioner authored, a transcript of petitioner's deposition taken on January 27, 2005, and multiple declarations including that of Nicole Young, an attorney who averred that in November 2003 while petitioner was suspended from the practice of law, she discussed the possibility of settlement of a case with petitioner, who advised her about the legal aspects of the case.

4. Hearing Judge's Determinations

After the parties agreed to waive a hearing and submit the matter for decision based upon documentary evidence and written briefing, the hearing judge took the matter under submission on May 17, 2005. On June 2, 2005, the hearing judge filed his decision, granting petitioner's petition for relief from actual suspension, finding that petitioner demonstrated by a preponderance of the evidence his rehabilitation, present fitness to practice, and present learning and ability in the general law as required by standard 1.4(c)(ii).

On June 22, 2005, the State Bar filed a Petition for Review and Request for Oral Argument.

II. DISCUSSION

In proceedings conducted pursuant to Rules of Procedure of the State Bar, rule 630 et seq., the standard of review is abuse of discretion. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577.) Accordingly, we review the decision of the hearing judge "'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 [citations omitted]."' (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577–578.)" (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 293.)[15] We also review the record to determine if any errors of law have been committed. (Rules Proc. of State Bar, rule 300(k).)

Standard 1.4(c)(ii) requires that petitioner establish by a preponderance of the evidence his rehabilitation, present fitness to practice, and present learning and ability in the general law. Moreover, petitioner must show, at a minimum, strict compliance with the terms of probation, exemplary conduct from the time of the imposition of the prior discipline, and the unlikelihood that the conduct leading to the prior discipline would be repeated. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

We agree with the hearing judge's finding that petitioner strictly complied with the conditions of his probation and satisfied the terms of his actual

15. In adopting the abuse of discretion standard of review, we reject the State Bar's assertion that the hearing judge abused his discretion when he did not find petitioner held himself out as entitled to practice and engaged in the unauthorized practice of law (UPL) while suspended. The hearing judge found petitioner's declaration to be credible and accepted his version of the facts about his involvement in the Garcia lawsuit even though the declaration conflicted with the declarations of the Garcias (whose statements he found not to be credible) and Nicole Young, who was opposing counsel in the Garcia matter. As noted above, in these proceedings, we may not reweigh the evidence, but rather we must accept the hearing judge's resolution of credibility and conflicting evidence. (*In the Matter of Terrones, supra*, 4 Cal. State Bar Ct. Rptr. at p. 293.) In the absence of reweighing this evidence, we simply do not find in the record that there is a preponderance of evidence establishing either UPL or that petitioner held himself out to the Garcias as entitled to practice.

suspension. However, several of the hearing judge's other findings, discussed below, are at odds with his conclusion that petitioner has satisfied the additional requirements of standard 1.4(c)(ii).

A. Rehabilitation

We consider petitioner's actions since his last discipline "and determine whether they, in light of all of his prior misconduct, sufficiently demonstrate his rehabilitation by a preponderance of the evidence." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

1. Absence of Exemplary Conduct

[1a] In finding exemplary conduct, the hearing judge focused on petitioner's community service and his excellent work record as an office manager and paralegal, but he ignored the totality of petitioner's actions since his last discipline. Indeed, in view of the hearing judge's own findings that petitioner engaged in an "objectively unsupportable" crusade to discredit State Bar employees, "consciously embarked" on a baseless campaign against this court's jurisdiction and asserted numerous other meritless challenges to the disciplinary process, we conclude it was an abuse of discretion to find that petitioner's conduct was exemplary. (See, e.g., *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 35–36 [petitioner who failed to show justification of lawsuit he filed for punitive damages failed to sustain burden of showing exemplary conduct].)

[1b] Petitioner must establish "that the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline . . . is not likely to be repeated." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.) Petitioner's prior misconduct involved pursuing meritless claims and showing disrespect for the interests of his clients and the judicial system by filing frivolous objections and appeals and disregarding lawful court orders. His conduct since the imposition of his actual suspension in *Henschel II* replicates some of this previous misconduct. Thus, petitioner's actions since the imposition of discipline should have put the hearing judge "on notice that the conduct was not aberrational, and that the problems were deeply rooted." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 583.)

[2] The hearing judge also erred in his consideration of the numerous declarations attesting to petitioner's good character and exemplary conduct. These declarations from family, friends and colleagues are insufficient as a matter of law to establish rehabilitation. To be sure, many of the declarations contained laudatory descriptions of petitioner's capabilities and effectiveness in resolving difficult problems. But a close reading of these declarations shows that with few exceptions, the declarants were unaware of the specific nature of petitioner's wrongdoing, and almost all were under the misapprehension that his tumor operation in 1996–1997 was the cause of his misconduct in *Henschel I* and *II*. As such, we find these declarations do not constitute substantial evidence to support the hearing judge's finding of exemplary conduct. (Std. 1.2(e)(vi); *In re Ford* (1988) 44 Cal.3d 810, 818; see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.)

2. Lack of Remorse

[3a] We also look for evidence that petitioner understands the nature of his misconduct. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 431.)[16] Petitioner continues to reject the truth of the facts and legal conclusions contained in his stipulation in *Henschel II*, claiming that trial counsel illegally coerced him to sign it. Also, as recently as January 2005, during his deposition, petitioner testified that he was not culpable of his prior ethical misconduct because his illnesses precluded a finding that he had acted wilfully. The hearing judge excused petitioner's lack of accountability because it was "based on an erroneous belief that [petitioner] is somehow not responsible for his conduct because of

16. Although the standard of proof is higher in reinstatement proceedings, we consider to be instructive reinstatement cases which address the issue of rehabilitation.

his various illnesses which affected his memory and judgment in 1996 and 1997. . . ." Petitioner's belief that he is not culpable of misconduct is indeed "erroneous" since much of his wrongdoing either pre–dated or post–dated his health problems. In *In the Matter of Ainsworth* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 899, we held that the attorney had not shown rehabilitation because he continued to minimize and deny his serious wrongdoing.

[3b] Petitioner argues that his absence of remorse does not undermine his showing of rehabilitation but instead reinforces his showing of good character because he is unwilling to perform an artificial act of contrition, citing *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 730. However, in *Hall*, the Supreme Court found that Hall had offered evidence of a good faith basis for his assertion of innocence. We find no such basis here for the assertion of a good faith belief. "'The law does not require false penitence. [Citation.] But it does require that the [attorney] accept responsibility for his acts and come to grips with his culpability. [Citation.]' [Citation.]" (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

[3c] In view of petitioner's unwillingness to accept responsibility for his prior misconduct, we conclude it was unreasonable for the hearing judge to find that petitioner is rehabilitated. Petitioner's ongoing lack of accountability for his previous wrongdoing is particularly troubling to us since it mirrors the aggravating circumstances of indifference toward the consequences of his misconduct, which were present in both *Henschel I* and *Henschel II*.

B. Petitioner's Fitness to Practice Law

[4a] Petitioner is further obligated to prove by a preponderance of the evidence his present fitness to practice law. (Std. 1.4(c)(ii); Rules Proc. of State Bar, rule 634.) Accordingly, petitioner must show that he possesses the requisite good moral character to practice law in this state. (*In re Gossage* (2000) 23 Cal.4th 1080, 1095.) Such a showing includes a demonstration that petitioner possesses the traits 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, rule X, §1.)

[4b] We are unable to find on this record substantial evidence of petitioner's respect for the rights of others or for the judicial process. On the contrary, petitioner mounted a relentless and meritless offensive against certain State Bar prosecutors and other personnel, accusing them of suborning perjury, coercion, criminal acts of moral turpitude, making "false and frivolous accusations" against him, falsely threatening administrative action, falsely notifying him that he was not in compliance with his probation conditions, withholding evidence, and criminal acts of deceit. He indiscriminately made these baseless charges in letters, e–mails, facsimiles, in pleadings filed in the Supreme Court and in this court, and in a multitude of telephone calls to various individuals and departments of the State Bar, including the Office of the Chief Trial Counsel, the President of the Board of Governors, the Office of Probation, the Records Department and various staff attorneys. This was not merely an offhand comment by an attorney who was disgruntled with the outcome of his disciplinary proceeding. This was a protracted campaign between December 2002 and February 2005 that was tantamount to a vendetta. Such behavior rises to the level of harassment and is indicative of petitioner's lack of respect for the employees of the State Bar and of the disciplinary process.

[4c] Petitioner's censure of the State Bar extended beyond specific employees and to the judicial branch itself. For example, he asserted in pleadings filed in the Supreme Court that the State Bar was an organization that had a "history of not knowing what laws are proper and what laws are unconstitutional." He added: "Since the State Bar is an arm of the Supreme Court, these dishonest and unlawful acts reflect badly on the State Supreme Court's ability to supervise the State Bar of California from violating the political laws of the State."

[4d] The record clearly demonstrates that petitioner is unable or unwilling to conduct himself in a manner consistent with the settled definition of good moral character. Therefore, we find that the hearing judge abused his discretion when he found that

petitioner established by a preponderance of the evidence his present fitness to practice.

C. Petitioner's Learning and Ability in the General Law

[5a] Petitioner must also prove by a preponderance of the evidence that he possesses present learning and ability in the general law. (Std. 1.4(c)(ii); Rules Proc. of State Bar, rule 634.) The hearing judge concluded that petitioner's repeated assertions of "meritless legal arguments and objectively unsupportable allegations" did not adversely reflect on his legal abilities. We find this conclusion to be unreasonable.

[5b] Petitioner was given a specific explanation of and the legal authority for the State Bar's membership status designations by the Bar's Chief Assistant General Counsel, who wrote to petitioner in October 2003. Shortly thereafter, the State Bar again advised petitioner that describing himself as an inactive member of the State Bar was incorrect. Nonetheless, petitioner ignored that advice and persisted in identifying himself as "inactive" or as "not a member" or a "former member" of the State Bar in all correspondence and on all pleadings he filed in the proceedings below and in the Supreme Court. Petitioner also repeatedly challenged the constitutionality of standard 1.4(c)(ii) proceedings based on his faulty legal analysis of his own membership status.

[5c] The hearing judge characterized petitioner's futile attempts to protest his membership status as "meritless, incorrect, and misguided" and further found that "any representation or suggestion that Petitioner is an inactive member of the State Bar is false." But the hearing judge failed to take into account the length of time and the number of separate instances when petitioner continued to challenge his membership status.

[5d] Petitioner's jurisdictional challenges also call into question his legal abilities. Within one month after the California Supreme Court denied petitioner's request to assume jurisdiction, he sought the same relief from this court on the same grounds.[17]

[5e] Petitioner further manifested unsound legal judgment with his meritless attempts to remove his disciplinary record from the State Bar's website, claiming that section 6002.1 prohibited the State Bar from disclosing his records to the public "unless required to be made so available by a condition of probation." In yet another letter–writing crusade, he repeatedly criticized the State Bar's website description of a State Bar Governor's disciplinary history, arguing that the Bar's failure to specify the Governor's criminal history was discriminatory because petitioner's discipline was described in some detail.

We find a strong similarity with the misconduct in *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112. As in *Lais*, petitioner sought a redetermination of issues previously decided by a binding court authority, and his support for his jurisdictional argument was untenable. Furthermore, as in *Lais*, petitioner imposed on the court's time by "greatly delay[ing] the adjudication of Petitioner's petition," and burdened the court with pointless review of his voluminous pleadings, reflecting his lack of respect for the judicial process. Petitioner's conduct also is suggestive of *In re Morse* (1995) 11 Cal.4th 184, 209, wherein the Supreme Court observed: "Morse, like any attorney accused of misconduct, had the right to defend himself vigorously. Morse'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, Morse went beyond tenacity to truculence."

[5f] Despite the fact that petitioner completed more than 100 hours of CLE, we have previously held that an increased knowledge of the law is not sufficient to satisfy the requirement that an attorney possess present learning and ability in the general

17. The Supreme Court and this court have rejected petitioner's jurisdictional argument that we are not acting as judges but merely as referees who may not hear his case without his consent. Nevertheless, in September 2004, in connection with a class he presented entitled "Legal Ethics 101," petitioner distributed an MCLE course outline stating "Bar Court Judges not Judges, general referees."

law. Petitioner must prove not only that he knows the law but also that he is able in it. (*In the Matter of Ainsworth, supra*, 3 Cal. State Bar Ct. Rptr. at p. 901.) Viewed in its entirety, petitioner's behavior demonstrates an inability to evaluate facts and the law competently and to draw appropriate inferences and conclusions from them. Thus, the hearing judge abused his discretion when he found that petitioner possessed learning and ability in the general law.

D. Legal Errors

[6a] The parties stipulated in *Henschel II* to six aggravating circumstances, including dishonesty. The hearing judge deemed this aggravating factor to be duplicative of petitioner's substantive offenses and therefore gave it only "nominal weight." Furthermore, the hearing judge treated as mitigation certain health and other problems described in the portion of the stipulation designated as "other circumstances." In so doing, the hearing judge gave "some mitigating weight" to these problems, even though he found "no real nexus was drawn between Petitioner's problems and his misconduct."

[6b] The State Bar correctly argues that the hearing judge committed legal error when he discounted the aggravating factor of dishonesty as duplicative and when he added mitigation where there had been none. "[T]he discipline there ordered [in the prior proceedings] should not be reviewed or reconsidered . . . . [G]reat 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." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578.) Nevertheless, we find these errors to be harmless. It was appropriate for the hearing judge to consider the aggravating factors in determining the amount and nature of the evidence required to justify terminating suspension. (*Id.* at p. 578.) In assessing the likelihood that misconduct could recur, it was also appropriate for the hearing judge to consider stipulated facts that may have shed light on the cause of petitioner's misconduct, even if identified as "other circumstances." (*Id.* at p. 580.)[18]

[7] We also find the hearing judge committed legal error when he found "the attorney's compliance with the terms of the suspension and the conditions of probation will *presumptively* effectuate the attorney's rehabilitation . . . ." (Italics added.) The hearing judge thus incorrectly created a presumption of rehabilitation arising from petitioner's compliance with his probation, when in fact "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 . . . his 'rehabilitation, present fitness to practice and present learning and ability in the general law before [he] shall be relieved of the actual suspension.'" (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578 (italics added).) We do not further consider the implications of the erroneous introduction of a presumption in this case because we have already concluded there is not substantial evidence that petitioner has satisfied the requirements of standard 1.4(c)(ii).

III. CONCLUSION

Since his prior discipline, petitioner has undertaken steps to improve his professional conduct. Regrettably, petitioner's progress towards rehabilitation is undermined by a continuing course of conduct that is both unreasoned and unreasonable. We therefore conclude that the hearing judge abused his discretion in finding that petitioner satisfied the showing required by standard 1.4(c)(ii) because there is not substantial evidence in this record of petitioner's rehabilitation, fitness to practice and present learning and ability in the law. Accordingly, the hearing judge's decision granting the petition for relief from actual suspension is reversed.

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18. We find without merit the State Bar's additional point of legal error that the organization of the hearing judge's decision necessarily indicates in what sequence the hearing judge reviewed the evidence and formed his conclusions. We deem as pure conjecture the State Bar's assertion that the form of the decision is indicative that the hearing judge failed to consider the totality of the evidence before reaching any legal conclusions. We also do not find merit to the State Bar's argument that a typographical error in the decision below as to the termination date of petitioner's actual suspension was a material error.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SAMUEL C. BELLICINI

Petitioner for Reinstatement

No. 03–R–03728

Filed March 6, 2006

SUMMARY

Within a few years of becoming a licensed attorney, petitioner repeatedly failed to perform competently for clients, misled them, ignored court orders and misappropriated entrusted funds resulting in his resignation with charges pending in September 1993. In September 2003, petitioner sought reinstatement, and the hearing judge recommended that the petition for reinstatement be granted. (Hon. Patrice E. McElroy, Hearing Judge.)

The State Bar sought review contending that petitioner failed to establish his rehabilitation from his alcohol and gambling addictions, failed to make timely restitution, and failed to comply with rule 955 of the California Rules of Court.

The review department rejected most of the State Bar's contentions but concluded that petitioner's period of exemplary conduct was insufficient to establish his overall rehabilitation and recommended that the petition for reinstatement be denied.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Petitioner: Jerome Fishkin

HEADNOTES

[1] **148 Evidence–Witnesses**
2504 Reinstatement–Burden of Proof
The fact that pretrial statements and a stipulation were used to apprise petitioner's character witnesses of the acts that led to his resignation is not a basis for discounting the weight given to the testimony of such witnesses, particularly when no formal charges were ever filed against petitioner.

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**
2504 Reinstatement–Burden of Proof
The fact that petitioner's character witnesses did not know petitioner before he entered recovery from his alcoholism was not a reason to discount the weight given to their testimony because they all had recent, close contact with petitioner which qualifies them to reflect on his present moral qualifications.

[3a, b] **191 Effect/Relationship of Other Proceedings**
2504 Reinstatement–Burden of Proof
2590 Reinstatement–Miscellaneous
The fact that petitioner waited almost ten years after he resigned before he made restitution did not detract from petitioner's showing of rehabilitation since he demonstrated a proper attitude and sincerity toward restitution by voluntarily choosing not to discharge debts owed to creditors who were former clients or lienholders and by fully reimbursing all but one of his victims.

[4] **2504 Reinstatement–Burden of Proof**
Where petitioner completed a structured recovery program, increased his self–esteem, terminated friendships with others who drink, and led a stable life since entering sobriety evidenced by consistent employment, the purchase of a new home and reconciliation with his wife and parents, and where the State Bar's and petitioner's experts both testified that petitioner's addictions are in sustained full remission, there is a substantial likelihood that petitioner's sobriety from his alcohol and gambling addictions will continue.

[5] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
Since petitioner's post–resignation misconduct related to his gambling and alcohol abuse negatively reflected on his moral character, petitioner's first day of sobriety is the point when he began his rehabilitation in earnest insofar as the practice of law is concerned. It is from this point that petitioner's overall rehabilitation in light of his past wrongdoing is measured. Therefore the question was not whether the passage of time since petitioner failed to file a rule 955 affidavit after resignation should be considered in establishing his rehabilitation but whether petitioner's 39–month period of sustained exemplary conduct from the date of sobriety to the date of trial is sufficient to demonstrate his overall rehabilitation given the seriousness of his past misconduct.

[6a, b] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
Where petitioner's gambling and alcoholism resulted in ethical breaches that involved misappropriation of entrusted funds, multiple acts of deceit which continued post–resignation, and repeated disregard for court orders, including one from the Supreme Court, and that caused harm to multiple clients due to incompetent performance or abandonment, petitioner's period of exemplary conduct was insufficient to establish his overall rehabilitation given the extent of his prior wrongdoing and addictions.

OPINION

WATAI, J:

The State Bar asks us to review the decision of a hearing judge recommending the reinstatement of petitioner Samuel C. Bellicini, who resigned with charges pending effective January 6, 1994, as a result of misconduct that occurred while he was addicted to alcohol. The State Bar contends that petitioner has neither demonstrated a meaningful recovery from alcoholism and gambling addiction nor established his rehabilitation in light of his past misconduct. Furthermore, the State Bar asserts that petitioner has not made timely restitution and that petitioner's failure to comply with California Rules of Court, rule 955, should preclude his reinstatement.

We commend petitioner's efforts since 2001 in making amends for his prior misconduct as well as his continued participation in Alcoholics Anonymous, the Other Bar, and other group therapy which has allowed him to remain in full remission from his alcohol addiction and gambling problem. Our independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207) establishes that although petitioner is in recovery from the addictions that caused his ethical violations, petitioner's period of sustained exemplary conduct is insufficient to demonstrate his overall rehabilitation from his past misconduct. Therefore, we reverse the decision of the hearing judge recommending petitioner be reinstated to the practice of law in California.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's Background and History of Substance Abuse

Petitioner was admitted to the practice of law on May 7, 1991. For a brief period, he worked as an associate for a law firm until his alcoholism caused him to be dismissed. Petitioner then established his own practice as a solo practitioner. Due to his unabated heavy drinking, he abandoned his law practice by October 1992. Thereafter, petitioner processed unlawful detainer matters as an independent contractor until he was dismissed again as a result of his alcoholism. By the time petitioner tendered his resignation with charges pending on September 28, 1993, his alcoholism had caused him to suffer unemployment, eviction, and homelessness.

Petitioner was not always disabled by alcoholism. During high school, petitioner excelled scholastically, winning numerous scholarships and public speaking awards. He also balanced school with work, initially as an assistant manager of a restaurant and thereafter as a file clerk with a small law firm in Oakland. But by the age of nineteen, petitioner began drinking.

While attending college, he would drink socially on a regular basis and noticed that he was able to drink substantially more liquor than his friends before getting drunk. Although petitioner's drinking resulted in hangovers, missed classes and missed days at work, it did not prevent him from obtaining a degree from the University of California at Berkeley and gaining admission to University of San Francisco School of Law.

While attending law school, petitioner developed friendships with individuals who drank as heavily as he did, further exacerbating his problem with alcohol. Although he performed well on his exams despite his hangovers and failure to attend classes, it was during law school that petitioner first began to suffer negative consequences due to his inability to control his drinking. These consequences included petitioner's increased belligerence with others, his increased financial recklessness to support a lifestyle that revolved around drinking, and his dismissal from law review because his drinking caused him to miss deadlines. The negative consequences of petitioner's alcoholism accelerated after he graduated from law school.

Petitioner practiced law for only a brief period before his alcoholism caused him to commit multiple ethical violations, which ultimately led him to resign with disciplinary charges pending. We discuss in greater detail, *post*, petitioner's specific ethical misconduct. According to petitioner: "The State Bar had continued to seek me out to have me answer to the charges that my former clients and other professionals had filed against me. I had ignored these requests

until, I believe, I received a notice in September 1993, stating something to the effect that I was either to appear and speak to the State Bar investigator, or the charges leveled against me would become the subject of a formal disciplinary proceeding. On Tuesday, September 28, 1993, I met with the State Bar investigator, and at that meeting I became convinced to resign from the State Bar. I signed the resignation he gave me that day."

Despite experiencing an event as significant as his resignation, petitioner still could not escape the grip of his alcoholism and continued to convince himself that he was not an alcoholic. He obtained temporary employment with a law firm as a calendar clerk, but his drinking led to absenteeism, and he was let go. Although he obtained other temporary employment as a calendar clerk, petitioner had begun gambling and was "entrenched in the ritual of getting drunk and losing what money [he] earned at the card tables, instead of paying rent." By the end of 1994, petitioner was penniless and living on the street.

Petitioner's parents allowed him to move in with them but only if he agreed to attend Gamblers Anonymous. Although petitioner attended Gamblers Anonymous meetings, they provided little benefit because petitioner continued to drink. Petitioner then moved out of his parents' home and began renting a room in a house. By March 1996, petitioner obtained permanent employment as a calendar clerk for a small law firm in San Francisco, but he quit that job by the end of the year for a higher-paying job as a paralegal. Petitioner also realized he did not have much time left with the law firm because, according to petitioner, "my attendance was increasingly poor as a direct result of my alcohol abuse, and I lied to the office manager when confronted about my past as an attorney, a fact I did not disclose in applying for that job, but which was later discovered by an associate of the firm."

In February 1997, shortly after beginning work as a paralegal, petitioner married his girlfriend, who was pregnant with his child. Petitioner continued to drink and gamble and also began drinking during lunch. Petitioner's daily drinking adversely affected his job performance and he was dismissed in January 1998. During this year, petitioner filed for bankruptcy, but he did not include as dischargeable debts money he owed to former clients and lien holders because he intended at some point in the future to compensate them.

Petitioner took temporary jobs for over two years before a recruiter successfully placed him as executive assistant to the legal department of an internet company in September 2000. At this time, petitioner's alcoholism reached a new plateau and he required at least one pint of hard liquor in order to get drunk. He became insubordinate on the job and his attendance and work performance deteriorated. By March 2001, general counsel for the company fired petitioner.

Rather than use this period of unemployment as an opportunity to address his alcoholism, petitioner began drinking in the mornings and throughout the day. During this time, petitioner drank between a pint and a quart of hard liquor daily. Since his wife remained employed, petitioner did not face the typical repercussions his alcoholism often caused, such as hunger, eviction or homelessness. Petitioner continued to ignore his drinking problem until his wife threatened to leave him and take their son.

To avoid abandoning his wife and child as he had abandoned his legal career, petitioner finally decided to seek counseling to combat his alcoholism. He took his last drink on May 14, 2001, and after many years of succumbing to his alcoholism, petitioner finally experienced his first full day of sobriety on May 15, 2001.

B. Petitioner's Misconduct

We must examine petitioner's evidence of rehabilitation in light of the misconduct which led to his resignation. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Petitioner is an admitted, though recovering, alcoholic, who, within a few years of becoming a licensed attorney, repeatedly failed to perform competently for his clients, misled his clients and others, ignored court orders and misappropriated entrusted funds. Due to petitioner's resignation, he was never formally charged or found culpable of ethical wrongdoing. The parties executed a "First Stipulation of Facts" which provided many of the details of the

matters under investigation at the time petitioner resigned. The hearing judge made several factual findings and conclusions regarding petitioner's underlying misconduct, and we adopt, with modification, those findings and conclusions.

1. Client matters

In one matter, after petitioner retained $2,962.20 in client funds for payment to a client's doctor, petitioner failed to make that payment and instead used the funds to gamble and purchase alcohol. Thereafter, in order to postpone a lawsuit, he repeatedly misrepresented to the client's doctor that he intended to provide payment. In another case, petitioner failed to perform any work, resulting in the entry of default against his client. Petitioner also failed to refund $200 in advanced attorney fees and misrepresented to the client that he would seek to set aside the default and pay any associated costs. In a third matter, petitioner again failed to perform competently, resulting in entry of default against another of his clients. In a fourth matter, petitioner improperly withdrew from employment when he abandoned a client. In a fifth matter, petitioner failed to promptly pay $358 to a client's doctor and converted the funds for his own personal use. Thereafter, petitioner misrepresented to the client's doctor that he had mailed the funds. In a sixth matter, petitioner failed to perform competently, resulting in a small claims judgment against his client. Petitioner then lied to the client about pursuing an appeal of the judgment and thereafter abandoned the client. Petitioner also failed to cooperate with the State Bar when he did not respond to several letters the Client Security Fund sent him asking for a response to the client's claim. Finally, in a seventh matter, petitioner failed to comply with court orders requiring him to pay sanctions.

2. Noncompliance with Rule 955

On December 7, 1993, the Supreme Court filed an order[1] accepting petitioner's resignation and ordered him to comply with California Rules of Court, rule 955.[2] Petitioner did not file a rule 955 affidavit by the required date. He described this point in his life as having "bottomed out" due to his alcoholism. Petitioner expressed regret for not having filed a rule 955 affidavit. He explained that because he had been evicted from his home and had relinquished the legal career he had worked several years to obtain, he found himself in a state of hopelessness and despair. According to petitioner, his only desire at this point in his life was to forget the past. At the time, petitioner neither had any clients nor possessed any client property. At oral argument, petitioner contended that his failure to file a rule 955 affidavit is not fatal to his petition for reinstatement. Nevertheless, it is troubling that petitioner still has not filed the 955 affidavit in compliance with the Supreme Court order.

C. Petitioner's Rehabilitation

Petitioner accepted full responsibility for the ethical misconduct he committed prior to his resignation and expressed remorse for the harm he caused his former clients as a result of his inability to represent them properly. When petitioner committed the misconduct that led to his resignation, he was suffering from the effects of his active alcoholism. As previously noted, petitioner stopped drinking alcohol and experienced his first day of sobriety on May 15, 2001, almost eight years after he tendered his resignation and after his wife threatened to leave with their son. Three days later, petitioner enrolled in a two-year Chemical Dependency Recovery Program (CDRP) offered through Kaiser Permanente. While participating in CDRP, petitioner received intensive education on the physiological and emotional bases of alcoholism and attended almost daily group therapy sessions and weekly individual visits with a psychologist in order to refrain from drinking.

Two months into treatment, petitioner's wife and son were away on vacation and the stress of being alone made petitioner want to begin drinking again.

1. In accordance with Evidence Code section 452, subdivision (d), we take judicial notice of the Supreme Court's order.

2. Unless otherwise noted, all further references to "rule 955" are to California Rules of Court, rule 955. Subdivision (c) of this rule provides "the member shall file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order entered pursuant to this rule."

He attended his scheduled session with his therapist that day and confided that he felt helpless to stop himself from binge drinking. That day, petitioner's therapist referred him to Alcoholics Anonymous (AA), a fellowship of men and women who assist one another to stay sober. Petitioner attended AA, and through the support of group members found the strength to avoid taking a drink that day.

During the summer of 2001, petitioner regularly attended AA meetings seven to fourteen times per week in addition to his CDRP sessions. By fall 2001, petitioner fully acknowledged he was an alcoholic and began reaching out to members of his AA home group. For approximately one year thereafter, petitioner was unemployed but continued to attend CDRP and AA meetings regularly. Petitioner also served as a secretary and treasurer for his AA home group, which required him to account for cash contributed during meetings and to distribute those funds to pay for expenses such as refreshments and rent for the group's meeting room. In May 2002, petitioner also began attending weekly meetings of the Other Bar, an organization of recovering lawyers and judges providing support to members of the legal profession with substance abuse problems.

By fall of 2002, petitioner's wife separated from him. Despite this stressful event, petitioner did not relapse and drink alcohol. Instead, petitioner successfully lived on his own, remained gainfully employed, paid his bills, and provided child support. Petitioner testified that this was a turning point for him because he realized he could maintain responsibilities to others, he was less concerned of what others thought about him and he began developing friendships based on enjoying someone's company rather than for the purpose of drinking.

Petitioner has had two jobs since he and his wife reconciled in April 2003. The first was as an executive assistant to general counsel with DHL. The company relocated out of state and petitioner chose not to follow. Currently petitioner works with the law department at the U.S. Postal Service and shortly before trial in this matter, he was promoted to paralegal. Petitioner describes his relationship with his wife as stable, as evidenced by the fact that they purchased their first home together and opened their first joint checking account. Petitioner has also made amends with his parents. According to petitioner, his parents enjoy having him around now because he no longer causes them pain or worry. Also, his parents gave him the money he needed to pay restitution.

Presently, petitioner continues weekly therapy in an alumni group for graduates of CDRP. He also volunteers monthly to discuss with newly–sober patients in CDRP how he successfully maintains sobriety. Petitioner also attends weekly meetings of the Other Bar and AA. Additionally, petitioner is sponsoring someone in his AA home group and volunteers monthly with AA teleservice, an answering service that provides limited consultation and information regarding AA.

In July 2003, with money given to him by his parents, petitioner paid restitution to the doctors who remained unpaid for services provided to petitioner's clients, refunded advanced fees, paid sanctions imposed due to his misconduct, and reimbursed CSF. Petitioner's efforts to locate one of his former clients in order to refund unearned fees have to date been unsuccessful.

D. Reinstatement Proceedings

Petitioner filed his petition for reinstatement on September 17, 2003. A multi–day hearing commenced on August 24, 2004. Petitioner and eight witnesses, including his treating physician and three attorneys, testified on his behalf.

Dr. Kate Riley is a clinical psychologist and petitioner's treating medical professional. She has worked with petitioner since May 2001 as an addiction counselor through CDRP. She testified that when petitioner initially met with her, he was arrogant and defensive because he was convinced he did not have an alcohol problem and therefore was not receptive to help. She observed that when petitioner initially came in for treatment, he had a fantasy about being a sophisticated, debonair person who drank and smoked. However, his actual image of himself did not fit his fantasy, causing conflict in his work and personal life. Petitioner made a breakthrough when, shortly after beginning treatment, he acknowledged he was an alcoholic and began seeking treatment for

"everything." Dr. Riley observed that through the course of two years of treatment, petitioner became less reliant on external sources of self–esteem, replacing them with internal or interpersonal sources. This allowed petitioner to develop an image of himself more congruent with who he actually is. After completion of the two–year program, she observed a major character shift in petitioner, noting that he is honest, willing to apply self–scrutiny, willing to ask for help, and willing to take suggestions and advice from others.

Dr. Riley explained that individuals who are in recovery for under two years are in partial remission. She further explained that after two years, if CDRP participants have experienced significant changes in their interpersonal and occupational function as well as their leisure activities and family relationships, they are in full sustained remission. She observed that petitioner is capable of having fun and relaxing now, which indicates he has replaced chemical pleasures with clean and sober life pleasures. According to Dr. Riley, petitioner is a model patient who experienced no relapses and is in full sustained remission. She stated that he is not disabled by alcohol dependency, pathological gambling, or lower–grade depression (dysthymia). She stated petitioner has a good prognosis for continued sobriety even if he experiences significant stressors because he is more stable and has taken an active role in his recovery by participating in AA and the Other Bar and by developing close friendships with other recovering individuals.

In rebuttal, the State Bar presented Dr. James R. Westphal, an expert in addiction psychiatry, who in the last four to five years has been working with patients exhibiting psychiatric problems combined with substance abuse. He examined petitioner to evaluate any psychiatric and substance use disorders in relation to petitioner's ability to practice law. According to his report, petitioner's pathological gambling and alcohol dependency are in sustained full remission and petitioner's dysthymia is in remission. He further reported that petitioner is not currently disabled by his alcohol dependency, pathological gambling or dysthymia.

Dr. Westphal testified that for individuals who are alcohol dependent, studies have shown that five years of sobriety is the point where recovery is considered solid because if a person achieves sobriety for that length of time, he is more likely to remain sober than not. He testified that in a case where there are multi–impulsive disorders, such as petitioner's gambling and alcohol addiction, he believes there is a greater risk of relapse but he could not quantify that risk. For this reason, he recommended that petitioner "will need sobriety support and monitoring for relapse of his alcohol dependency and pathological gambling for several more years."

Despite this recommendation, Dr. Westphal testified that petitioner has done a good job in his recovery and has accomplished what is necessary in terms of recovery. Furthermore, he acknowledged several factors existing in petitioner's case that would reduce his risk of relapse, such as active participation in AA, participation in the Other Bar, decreased resistance to treatment, increased level of self–esteem, and termination of friendships with drinkers. He also acknowledged that petitioner's handling of other people's money and his continued sobriety despite his marital separation are indicators of petitioner's decreased risk of relapse.

The hearing judge filed her decision on December 21, 2004, concluding that petitioner had demonstrated by clear and convincing evidence that he was rehabilitated, that he had the requisite ability and learning in the general law and that he possessed the moral qualifications for reinstatement to the practice of law, which the judge recommended. The State Bar here seeks review of that decision and recommendation.

II. DISCUSSION

A. Requirements for Reinstatement

Although petitioner resigned with disciplinary charges pending, he must meet the same requirements for readmission as if he were disbarred. (*In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 552.) In order to be reinstated, petitioner must pass a professional responsibility examination, demonstrate rehabilitation and present moral qualifications and establish present ability and learning in the general law. (Cal. Rules of Court, rule 951(f).) Furthermore, to prove rehabilitation, "a

petitioner needs to show a recognition of his or her wrongdoing . . . ." (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674.) Ultimately, our decision must turn on whether petitioner has shown proof of "sustained exemplary conduct over an extended period of time." (*In re Petty* (1981) 29 Cal.3d 356, 362) Although petitioner resigned in 1993, he continued to drink alcohol until he enrolled in a recovery program in 2001. As discussed in greater detail, *post*, we measure petitioner's rehabilitation from this point.

B. Present Ability and Learning in the General Law

The hearing judge found that petitioner had demonstrated by clear and convincing evidence that he possesses the requisite ability and learning in the general law. Petitioner passed the Professional Responsibility Examination in August 2003, he recently completed approximately 24 hours of continuing legal education covering a wide variety of topics such as business law, employment law, jury instructions, and client trust accounting, and he subscribed to a legal newspaper. The State Bar does not contest petitioner's present ability and learning in the general law, and upon our independent review of the record, we find no reason to question his legal abilities.

C. Petitioner's Burden of Proof Regarding Rehabilitation

Petitioner bears a heavy burden of proving his rehabilitation. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091.) Moreover, petitioner's evidence of present good character must be considered in the light of his prior misconduct, which in this case was very serious. (*In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 553.) However, the law favors rehabilitation, and even egregious past misconduct does not preclude reinstatement. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 316.)

D. Petitioner's Evidence

1. Good character witnesses

The hearing judge found "Petitioner's character witnesses also help demonstrate Petitioner's rehabilitation and good moral character." We agree. "'[C]haracter testimony, however laudatory' does not alone establish the requisite good character." (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.) We have nevertheless observed that "in determining whether an erring attorney has proved rehabilitation and present moral qualifications, the California Supreme Court has heavily weighed 'the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living' of such an attorney. [Citations.]" (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 317–318.)

Seven character witnesses testified on petitioner's behalf, including three attorneys. Most were aware of the serious nature of petitioner's misconduct, by virtue of reading the pretrial statements of the parties and the "First Stipulation of Facts." All of these witnesses have known petitioner only since he entered recovery and are acquainted with him through AA, the Other Bar or CDRP. They uniformly attested to petitioner's good character and honesty. Most of these witnesses "gave specific, convincing reasons for holding favorable opinions of petitioner's rehabilitation or present moral fitness." (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 465.) For instance, Gilbert Kirwin, an attorney who has been practicing law for 38 years and who has been involved with the Other Bar for 27 years, has met many alcoholics in various stages of recovery and believes petitioner is fit to resume the practice of law primarily because of the humility petitioner displays. Edwin T. Caldwell, an attorney for almost 40 years who is on the state oversight committee for the Lawyers Assistance Program, has been observing alcoholic lawyers for 26 years and considers petitioner to be one of the great examples of a person who has reversed his life in all aspects and has a character that is above reproach. And Robert Resner is an attorney and independent consultant for the Other Bar who has observed several thousand alcoholics in recovery. He believes petitioner truly wants recovery because he is open and honest about what he has done in his past, expressed regret about it, and is doing what he can to make amends for it in order to lead a better life. He has also observed that petitioner's relationship with his family has improved substantially.

Favorable testimony from members of the bar and members of the public of high repute is entitled to considerable weight. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 431.) Accordingly, we give significant weight to the testimony of judges and officers of the court because "These witnesses have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 319.)

[1] The State Bar argues that petitioner's character evidence should be discounted since his witnesses do not constitute a wide range of references necessary to establish rehabilitation, none knew petitioner before he entered recovery from his alcoholism, and they were not familiar with the extent of petitioner's misconduct. We reject the State Bar's last contention as unsupported by the record. We see no shortcoming in using the parties' pretrial statements and stipulation to apprise the character witnesses of petitioner's acts that led to his resignation, particularly when no formal charges were ever filed against petitioner.

[2] "It is the cumulative effect of a cross–section of witnesses with varying relationships to the petitioner that paints a picture of his present character." (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 319.) We do not agree with the State Bar that such evidence should be discounted. The absence of character testimony or reference letters from petitioner's family members or employers is unfortunate, but it does not reduce the importance of the attorneys who testified on his behalf and whose character testimony is significant in reinstatement proceedings and entitled to considerable weight. (*Id.* at p. 318.) We also see no reason to discount the weight given to petitioner's remaining character witnesses since they all had recent, close contact with petitioner which qualifies them to reflect on his present moral qualifications. (See *In the Matter of Miller, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 431–432.)

The State Bar did not present rebuttal evidence to the favorable character references. But even this quality and quantity of favorable character evidence are not determinative of petitioner's rehabilitation. (*In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 5.) We accordingly look to other factors as indicia of petitioner's rehabilitation and present moral character.

2. Community service

We agree with the hearing judge's finding that petitioner's charitable work is a factor supporting his reinstatement. Although the hearing judge only noted that petitioner volunteers monthly to discuss with newly–sober patients in recovery how to maintain sobriety, we find that petitioner's work through AA in sponsoring a recovering alcoholic and volunteering monthly with AA teleservice also aid his rehabilitative showing.

3. Restitution

[3 a] Unquestionably, we consider evidence of restitution for "its probative value as an indicator of rehabilitation . . . ." (*Hippard v. State Bar, supra,* 49 Cal.3d 1084, 1093.) The State Bar takes issue with the fact that petitioner waited almost ten years after he resigned before he made restitution and that he made no restitution during the first two years he was in recovery. We do not find that such facts detract from petitioner's showing of rehabilitation, since petitioner continued to suffer from alcoholism for more than eight years after he resigned and was unemployed for approximately one year after he entered recovery.

The State Bar argues that petitioner merely provided restitution in anticipation of reinstatement contending that he "has been *able* to make restitution for a long time." Although it is clear that petitioner immediately embarked on his restitution efforts once his parents provided him the funds to do so, there is no evidence in the record that petitioner actually had the means to provide restitution any sooner than July 2003. We note that the Supreme Court has given favorable consideration to restitution even in circumstances involving external pressures to pay such as court orders and agreements with victims. (*In the Matter of Miller, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 429–30, and cases cited therein.) Moreover, reinstatement has been granted in cases where there has not been full and complete restitution, provided a

petitioner has demonstrated an attitude of earnestness and sincerity. (*Resner v. State Bar* (1967) 67 Cal.2d 799.)

[3 b]"[R]estitution is neither mandatory, nor in and of itself determinative of rehabilitation. [Citation.] Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim. [Citations.]" (*In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at p. 674.) Although we cannot determine from this record whether petitioner truly had the financial means to pay restitution much earlier, the record is far more clear and convincing with respect to petitioner's attitude toward the importance of restitution. When petitioner declared bankruptcy, he voluntarily chose not to discharge debts owed to creditors who were former clients or lienholders in client matters. This, coupled with petitioner's full reimbursement to all but one of his victims, who cannot be presently located, adequately demonstrates a proper attitude and sincerity toward restitution. (*In re Andreani* (1939) 14 Cal.2d 736, 750.) Therefore, we do not find that the timing of petitioner's restitution detracts from his rehabilitative showing.

4. Recovery from alcohol and gambling addictions

Because petitioner has been drinking since age nineteen and has multiple addictions which led to serious misconduct, the State Bar contends that petitioner must show a lengthy recovery period greater than the 39 months of sobriety he has maintained from May 15, 2001, to the time of trial on August 24, 2004. The State Bar therefore argues petitioner has not demonstrated a meaningful and sustained recovery from his alcoholism and gambling. As the Supreme Court held in *Gary v. State Bar* (1988) 44 Cal.3d 820, 828, in establishing rehabilitation from his addictions, petitioner must give us strong "assurance that his longstanding addiction[s] [are] permanently under control . . . ." Furthermore, we recognize that where alcohol abuse was addictive in nature and causally contributed to professional misconduct, "the requisite length of time to show 'meaningful and sustained' rehabilitation will vary from case to case." (*In re Billings* (1990) 50 Cal.3d 358, 368.)

As previously noted, the State Bar's expert testified that for individuals dependent on alcohol alone, the risk of relapse becomes relatively minimal at five years, but for individuals with alcohol dependency and pathological gambling, he believed there is a greater risk of relapse which he could not quantify. Beyond referring to its expert's testimony, the State Bar provides no authority as to what period of sobriety would be sufficient for petitioner to establish rehabilitation from his alcoholism and gambling problem. Our review of case authority reveals but one case, *In the Matter of Kirwan* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 692 (*Kirwan*), which addressed the issue of rehabilitation from alcohol abuse within the context of a reinstatement proceeding. (Cf. *In the Matter of Salyer* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 816 [Reinstatement granted where petitioner, who resigned with charges pending after felony embezzlement conviction attributable to methamphetamine addiction, established 17–year abstinence from methamphetamine use].) We did not address whether Kirwan had been sober for a sufficiently long period. Instead, the issue in *Kirwan* was whether we could be confident that his seven years of sobriety would continue absent any ongoing participation in a recovery program or psychological counseling. Here, in contrast, petitioner presented evidence of his ongoing, extensive involvement with and participation in AA, the Other Bar, and the CDRP alumni group, all of which provide additional outside support to assist petitioner with his efforts to maintain sobriety. Thus, the question in the present matter is one not addressed in *Kirwan* – whether the length of time of petitioner's sobriety is sufficient for us to be very confident that his sobriety will continue.

[4] In considering this issue, we observe that petitioner has completed a structured recovery program and has led a stable and productive life evidenced by his consistent employment since entering sobriety as well as the successful purchase of his first home and reconciliation with his wife and parents. Several other factors – such as petitioner's increased level of self–esteem, his termination of friendships with others who drink, his failure to relapse despite a marital separation, and his honest handling of money – also militate in favor of petitioner's continued sobriety.

Even more compelling is the fact that both experts testified that petitioner's addictions are in sustained full remission with one expert further opining that petitioner has a good prognosis for continued sobriety even if he experiences significant stressors in the future. For these reasons, there is substantial likelihood that petitioner's sobriety will continue.

5. Petitioner's overall rehabilitation

The State Bar contends that in light of petitioner's past wrongdoing, he failed to demonstrate exemplary conduct over an extended period of time. We agree. Although we find that petitioner is in recovery from alcoholism and gambling, on this record we do not find that petitioner "demonstrated his overall rehabilitation by clear and convincing evidence." (See *In re Menna* (1995) 11 Cal.4th 975, 988 [when weighed against the enormity of past misconduct, recovery from gambling addiction did not necessarily justify admission].) In seven client matters over approximately a two–year period, petitioner repeatedly failed to perform competently, abandoned clients, failed to distribute client funds promptly, made misrepresentations to clients or lienholders, and misappropriated $3,320.20 in entrusted funds in order to gamble and purchase alcohol. Furthermore, he failed to refund unearned fees, disobeyed court orders, and failed to cooperate with CSF. After resigning, he failed to comply with the Supreme Court's order to file a 955 affidavit. Approximately three years after resigning, petitioner admittedly lied to a former employer about his past as an attorney. Not until mid–May 2001, almost eight years after he tendered his resignation, did petitioner begin to seriously address his addictions so that he could take responsibility for his misconduct and hold himself accountable to those he had harmed.

[5] The hearing judge found that petitioner's misconduct occurred more than ten years ago and concluded that petitioner was rehabilitated from his past wrongdoing based on the passage of an appreciable period of time. We do not adopt this finding since it fails to account for petitioner's continued alcohol and gambling related misbehavior that continued until at least May 2001. Since petitioner's continued misconduct related to his abuse of alcohol and his gambling negatively reflected on his moral character, we find, instead, that petitioner's first day of sobriety is the point when petitioner began his rehabilitation in earnest insofar as the practice of law is concerned. It is from this point that we measure his overall rehabilitation in light of his past wrongdoing. Thus, the question before us is not whether the passage of time since petitioner failed to file a rule 955 affidavit should be considered in establishing his rehabilitation but whether petitioner's 39–month period of sustained exemplary conduct from mid–May 2001 to the date of trial in this matter is sufficient to demonstrate his overall rehabilitation given the seriousness of his past misconduct. For the reasons described below, we conclude it is not.

As we previously noted, to establish rehabilitation, petitioner must show by clear and convincing evidence "sustained exemplary conduct over an *extended period of time*." (*In re Petty*, *supra*, 29 Cal.3d at p. 362, italics added.) Petitioner erroneously relies on the fact that his "misconduct is over 10 years old" to support the assertion that his demonstrated period of sustained exemplary conduct sufficiently establishes rehabilitation from his prior wrongdoing. Petitioner cites no authority in which reinstatement was granted to a petitioner who demonstrated only approximately three years of exemplary conduct but argues that reported cases which require longer periods of rehabilitation involved misconduct far more serious than his own.

Our holding in *In the Matter of Miller*, *supra*, 2 Cal. State Bar Ct. Rptr. 423 (*Miller*) contradicts petitioner's contention. Miller resigned after he misappropriated more than $86,000 from an estate over a six–year period. After resigning, Miller completed some pro bono and volunteer work and occupied positions of fiduciary trust as an estate administrator and trustee, all without impropriety. He also provided complete restitution prior to filing his petition. We concluded that the evidence in *Miller* suggested that his misconduct was aberrational because Miller practiced law without misconduct for at least 37 years, and it was undisputed that he provided extensive pro bono work during his legal career. Evidence of rehabilitation also included four letters of reference and the testimony of five favorable character witnesses consisting of three attorneys, a municipal court judge, and a state appellate justice. We recommended Miller's reinstatement after concluding that

his five and one–half years of sustained exemplary conduct between the time the Supreme Court accepted his resignation and the time he filed his petition for reinstatement was sufficient to establish his rehabilitation.

[6 a] As in *Miller*, petitioner has paid or attempted to pay restitution, has completed some volunteer work and has successfully occupied a position of trust without incident. He has also presented favorable character witnesses as evidence of his rehabilitation. Similarly, petitioner's misconduct involves the misappropriation of entrusted funds. Although petitioner's misappropriations do not approach the magnitude of that in *Miller*, we consider petitioner's misconduct just as serious, if not more so, due to the extent of his ethical breaches, his multiple acts of deceit which continued post–resignation, his repeated disregard for court orders, including one from our Supreme Court, and the number of clients he harmed through incompetent performance or outright abandonment.

Even though Miller's misconduct was not the result of an addiction, Miller's 37–year legal career without prior misconduct and his extensive pro bono work were strong evidence that his misconduct was aberrational. Because petitioner practiced law for only 28 months before resigning and because he suffered multiple addictions during his entire legal career, we cannot conclude, as we did in *Miller*, that petitioner's misconduct is aberrational. Given the facts that petitioner's misconduct is as serious as that in *Miller* and that we cannot conclude that his misconduct was aberrational, we believe that petitioner's period of sustained exemplary conduct should, at a minimum, match that in *Miller*.

Because of the paucity of reinstatement cases addressing the issue at hand, we also consider published reinstatement decisions from other jurisdictions involving misconduct related to alcohol abuse. All of these cases support our conclusion that petitioner has not shown sustained exemplary conduct over an extended period of time sufficient to establish his rehabilitation. One such case is *In re Moynihan* (1989) 113 Wash.2d 219 [778 P.2d 521] which involved an attorney who was disbarred for neglect of client matters, misappropriation of client funds totaling approximately $5,100 and failure to cooperate with the disciplinary investigation. Moynihan's misconduct was attributed to his excessive alcohol use which began at age 14 and continued throughout college, law school and his practice. Moynihan completed in–patient treatment for his alcoholism, and attended weekly AA meetings as well as weekly meetings with recovering alcoholic attorneys and judges. When Moynihan petitioned for reinstatement, he had been disbarred for approximately seven years and had abstained from alcohol for almost eight years. The Washington Supreme Court concluded that Moynihan clearly and convincingly demonstrated his rehabilitation worthy of reinstatement.

In re Chantry (1974) 84 Wash.2d 153 [524 P.2d 909] involved an attorney who was disbarred for misappropriating approximately $1100 in client funds and abandoning another client. Restitution was made shortly after disbarment. The attorney was deeply involved in marital and alcohol problems in the years prior to and during his disharment. Like petitioner, Chantry did not immediately enter sobriety after losing his right to practice law. At the time the Washington Supreme Court granted Chantry's petition for reinstatement, almost nine years had elapsed since his disbarment, and he had been sober for over six years.

In *In re McDonnell* (1980) 82 Ill.2d 481 [413 N.E.2d 375], McDonnell agreed to have his name stricken from the roll of attorneys following his convictions for conspiracy to transport stolen securities and failure to file income tax returns. When the criminal offenses occurred, McDonnell had a serious drinking problem and gambled. Approximately three years after his name was removed from the roll of attorneys, McDonnell filed a motion for reinstatement which was denied. Nine years following removal of his name from the roll of attorneys, McDonnell again petitioned for reinstatement. This time, based on petitioner's regular attendance at AA meetings and the testimony of his treating physician, the Illinois Supreme Court determined that McDonnell had provided clear and convincing evidence of his rehabilitation and fitness to practice law.

In *Matter of Reinstatement of Pierce* (1996) 1996 OK 65 [919 P.2d 422], an attorney who resigned

with charges pending after pleading guilty to eleven drug–related felony charges petitioned for reinstatement six years later. Despite having been sober from drugs and alcohol for over six years, the Oklahoma Supreme court found that the petitioner failed to present clear and convincing evidence of rehabilitation in light of the seriousness of the underlying misconduct, and denied the petition.

[6 b] In *Matter of the Reinstatement of Hanlon* (1993) 1993 OK 159 [865 P.2d 1228], an attorney who was disbarred due to a drug conviction applied for reinstatement ten years later. The attorney asserted that his problems stemmed from alcohol abuse, but despite four years of sobriety, his petition was denied due to inadequate evidence showing rehabilitation. (See also *Petition of Trygstad* (S.D. 1989) 435 N.W.2d 723 [where attorney led exemplary life and abstained from use of alcohol and drugs for a period of five years since release from prison after being disbarred for conviction of conspiracy to distribute cocaine, and where misconduct was related to substance abuse, reinstatement denied because rehabilitative effort was insufficient to re–establish good moral character in light of gravity of misconduct]; *In re Batali* (1983) 98 Wash.2d 610 [657 P.2d 775] [petition for reinstatement granted approximately eight years after disbarment for significant client misappropriations stemming from petitioner's abuse of alcohol]; *Application of Gavin* (1979) 415 N.Y.S.2d 1020 [petition for reinstatement granted seven years after petitioner was disbarred for misconduct committed while petitioner was suffering from acute alcoholism.]; *In re Johnson* (1979) 92 Wash.2d 349 [597 P.2d 113] [petition for reinstatement granted eleven years after disbarment for conviction of grand larceny arising out of mishandling of a guardianship estate which was primarily caused by petitioner's alcoholism that was successfully controlled for approximately five years at time of reinstatement].) As these cases reveal, when serious ethical misconduct is attributable to alcoholism, the period of exemplary conduct necessary to sufficiently establish rehabilitation exceeds the 39–month period petitioner has maintained. Given the extent of his prior wrongdoing and addictions, we find that petitioner's period of exemplary conduct is insufficient to establish his overall rehabilitation.

6. Compliance with Rule 955

The State Bar also argues that petitioner should be denied reinstatement because of his ongoing failure to comply with rule 955. Without diminishing the importance of compliance with rule 955 (See, e.g. *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227), because we have decided not to recommend petitioner's reinstatement based on an insufficient period of sustained exemplary conduct, we need not reach the rule 955 issue.

III. CONCLUSION

We commend petitioner's efforts in overcoming his addictions that caused him to commit serious ethical violations early in his legal career and which plagued him for many years thereafter. Having viewed the evidence in its totality, we conclude that petitioner's rehabilitative showing is insufficient at this time to establish his overall rehabilitation from his past misconduct over an extended period of time. Nevertheless, we find petitioner's significant efforts to rehabilitate himself constitute good cause within the meaning of Rules of Procedure of the State Bar of California, rule 662(d) and accordingly order that a subsequent petition may be filed one year after the effective date of this opinion. The hearing judge's decision recommending that petitioner be reinstated to the practice of law in the State of California is hereby reversed, and the petition for reinstatement is denied.

We concur:
STOVITZ, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEPHINE M. WELLS

A Member of the State Bar

No. 01–O–00379

Filed December 5, 2005, as modified February 3, 2006, and March 7, 2006

SUMMARY

While residing in South Carolina, respondent represented two clients with their respective employment discrimination cases even though respondent was not admitted as an attorney in that state. The hearing judge found respondent culpable of the unauthorized practice of law in another jurisdiction, charging an illegal fee, failing to return unearned fees, failing to maintain funds in trust, and committing acts of moral turpitude and recommended six months' actual suspension. (Hon. Joann M. Remke, Hearing Judge.)

The review department concluded that respondent was not culpable of moral turpitude in connection with her unauthorized practice of law, that this was insufficient to prove good faith mitigation, that the fees she charged and collected were not only illegal but also unconscionable, and that respondent was additionally culpable of moral turpitude during a conversation with a South Carolina deputy solicitor. The review department adopted all other findings and conclusions of the hearing judge and recommended that respondent be suspended for two years, stayed, that she be placed on probation for two years on the condition that she be actually suspended for six months and until she paid restitution.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Petitioner: William M. Balin

HEADNOTES

[1a, b] 252.10 Rule 1–300(B) [former 3–101(B)]
Where respondent's representation of a client was not confined exclusively to the practice of law in federal court or before the EEOC but also included resolving the client's state tort claims as well as providing legal advice and counsel regarding the South Carolina Human Affairs Commission, the doctrine of federal preemption did not preclude a finding of culpability for the unauthorized 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] **252.10 Rule 1–300(B) [former 3–101(B)]**
Where respondent stated on much of her correspondence and her business card that she was licensed in California and was of counsel to the law office of a South Carolina attorney and designated her South Carolina office as an out of state administrative office and where respondent failed to advise clients that she was licensed only in California or that she was unlicensed in South Carolina, respondent held herself out as entitled to practice law.

[3] **290.00 Rule 4–200 [former 2–107]**
Since respondent was not entitled to charge or collect her fees for those services that constituted the unauthorized practice of law and since respondent was not allowed quantum meruit recovery for services rendered under a fee contract that was unenforceable as illegal or against public policy, the fees respondent charged constituted an illegal fee under rule 4–200(A).

[4] **290.00 Rule 4–200 [former 2–107]**
Where respondent collected fees and costs almost three times the amount her client agreed to pay, the fees and costs respondent wrongfully collected were so wholly disproportionate to what the client agreed to as to shock the conscience and were thus unconscionable under rule 4–200(A).

[5a, b] **290.00 Rule 4–200 [former 2–107]**
Where respondent unilaterally collected over 43 percent of a client's gross recovery and where there was no evidence that the client agreed to such a fee, respondent's fees were unconscionable.

[6] **221.00 State Bar Act–Section 6106**
Moral turpitude includes creating a false impression by concealment as well as affirmative misrepresentations.

[7] **101 Procedure–Jurisdiction**
A disciplinary action may be maintained even though the attorney has been acquitted of criminal charges that have been dismissed based on the same facts. Moreover, the State Bar Court has jurisdiction to regulate misconduct even when it occurred in another state and did not result in an out–of–state criminal conviction.

[8] **162.19 Proof–State Bar's Burden–Other/General**
192 Due Process/Procedural Rights
252.10 Rule 1–300(B) [former 3–101(B)]
Ordinarily in disciplinary proceedings culpability must be established by convincing proof and to a reasonable certainty. However, this standard does not apply where otherwise provided by law. Therefore in finding a violation of rule 1–300, proof beyond a reasonable doubt is constitutionally required because the applicable South Carolina statute regulating the profession makes the unauthorized practice of law a crime.

[9] **192 Due Process/Procedural Rights**
Respondent's Sixth Amendment claim to a jury trial does not attach to disciplinary proceedings in California because such proceedings are not governed by the rules of procedure governing criminal litigation.

[10] **588.10 Aggravation–Harm–Generally–Found**
Where respondent collected illegal and unconscionable fees and interfered with the investigations by the California State Bar and the State of South Carolina by giving false and misleading information, such conduct significantly harmed the public, administration of justice and her clients and is properly considered as a factor in aggravation.

[11] **591 Aggravation–Indifference–Found**
Since as of the date of the hearing respondent had not yet refunded the fees and costs she wrongfully collected, such conduct demonstrated indifference towards the consequences of her misconduct.

[12] **1015.04 Discipline–Actual Suspension–Six Months**
Where respondent engaged in the unauthorized practice of law in another jurisdiction, charged and collected illegal and unconscionable fees, failed to return unearned fees, failed to maintain funds in trust, and committed multiple acts involving moral turpitude, where there was mitigation for extreme emotional distress, good character, and entering into a stipulation of material facts, and where there was aggravation due to one prior record of discipline, multiple acts of wrongdoing, significant harm to clients, the public, and the administration of justice, and indifference towards the consequences of her misconduct, the appropriate disciplinary recommendation was a two–year stayed suspension and two years of probation on conditions which included six months' actual suspension and until restitution is paid.

ADDITIONAL ANALYSIS

Culpability
Found
221.11 Section 6106–Deliberate Dishonesty/Fraud
252.11 Rule 1–300(B) [former 3–101(B)]
277.61 Rule 3–700(D)(2) [former 2–111(A)(3)]
280.01 Rule 4–100(A) [former 8–101(A)]
Not Found
221.50 Section 6106
Aggravation
Found
511 Prior Record
521 Multiple Acts
Mitigation
Found
725.11 Disability/Illness
735.10 Candor–Bar
740.10 Good Character
Declined to Find
715.50 Good Faith
Standards
871 Unconscionable Fee–6 Months Minimum
Discipline
1013.08 Stayed Suspension–2 Years
1017.08 Probation–2 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School

OPINION

EPSTEIN, J:

Respondent, Stephine M. Wells, was admitted to the practice of law in California in 1984. In 1996, respondent moved to South Carolina, and while a resident there, she practiced law without a license. Although respondent's unauthorized practice of law is of serious concern, we are perhaps even more concerned with her overreaching of her clients and her dishonesty with officials in both California and South Carolina, who were responsible for investigating her misconduct.

The hearing judge found clear and convincing evidence that respondent was culpable of two counts of violating California Rules of Professional Conduct, rule 1–300(B), which prohibits the practice of law in another jurisdiction where to do so would be in violation of that jurisdiction's regulation of the profession.[1] In addition, the hearing judge determined that respondent was culpable of charging an illegal fee, failing to return unearned fees, failing to maintain funds in a trust account, and three acts of misconduct involving moral turpitude. The hearing judge recommended that respondent be placed on probation for two years, with conditions, including six months' actual suspension. Both respondent and the State Bar appeal.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), although we give great weight to the credibility determinations made by the hearing judge, who saw and heard the parties testify. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)[2] Based upon the record, including the parties' stipulations, the exhibits and the testimony in the hearing below, we adopt most of the hearing judge's findings, with modifications that ultimately do not affect the degree of discipline recommended. Accordingly, we recommend that respondent be suspended for two years, stayed, with two years' probation on the condition she be actually suspended for six months and until respondent pays restitution equal to the amount of the fees collected, plus interest, for her unauthorized legal representation of Lance Amyotte and Hana Odeh in South Carolina. We believe this discipline is adequate to protect the public, the courts, and the profession.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent has practiced law in California since 1984. The focus of respondent's practice has been employment discrimination claims under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII). She has one prior discipline in 1993, a private reproval, for misconduct in a one–client matter involving commingling personal funds in a client trust account, and in a second matter where she represented a client without a retainer agreement, and failed to place a disputed fee in her client trust account.

In August of 1996, respondent moved to Lake Wylie, South Carolina, and bought a home after her marriage to Calvin Moragne. She considered Lake Wylie her "home base," although she spent a significant amount of time commuting to San Francisco, where she continued to represent clients.

After she moved to Lake Wylie, respondent practiced employment law from her home until it became too crowded for her to continue there. In June or July of 1999 she rented space in a building close to her home, which she claims she used only as her "administrative office." However, respondent and two clerical personnel used the office on a regular basis, and the two complaining witnesses testified they were interviewed at length by respondent in this

1. South Carolina Code (SCC) section 40–5–310, which proscribes the unauthorized practice of law, provides: "No person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony. . . ."

2. The hearing judge found that respondent, as well as the two complaining witnesses, Lance Amyotte and Hana Odeh, "were not entirely credible in their testimony."

office in connection with their respective employment discrimination cases. In addition to maintaining the Lake Wylie office, respondent listed herself in the local phone book as "attny." and she printed a business card, which read: "Stephine M. Wells–Moragne, Esquire, 4605 Charlotte Highway, Suites 5–6, Lake Wylie, South Carolina 29710." The business card contained the following notation: "Member of the California Bar and of counsel for Mariano F. Cruz [with local telephone and facsimile numbers]."[3] In addition to her legal representation of the two complaining witness (see discussion below in Case No. 01–O–00379 and Case No. 01–O–00659), respondent represented at least seven other clients in various matters in state and federal courts while she was a resident of South Carolina.

Respondent closed her Lake Wylie office in early 2001, returned to California, re–established residency and divorced Moragne. Respondent was not admitted as an attorney in South Carolina during the entire time she resided there.

The State Bar filed a 13–count Notice of Disciplinary Charges (NDC) on September 25, 2002, and respondent filed an Answer on October 25, 2002. An Amended NDC was filed on April 7, 2003, and a response was filed by respondent on April 28, 2003. Two counts in the NDC alleging violations of Business and Professions Code section 6068, subdivision (a),[4] were dismissed by order of the court upon request of the State Bar at a pretrial conference. On June 24, 2003, the parties entered into a Stipulation as to Facts and Admission of Documents ("Stipulation"). A five–day trial commenced on the same date, and the matter was submitted on December 16, 2003. The hearing judge filed her decision on March 11, 2004, finding respondent culpable of two counts of Unauthorized Practice of Law (UPL) in another jurisdiction, in violation of Rules of Professional Conduct, rule 1–300(B);[5] and violations of rule 4–200(A) [charging an illegal or unconscionable fee]; rule 3–700(D)(2) [failure to return unearned fees]; rule 4–100(A) [failure to maintain funds in trust account]; and section 6106 as the result of three separate acts of misconduct involving moral turpitude. She recommended that respondent be suspended for two years, stayed, with an actual suspension of six months and that she pay restitution to the two clients for the fees she charged and collected.

Respondent stipulated that she practiced law while she was a resident of South Carolina. Nevertheless, she argues on appeal that she is not culpable under rule 1–300(B) because she maintains her professional activities in South Carolina were confined to federal employment discrimination claims. As such, she asserts state regulation of her law practice was preempted by federal law. Respondent also challenges this court's jurisdiction and further claims these proceedings violate her due process rights. Finally, respondent maintains that there was insufficient evidence of UPL as to one client and that her actions did not constitute moral turpitude. Respondent accordingly asks that we reverse the hearing judge's culpability determinations, with the exception of her failure to maintain a client trust account in one client matter, to which she stipulated, and remand this matter for a new discipline determination by the hearing department. The State Bar also is appealing from the decision below, seeking additional culpability findings and asking for disbarment as the appropriate discipline.

II. FINDINGS OF FACTS AND CULPABILITY DISCUSSION

A. The Amyotte Matter (Case No. 01–O–00379)

1. Factual Findings

On January 22, 2000, Lance Amyotte, a resident of South Carolina, hired respondent to represent him in a sexual harassment case arising from his employment

3. Mariano Cruz was an attorney with offices in Rock Hill, South Carolina, who briefly moved into respondent's office in Lake Wylie and worked with her on one case, as discussed below.

4. All further references to "section" are to the Business and Professions Code, unless otherwise noted.

5. All further references to "rule" are to the Rules of Professional Conduct, unless otherwise noted.

by Huddle House, Inc. in York, South Carolina. Amyotte worked as an assistant manager trainee in one of Huddle House's restaurants. He was referred to respondent by a local attorney, Mariano Cruz. On January 22, Amyotte signed a retainer agreement with respondent, which provided: "I have agreed to represent you in your claims against Huddle House, Inc. . . . as Pro Hac Vice Counsel with South Carolina Counsel, Mariano F. Cruz (attorneys). I am licensed to practice in California. . . . [¶] Plaintiff ("the client"), by signing this agreement, retains The Law Offices of Stephine M. Wells–Moragne, as pro hac vice counsel, and local counsel, Mariano Cruz, ("the attorneys"), to advise and represent the client in the client's case. . . ."[6] During the entire time she represented Amyotte, respondent was not admitted or sworn as an attorney in South Carolina. The retainer agreement specified a " 'Win or Lose' Retainer Fee," which would be "credited dollar for dollar against the recovery and refunded to the client." The agreement provided that Amyotte would pay $1,000 on signing, with the remaining $4,000 to be paid when he received a settlement in an unrelated personal injury case, which was handled by the Philpot Law Firm. The retainer agreement also required an advance of $3,000 for out–of–pocket expenses. The agreement further provided for a "standard" contingent fee of 33 percent of the recovery if the case settled before trial and 40 percent after the case was set for trial.

Amyotte paid respondent $1,000 when he signed the retainer agreement on January 22.[7] On August 1, 2000, respondent and Cruz received and negotiated a check in the amount of $7,000 from the Philpot Law Firm to cover the non–refundable retainer fee and expense advance. Respondent has no records of the deposit or disbursement of this $7,000, which she claimed she split with Cruz, keeping $4,000 for herself and giving him $3,000.

Beginning in January 2000 and concluding in February 2001, respondent stipulated that she "actively represented Mr. Amyotte" and that she "practiced law in Mr. Amyotte's matter including, but not limited to, providing him legal advice, negotiating with and proposing settlement terms to the opposing party and its counsel, representing him at a mediation, and receiving and negotiating a settlement check on his behalf." She also corresponded with Amyotte, telling him where to file his charge with the South Carolina Human Affairs Commission (SHAC), and advising him about what he should tell SHAC in his complaint. On July 5, 2000, with respondent's counsel and guidance, Amyotte filed a claim with the EEOC and with SHAC. In addition, respondent researched South Carolina law and drafted numerous letters, including a demand letter sent to the general counsel for Huddle House, citing South Carolina cases as precedent for the restaurant's liability, which she maintained "could reach monumental proportions." Respondent also corresponded with outside counsel for Huddle House, sending them a summary of witness statements. Most of her correspondence contained the letterhead "Law Offices of Stephine M. Wells–Moragne & Associates/William R. Hopkins III"[8] and listed her Lake Wylie address as her "Out of State Administrative Office." There was no indication in any of the correspondence that she was not admitted to practice in South Carolina or that she was licensed only in California.[9]

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6. Respondent never was admitted *pro hac vice* in the Amyotte matter, nor was she eligible for *pro hac vice* status since she was a resident of South Carolina at the time of her representation of Amyotte. South Carolina Appellate Court Rules, rule 404(b) provides in relevant part: "An attorney may not appear *pro hac vice* if the attorney is a resident of South Carolina . . . or is regularly engaged in the practice of law. . . ." (See also, United States District Court for the District of South Carolina, Rules By District Court, rule 83.I.05(C) limiting *pro hac vice* status to the "occasional" appearance in federal court.) As a resident, respondent was required to be a member in good standing of the South Carolina Bar in order to appear in federal court. (United States District Court for the District of South Carolina, Rules By District Court, rule 83.I.03(A).)

7. On July 28, 2000, respondent sent an amended notice of lien to the Philpot Law Firm for $7,000 asserting that Amyotte agreed to pay her legal fees and costs from the settlement of a personal injury case handled by the Philpot Law Firm.

8. William Hopkins III is respondent's son, also a California–licensed attorney.

9. Some of her letters contained letterhead using her name only, followed by "Esquire" with the notation that she was a "Member of the California Bar and of counsel for Law Office of Mariano F. Cruz." A few of her letters had no reference to her status as a California attorney.

Ultimately, Huddle House settled with Amyotte, who signed a settlement agreement on February 11, 2001, pursuant to which he released Huddle House of all federal and state claims in exchange for $9,000 payable to Amyotte "and his attorney, Stephine M. Wells–Moragne." The agreement recited that Amyotte had consulted with respondent before signing it.

Respondent returned to California prior to receiving the settlement funds from Huddle House. She received the $9,000 check from Huddle House on February 15, 2001, and deposited it on February 20, 2001. The settlement funds were not placed into a client trust account. On February 22, 2001, she wired $4,000 to Amyotte's checking account from the Bank of America account of her son, Hopkins, which was neither a client trust account nor the account into which she had deposited the settlement funds. Five days later, on February 27, 2001, respondent issued a check in the amount of $750 from a personal checking account in her name and that of her husband at First Union National Bank, which was not the account into which she had deposited the settlement funds. On the same date she also paid Amyotte $650 in cash. Thus, from the Huddle House settlement proceeds respondent distributed a total of $5,400 to Amyotte, and kept $3,000 as attorney's fees plus $605 as costs. Respondent failed to credit Amyotte with either the $7,000 lien payment she previously had received from the Philpot Law Firm or the $1,000 initially paid by Amyotte when he signed the retainer agreement. Accordingly, the total amount respondent obtained from Amyotte's case was $11,605: $1,000 deposit + $7,000 from Philpot lien + $3,605 from settlement proceeds. Respondent maintained no financial records for this matter, but in her final "Settlement Disbursement" sent to Amyotte, she stated her costs were $605 and her fee was $3,000 as one–third of the $9,000 settlement proceeds.

2. Culpability Discussion

Respondent was charged with six counts of misconduct in connection with her representation of Amyotte. We discuss each count, with the exception of count 1 (failure to support the U.S. Constitution and California law (§ 6068, subd. (a)), which, as noted *ante*, the judge dismissed upon the request of the State Bar. We adopt the dismissal of count 1.

a. Unauthorized Practice of Law in Another Jurisdiction (Rule 1–300(B))

[1a] The hearing judge found respondent culpable of the unauthorized practice of law (UPL) in South Carolina pursuant to rule 1–300(B).[10] We agree. Respondent stipulated that while she resided in South Carolina "[b]etween January 2000 and January 2001, respondent actively represented Mr. Amyotte . . . " and that she "practiced law in Mr. Amyotte's matter. . . . " The record amply supports these stipulations. Nevertheless, respondent contends on appeal that her practice of law was restricted exclusively to Amyotte's Title VII federal civil rights claim before the EEOC, and, accordingly, she argues that under *Sperry v. Florida* (1963) 373 U.S. 379, the doctrine of federal preemption precludes a finding of culpability for UPL pursuant to SCC section 40–5–310 and rule 1–300. In *Sperry v. Florida*, *supra*, 373 U.S. 379, 404, the United States Supreme Court held that the preparation and prosecution of applications for letters patent before the United States Patent Office was expressly intended by Congress to be governed exclusively by federal law and therefore the practice by non–lawyers before the Patent Office could not be enjoined by the State of Florida as the unauthorized practice of law.

[1b] Respondent's preemption argument is unavailing in this case for the simple reason that the

10. Rule 1–300(B) provides: "A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

record establishes beyond a reasonable doubt[11] that respondent's representation of Amyotte was not confined exclusively to the practice of law in federal court or before the EEOC. Rather, respondent's activities also included resolving Amyotte's *state* tort claims against Huddle House, as well as providing legal advice and counsel regarding SHAC. Indeed, in the course of her representation, respondent assisted Amyotte in the completion of two SHAC forms, the Initial Inquiry Questionnaire and the Charging Party Questionnaire. This assistance alone constituted the practice of law in South Carolina. (*State of South Carolina v. McLauren* (2002) 349 S.C. 488, 499 [563 S.E.2d 346, 351]; *State of South Carolina v. Despain* (1995) 319 S.C. 317, 320 [460 S.E.2d 576, 578].) But respondent also drafted various demand letters specifying federal *and* state law as the basis of liability, and she negotiated a settlement on behalf of Amyotte which compromised his federal *and* state law claims against Huddle House. "Conduct constituting the practice of law includes a wide range of activities. [T]he practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients . . . and in general all advice to clients and all action taken for them in matters connected with the law." (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich* (1989) 297 S.C. 400, 402 [377 S.E.2d 306, 307.) Respondent's practice of law in the Amyotte matter extended beyond his EEOC claim and clearly falls within South Carolina's broad definition of the practice of law.

Moreover, we find there is evidence beyond a reasonable doubt that respondent held herself out as entitled to practice, which also is considered by the California Supreme Court and the South Carolina Supreme Court to constitute UPL. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 ["unauthorized practice of law includes the mere holding out by a layman that he is . . . entitled to practice law"]; *In re Cadwell* (1975) 15 Cal.3d 762, 771, fn. 3 [implied representation of entitlement to practice constitutes UPL]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 175, fn. 13 [use of term "Of Counsel" on letterhead to describe an unlicensed person constitutes UPL]; *In the Matter of Clarkson* (2004) S.C. LEXIS 131 [representation by a disbarred attorney that he had graduated from law school constituted holding out in violation of SCC section 40–5–310].)

[2] Here, respondent stated on much of her correspondence and her business card that she was licensed in California, was "of counsel to the Law Office of Mariano F. Cruz" and designated her office as an "Out of State Administrative Office,"[12] but she failed to advise that she was licensed *only* in California or that she was unlicensed in South Carolina. In so doing, respondent held herself out as entitled to practice law. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [suspended attorney found to have created a false impression that he was currently able to practice by using the term "Member of the State Bar" and the honorific "ESQ." next to his signature on a job application]; *The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d at p. 307 [attorney created false impression he was entitled to practice in

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11. As noted in footnote 10, in order to establish respondent's culpability under rule 1–300(B), we must first determine if her conduct "*would be in violation* of regulations of the profession *in that jurisdiction*" i.e., in South Carolina. (Emphasis added.) SCC section 40–5–310 is the only source cited and relied upon by the parties and the hearing judge as regulating respondent's unauthorized practice in South Carolina, and this statute makes UPL a felony punishable by up to five years in prison and/or a $5,000 fine. The constitutionally required standard of proof for criminal violations, whether felonies or misdemeanors, is guilt beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364 [due process clause of the United States Constitution requires that criminal conviction of an accused must be by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."].) We are persuaded that the record in this case satisfies the more stringent evidentiary standard of beyond a reasonable doubt, particularly in view of the undisputed facts and respondent's Stipulation.

12. We find that her designation of her Lake Wylie office as "administrative" elevates form over function. Amyotte and Odeh testified that they believed they were meeting in respondent's law office when they met with her to discuss their cases. In addition, for a period of time, attorney Cruz, with whom she associated as "of counsel," practiced law in the Lake Wylie office.

South Carolina because letterhead used a South Carolina address and the words "licensed to practice" in another state, without specifying that he was licensed *only* in the other state, and not licensed in South Carolina].) One simply "cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law" when in fact she is ineligible to practice. (*In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at p. 91.) Thus, independent of her representation of Amyotte, respondent's actions in holding herself out as entitled to practice constituted UPL in South Carolina and therefore violated SCC section 40–5–310.[13]

The hearing judge also rejected respondent's argument that her activities were permitted because they were merely preliminary to her appearance in the Amyotte case as *pro hac vice* counsel, and we reject this argument as well. As a resident of South Carolina, she did not qualify for this status. "*Pro hac vice* admission . . . is not a vehicle by which a South Carolina resident, who is a member of an out–of–state bar, may circumvent the rules of admission to practice in this State." (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d at p. 308; see fn. 6 *ante*.)

b. Illegal and Unconscionable Fee (Rule 4–200(A))

[3] Our conclusion that respondent is culpable of UPL compels the further conclusion that the fees respondent charged and collected from Amyotte were illegal under rule 4–200(A). Regardless of the fact that she was compensated pursuant to a contract, respondent was not entitled to charge or collect her fees for those services that constituted UPL. (*Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136.)[14] Moreover, when services are rendered under a fee contract that is unenforceable as illegal or against public policy, quantum meruit recovery will not be allowed if the proscription is directed at "the very conduct for which compensation was sought. . . ." (*Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 463; see also, Annot., Attorney's Recovery in Quantum Meruit for Legal Services Rendered Under a Contract Which is Illegal or Void as Against Public Policy (1965) 100 A.L.R.2d 1378.) We therefore agree with the hearing judge that respondent charged an illegal fee in violation of rule 4–200(A).

[4] The hearing judge further found there was not clear and convincing evidence that the fee was unconscionable. The State Bar argues on appeal that the record supports a finding that the fees collected were unconscionable, and we agree. Pursuant to respondent's fee contract, Amyotte agreed to pay a 33 percent contingency fee against any recovery, including a $5,000 non–refundable deposit that would be "credited dollar for dollar against the recovery and refunded to the client." The agreement also required $3,000 as an advance against costs, which Amyotte in fact paid. The record reflects that respondent

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13. Parenthetically, we uncovered no precedent or legislative history establishing that 29 Code of Federal Regulations (CFR) 1601.7, sub.(a), cited by respondent as authority for her preemption argument, either authorizes the practice of law before the EEOC by non–attorneys or is intended to pre–empt state law regulating UPL. The legislative powers of the states will not be superceded by federal law unless that is "the clear and manifest purpose of Congress." (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949, citing *Cipollone v. Ligget Group Inc.* (1992) 505 U.S. 504, 516.) Such a "clear and manifest purpose" is not evident in 29 CFR 1601.7, which merely *permits* "any person, agency or organization" to make *a charge* of an unlawful employment practice under Title VII on behalf of an aggrieved individual with the EEOC. (Compare *Sperry v. Florida* (1963) 373 U.S. 379 [express congressional authorization for Commissioner of Patents to prescribe regulations allowing the recognition of agents or other persons to practice before the Patent Office in patent cases].) Neither rule 1–300 nor SCC section 40–5–310 conflicts with the purpose and objectives of Title VII (*Jevne v. Superior Court, supra*, 35 Cal.4th 949–950) since merely making *a charge* of unlawful employment practice with the EEOC would not, without more, constitute UPL. Furthermore, when acting in a dual capacity as an attorney and a lay person for a client, all services performed involving the practice of law are subject to the Rules of Professional Conduct. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 373.)

14. Our conclusion comports with the general rule that attorneys who are not admitted to practice in the state where they performed the services are not entitled to recover compensation for such services even though admitted to practice in another state. (See Annot., Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar (1967) 11 A.L.R.3d 907.)

incurred $650 in costs. Respondent was entitled to retain only those costs she reasonably incurred; she was not entitled to profit from the $3,000 cost advance. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851.) Nor was respondent entitled to charge more than was due her under her fee agreement. (*Id.* at p. 855.) Respondent collected fees and costs equaling $11,650, which is almost three times the amount Amyotte agreed to pay her. The fees and costs respondent wrongfully collected from Amyotte were so wholly disproportionate to what he agreed to pay as to shock the conscience. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564; *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402–403; see also rule 4–200(B)(1) [amount of fee in proportion to value of services considered in determining unconscionability].) We thus conclude that the fees and costs charged by respondent were both illegal *and* unconscionable under rule 4–200(A).

c. Failure to Refund Unearned Fee (Rule 3–700(D)(2))

The hearing judge found respondent violated rule 3–700(D)(2), which requires that when an attorney's employment is terminated, he or she must refund any portion of a fee paid in advance that has not been earned. We agree. Respondent retained a fee of $3,650 from the Huddle House settlement proceeds, which, as discussed above, was illegal and therefore unearned. Furthermore, respondent failed to refund the additional $8,000 in advance fees and costs she received from Amyotte and the Philpot Law Firm. Accordingly, the total amount of $11,000 should be refunded to Amyotte.[15]

d. Failure to Maintain Client Trust Account (Rule 4–100)

Respondent stipulated she violated rule 4–100 when she failed to deposit the funds she received for the benefit of Amyotte into a client trust account and paid him the settlement funds from her personal accounts. We therefore adopt the hearing judge's conclusion that respondent is culpable of a violation of rule 4–100.

e. Moral Turpitude (Section 6106)

The hearing judge concluded that respondent wilfully violated section 6106 because "by holding herself out as entitled to practice and actually practicing law when she was not a member of the South Carolina Bar, when she was not admitted to practice before a federal agency under title 5 United States Code Annotated, section 500, and when she was not admitted as *pro hac vice* counsel, respondent committed acts of moral turpitude and dishonesty."[16] We believe a finding of moral turpitude is at odds with the hearing judge's factual findings in support of mitigation to the effect that "[respondent] thought she was giving adequate notice to the public that she was not entitled to practice law in South Carolina by stating on her stationery 'Out of State Administrative Office' and 'Member of the California Bar.' She also told Amyotte that she was not admitted to [the] South Carolina Bar and associated herself with local counsel Cruz and Wall, thinking that such association would entitle her to practice." Although these actions were insufficient to protect respondent from a charge of UPL, they do militate against a finding of clear and convincing evidence of ill will or dishonesty establishing moral turpitude, and we therefore dismiss with count six charging a violation of section 6106.

B. The Odeh Matter (Case No. 01–O–00659)

1. Factual Findings

Hana Odeh lived and worked in Charlotte, North Carolina. She was employed by American United Insurance Agency (AUIA), a North Carolina subsidiary

15. Respondent now maintains that she was not obliged to refund all of the fees since she claims that she gave $3,000 of these funds to the referring attorney, Cruz. There was no agreement with Amyotte allowing respondent to split fees with Cruz, and therefore she was not authorized to do so.

16. The hearing judge also relied on respondent's incorrect accounting and her failure to credit Amyotte with the $8,000 as a basis for her moral turpitude finding. But, this specific conduct is the basis of our culpability determination under rule 3–700(D)(2) and is therefore duplicative. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119.)

of a South Carolina company, The Thaxton Group (Thaxton). On June 7, 2000, Odeh met respondent at her Lake Wylie office through a referral from a North Carolina attorney, Melvin Wall Jr., who desired to associate with respondent because of her employment discrimination expertise. The purpose of the June 7 meeting was to discuss Odeh's discrimination claim against AUIA/Thaxton. At that time, Odeh gave respondent a check for $1,500 for legal fees.[17] On May 23, 2000, prior to the meeting with respondent, Odeh filed a Charge of Discrimination with the EEOC against AUIA/Thaxton, claiming that she was unfairly denied a promotion from assistant manager to manager based on her gender, religion and country of origin. At the meeting with respondent, Ms. Odeh completed a "Client Information" form which provided personal information.

In the proceedings below, respondent stipulated that "[b]etween June 2000 and in or about August 2000, respondent actively represented Ms. Odeh." She further stipulated that during the same time period she "practiced law in Ms. Odeh's matter including, but not limited to, providing her legal advice, negotiating and proposing settlement terms to the opposing party and its counsel, representing her at mediation, and receiving a settlement check on her behalf." More specifically, on June 8, 2000, the day after their first meeting, respondent wrote to Bill Russell, Director of Human Resources for Thaxton, at its corporate offices in Lancaster, South Carolina, advising: "Our office, along with local counsel Attorney Melvin L. Wall, represents Hana Odeh." Respondent also notified Russell that it might be necessary to file a lawsuit to resolve Odeh's employment dispute, indicating that "the recent adverse employment actions [by Thaxton] may derive from Ms. Odeh's status as a whistle–blower." She advised that the investigation was ongoing as to this issue. The letterhead on this correspondence stated: "Law Offices of Stephine M. Wells- Moragne, Esquire" and listed her Lake Wylie, South Carolina address as her "Out of State Administrative Office." Following the word "Esquire" was the notation "Member of the California Bar and Of Counsel for Law Office of Melvin Wall, Jr., 3115 Clearview Drive, Charlotte, North Carolina." There was no indication that respondent could practice only in California.

On June 12, 2000, respondent sent a demand letter to Russell at Thaxton's South Carolina office, proposing a settlement of $75,000 for "all claims" so that Thaxton could avoid a "long and expensive lawsuit." The June 12 letter contained extensive legal analysis to justify the settlement demand, including analyses of Odeh's EEOC claim and "the public policy issues [that] are not covered through EEOC," such as her claims of retaliation due to Odeh's whistle–blowing activities, as well as claims of fraud and misrepresentation arising out of alleged inducements made to Odeh at the time of the acquisition of AUIA by Thaxton. Respondent indicated, however, that "there still may be a global settlement of all claims within that framework." In this letter, respondent advised Russell "[s]ince my practice is in California . . . and I make appearances only if requested as pro hac vice counsel once a lawsuit is filed, you may want to communicate directly with Mr. Wall, Ms. Odeh's local counsel."

On the same date that she sent the demand letter, respondent attempted to withdraw from the case because she was unwilling to accept a contingency fee instead of an hourly fee. Also, she felt she could not meet Odeh's demands for attention to her case. But on June 19 she had a change of heart and wrote to Odeh: "Mr. Wall requested that I continue to assist him. Therefore as a favor to him, I will." She indicated that Wall would send Odeh a contingency agreement, and respondent enclosed an invoice for costs incurred and legal services rendered, which she billed at the rate of $175 per hour.

Respondent continued settlement negotiations with Michael Carrouth, a South Carolina attorney to whom the matter had been referred by Thaxton. She wrote several letters to him, including a letter dated July 19, 2000, countering his settlement offer with a

17. On June 4, 2000, Odeh paid Wall $250 and on June 22, 2000, signed a retainer agreement with him, which provided for a contingency fee of 33 1/3 percent. There was no agreement between Odeh and respondent or between Wall and respondent allocating fees between them.

demand for $70,000, which she justified based on her analysis of the North Carolina unfair trade practices statute (North Carolina General Statue 58–63–15). Ultimately, Thaxton agreed to settle the matter for $15,000. On July 31, 2000, respondent advised Carrouth by letter that she had reviewed the draft release form and awaited the final version with the recommended revisions.[18]

Pursuant to the Settlement and Release Agreement, which the parties signed on August 7, 2000, Thaxton agreed to pay Odeh $10,000 "less applicable deductions" and also to pay respondent an additional $5,000 as attorney's fees and costs. Odeh agreed to dismiss the charges of discrimination filed with the EEOC, and released Thaxton/AUIA from all statutory, administrative, common law and state claims based on her claims of employment discrimination, fraud and misrepresentation. The Settlement and Release Agreement included a warranty by Odeh that respondent and Wall were her attorneys in this matter and that they had consulted with her before she signed the agreement. Finally, the Settlement and Release Agreement contained the following certification by respondent:

"I certify that I am licensed to practice law by the Supreme Court of a state other than North Carolina, that I represent Ms. Odeh, that I have reviewed this document, and that I have given her the benefit of my professional advice." Respondent testified that she authorized Wall to sign the agreement on her behalf.

On August 21, 2000, Thaxton issued a check to Odeh in the amount of $6,203.40, which it computed as payment of her gross salary in the amount of $10,000, deducting payroll taxes.[19] On the same date, Thaxton issued a $5,000 check in the name of respondent, with the notation "for legal fees." Respondent delivered the $6,203.40 check to Odeh and negotiated the $5,000 check, splitting the fees equally with Wall.[20] Respondent thus charged and received a total of $6,500 in fees ($1,500 from Odeh + $5,000 from Thaxton), which is 43 1/3 percent of the gross recovery. Respondent did not maintain any records of the funds received or disbursed, nor did she provide Odeh with an accounting of her fees.

In February 2001, the State Bar of California commenced an investigation after receiving a complaint by Odeh. In response to a letter from State Bar Investigator Lisa Edwards respondent wrote on December 11, 2001: "Please be assured that I did not practice law in North Carolina or South Carolina without a license in those states. [¶] I was living briefly in Lake Wylie South Carolina because I had married [Calvin Moragne]." In her letter, respondent further described her relationship with Odeh: "...Ms. Odeh wanted me to represent her. I explained that I could not. ... Ms. Odeh, is from the Middle East. She is extremely pushy and reacted to my firm responses that I did not and never had represented her with a great deal of efforts [*sic*] to manipulate me and disparage Mr. Wall. I would never have put myself in the position to be the subject of her boundless wrath." Three days later, respondent followed with another letter to Investigator Edwards, enclosing certain documents and reiterating: "Please note that my involvement [with Odeh] was short term as a preliminary evaluation to determine if I would apply to appear pro hac vice with Mr. Wall. I did not. . . ."

In February 2001, the Office of the Solicitor for the State of South Carolina, Sixteenth Judicial District, began its own investigation of respondent for charges of UPL in violation of SCC section 40–5–310.

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18. Respondent used a different letterhead template for this correspondence stating "Law Offices of Stephine M. Wells-Moragne & Associates/William R. Hopkins III" again listing her Lake Wylie address as her "Out of State Administrative Office" but also including Mariano F. Cruz "Attorney at Law" in the listing at her office. There was no indication on the letterhead that respondent was a California–licensed attorney or that she was not licensed in South Carolina.

19. Odeh subsequently disputed the settlement amount, claiming the payroll deductions were in error and that she was entitled to additional unemployment benefits. She sent a letter to respondent on November 10, 2000, complaining about the settlement and asking for assistance. Respondent did not respond to this letter. Wall unsuccessfully attempted to recover the additional unemployment benefits for Odeh.

20. Wall was in poor health and instructed Thaxton's counsel to send the check for the attorneys' fees directly to respondent.

On February 9, 2001, respondent spoke by telephone for approximately ten to fifteen minutes with deputy solicitor Kevin Brackett about her activities within that state. During the conversation, respondent stated she was handling three cases in South Carolina and would be returning to California within a month. Respondent testified that she thought Brackett wanted to know only about her current caseload and was in fact more interested in the whereabouts of Mariano Cruz, so she did not advise Brackett that she had actually worked on nine cases while in South Carolina. Nor did respondent disclose to Brackett that she had an office in Lake Wylie and had been a resident of South Carolina for the past four and one half years.

2. Culpability Discussion

Respondent was charged with six counts of misconduct in connection with her representation of Odeh. The judge dismissed count 7 (failure to support the U.S. Constitution and California law (§ 6068, subd. (a)) upon the request of the State Bar. We adopt the dismissal of this count.

a. Unauthorized Practice of Law in Another Jurisdiction (Rule 1–300(B))

Respondent stipulated that she actively represented Odeh and practiced law on Odeh's behalf between June 2000 and August 2000, while she resided in South Carolina. But, respondent again asserts the federal pre–emption argument in her defense, which we again reject for the reasons discussed *ante*. Specifically, respondent did not limit her practice to prosecuting Odeh's Title VII claim. Her settlement demands to Thaxton were based on federal and state law claims, including fraud, misrepresentation, unfair insurance practices and violation of public policy. Respondent's activities on behalf of Odeh were conducted within South Carolina and her negotiations were with South Carolina attorneys, who represented Thaxton, a South Carolina corporation.[21] We thus conclude that respondent's legal representation of Odeh constitutes UPL within the ambit of SCC section 40–5–310. (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich*, *supra*, 377 S.E.2d 306, 307.)

Finally, the same facts which underlie our conclusion in the Amyotte case that respondent held herself out as entitled to practice law apply to this matter as well, including the use of stationery which identified her as an attorney with an office in South Carolina, her business card, telephone listing, etc., none of which advised that she was either licensed only in California or unlicensed in South Carolina. (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich*, *supra*, 377 S.E.2d at p. 307.) Such activities in holding herself out were independent of her purported practice before the EEOC and constituted UPL in violation of SCC section 40–5–310. (*In the Matter of Clarkson*, *supra*, 2004 S.C. LEXIS 131.) We thus find respondent violated rule 1–300 due to her legal representation of Odeh in South Carolina while she was unlicensed in that state.

b. Illegal and Unconscionable Fee (Rule 4–200(A))

The hearing judge found that the fees respondent received in the Odeh matter were illegal because she was not entitled to practice in South Carolina. We agree, and adopt her finding of culpability under rule 4–200(A). Respondent was not entitled to charge or collect fees for those services that constituted UPL. (*Birbrower, Montalbana, Condon and Frank v. Superior Court*, *supra*, 17 Cal.4th 119, 136.)

[5a] The hearing judge further found, without explanation, that the fees charged were not unconscionable. However, we agree with the State Bar that there is clear and convincing evidence that

21. We reject respondent's argument that to the extent her representation exceeded the bounds of federal EEOC law, she still would not be culpable under rule 1–300(B) for UPL in *South* Carolina because Odeh resided in North Carolina and her place of employment was in North Carolina. Not only did all of respondent's professional activities take place in South Carolina, she compromised Odeh's state law claims against Thaxton, which by terms of the Settlement and Release included claims under South Carolina law.

respondent collected an unconscionable fee from Odeh when she unilaterally determined to collect 43 percent of Odeh's gross recovery. We find no evidence in the record that Odeh ever agreed to this fee.[22] *In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. 838, is instructive to our analysis. In *Kroff*, we found two instances of unconscionable fees in violation of rule 4–200(A) where an attorney charged a mere $217.18 without the agreement of the client (*Id.* at p. 851–852), and in another matter unilaterally increased fees and costs by $758.18 beyond the amount agreed to by a client. (*Id.* at p. 855.) We there said: "Dollar amounts are not the sole criteria in determining unconscionable fees. Here, respondent did not have the informed consent of the client." (*Id.* at p. 851; see also *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [unconscionable fees because of lack of informed consent of clients]; see also rule 4–200(B)(11) [client's informed consent to fee to be considered in determining unconscionability].)

[5b] As noted *ante*, Odeh had no fee agreement with respondent, although Odeh paid her $1,500 at their first meeting. When AUIA/Thaxton settled the matter for $15,000, it disbursed $6,203.40 to Odeh (reflecting $10,000 as gross salary minus applicable payroll taxes) and $5,000 to respondent as attorney's fees. In total, respondent unilaterally charged and collected $6,500 (43 1/3 percent of the gross recovery) without the agreement or informed consent of Odeh. Accordingly, we find the fees charged and collected are unconscionable. (*In the Matter of Kroff, supra,* 3 Cal. State Bar Ct. Rptr. at p. 855.)

c. Failure to Refund Unearned Fee (Rule 3–700(D)(2))

The hearing judge found respondent culpable under rule 3–700(D)(2). We agree. Since respondent's fee was illegal, it was of necessity unearned. Once her services were terminated, respondent was required to refund the unearned $6,500 in fees she collected from Odeh and Thaxton for her illegal representation of Odeh.[23] The fact that she gave half of the $5,000 she received from the settlement to Wall does not absolve respondent of responsibility for reimbursement of the entire $6,500 since Odeh did not agree to the fee split between Wall and respondent. Accordingly, we recommend restitution in the amount of $6,500 plus interest be paid to Odeh.

d. Moral Turpitude re Unauthorized Practice of Law (Section 6106)

The hearing judge found respondent culpable of moral turpitude under section 6106 on the basis of her activities in holding herself out as entitled to practice and in actually practicing law in the Odeh matter. However, the evidence of respondent's efforts, albeit ineffectual, to alert opposing counsel and her clients about her status as a California attorney, as well as her belief that she was entitled to practice on a *pro hac vice* basis, militate against a finding of clear and convincing evidence of acts of moral turpitude in connection with respondent's UPL. We therefore dismiss with prejudice count 11.

e. Moral Turpitude re Response to State Bar (Section 6106)

Respondent stipulated that during the time she resided in Lake Wylie, she actively practiced law on behalf of Odeh, and in fact, as of August 21, 2000, she had received $6,500 in fees for her representation of Odeh. Nevertheless, when respondent wrote to Lisa Edwards, the State Bar Investigator, on December 11, 2001, she stated: "Please be assured that I did not practice law in North Carolina or South Carolina without a license in those states. [¶] I was living *briefly* in Lake

22. The only indicia of the fee Odeh agreed to pay for the prosecution of her claim was in her contingency agreement with Wall, which stated that Wall would represent her "with regards to complaints of discrimination . . . against [AUIA], including mediation of related EEOC charges and, if necessary, litigation" for a contingency fee of 33 1/3 percent of the gross recovery. That agreement was not signed by respondent and did not provide for fee splitting.

23. As noted, *ante*, respondent may not be heard to claim that the fees were earned under a theory of quantum meruit, since quantum meruit recovery is not allowed where a violation of the rules of professional conduct "proscribe the very conduct for which compensation was sought . . . ." (*Huskinson & Brown LLP v. Wolf, supra*, 32 Cal.4th 453, 463.)

Wylie South Carolina because I had married [Calvin Moragne]." (Italics added.) Respondent further described her relationship with Odeh: ". . . Ms. Odeh wanted me to represent her. I explained that I could not. . . . *I did not and never had represented her.*" (Italics added.) Respondent followed with another letter to Investigator Edwards enclosing certain documents and reiterating: "Please note that my involvement [with Odeh] was short term as a preliminary evaluation to determine if I would apply to appear pro hac vice with Mr. Wall. I did not. . . ."

[6] The hearing judge found these misrepresentations constituted moral turpitude under section 6106, and we agree. However else moral turpitude may be defined, it most assuredly includes creating a false impression by concealment as well as affirmative misrepresentations. *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 90–91; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Moreover, "'deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated.' [Citation.]" (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.)

f. Moral Turpitude re Response to Solicitor's Office (Section 6106)

The hearing judge found there was insufficient evidence of moral turpitude arising from respondent's evasive responses during the telephone conversation on February 9, 2001, with Kevin Brackett, the South Carolina deputy solicitor. We respectfully disagree. Brackett testified that he specifically asked respondent "what legal matters have you undertaken since you have been in South Carolina." Respondent did not identify either the Amyotte or Odeh matters (and omitted five other matters that she now admits she worked on while in South Carolina), specifying just three cases in her conversation with Brackett. She also misled Brackett about the length of her stay in South Carolina, telling Brackett that she was in South Carolina to resolve a family crisis and would be returning to California shortly. Respondent did not tell Brackett that she had been a resident of South Carolina for almost four and one–half years or that she had an office there (which Brackett then advised respondent he knew about). Respondent testified that she thought Brackett was focusing on the activities of Mario Cruz and was asking about her current caseload only. Brackett testified he made it clear during the conversation that he was investigating possible violations of SCC section 40–5–310 by respondent and was inquiring about the scope of all of her activities while she was in South Carolina. He testified: "And so I asked her were there any other cases [other than the three she disclosed] that she was involved in any way, shape or form, and she assured me that no, that was the extent of her practice in South Carolina." The substance of Brackett's conversation was corroborated by his sworn affidavit, which was prepared shortly after the telephone call of February 9, 2001.

We have reviewed the evidence de novo and find Brackett to be more credible than respondent, who gave disingenuous and inconsistent testimony about the telephone interview.[24] For example, she testified she thought Brackett wanted to focus on Mario Cruz's activities rather than her own, which makes no sense in light of the specific questions Brackett asked her and the specific, albeit incomplete, responses she gave him. Furthermore, at the time she talked to Brackett, she was actively representing Amyotte and was in the process of negotiating a $9,000 settlement on his behalf. (The settlement check arrived six days after Brackett's interview with her.) Even under her own claimed misunderstanding of the nature of the telephone interview, she did not answer honestly as she was required to do.

We cannot overstate the importance of the high degree of honesty that was required when the South Carolina deputy solicitor asked respondent to provide information relevant to the investigation of her possible

24. The hearing judge did not make a credibility ruling as to Brackett, but she did rule that in general respondent was not entirely credible.

UPL activities. Respondent stipulated that Brackett advised her of the focus of his investigation, which should have put her on notice of the nature and import of their conversation. It matters not that the conversation lasted only ten or fifteen minutes; had respondent answered honestly and completely, we have no doubt that the conversation would have been lengthier and more substantive. We have said: "'No distinction can . . . be drawn among concealment, half–truth, and false statement of fact. [Citation.]' [Citation.]." (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Accordingly, we find sufficiently clear and convincing evidence of dishonesty during respondent's telephone interview with the Office of the Solicitor for the State of South Carolina, Sixteenth Judicial District to constitute moral turpitude.

C. Jurisdictional and Due Process Issues

Before turning to the issue of the degree of discipline, we address two points raised by respondent relating to our jurisdiction to hear this matter and to certain due process claims.

1. Jurisdiction

Respondent argues that under the Sixth Amendment to the United States Constitution, the State Bar Court has no jurisdiction to decide respondent's culpability for a felony violation of SCC 40–5–310, which "occurred entirely in South Carolina, and where South Carolina has not first adjudicated the fact of her violation of that statute."

[7] Respondent's jurisdictional argument lacks merit. A disciplinary action may be maintained even though the attorney has been acquitted of criminal charges that have been dismissed based on the same facts. (*Wong v. State Bar* (1975) 15 Cal.3d 528, 531.) Moreover, we have jurisdiction to regulate misconduct even when that misconduct occurred in another state and did not result in an out–of–state criminal conviction. (*Emslie v. State Bar* (1974) 11 Cal.3d 210.) "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." (*In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447; see also § 6049.1, subd. (e) permitting non–expedited disciplinary proceedings against a California attorney based on the attorney's conduct in another jurisdiction.)

In *Emslie v. State Bar*, *supra*, 11 Cal.3d 210, the Supreme Court disbarred a California member for misconduct that occurred in Nevada even though the criminal charges were dismissed by the State of Nevada because of insufficient evidence. The Supreme Court found that the attorney "committed acts *in the nature of* burglary and grand theft, that the commission of these acts constitute[d] moral turpitude and dishonesty on his part, and that the protection of the courts and the integrity of the legal profession requires that he should be disbarred." (*Id.* at p. 230, italics added.) Similarly, as an arm of the Supreme Court, we have jurisdiction to determine whether respondent's unlicensed practice of law in South Carolina "would be" a violation of SCC 40–5–310, regardless of whether such charge has been adjudicated in South Carolina.

2. Due Process

Respondent further argues that because SCC section 40–5–310 is a criminal statute, this court may not discipline her under the due process clauses of the United States and South Carolina constitutions in the absence of a trial by jury and conviction based on evidence beyond a reasonable doubt.[25] The Supreme

25. [8] As discussed herein, we reject respondent's argument that she is entitled to the *procedural* protections in these disciplinary proceedings that are afforded defendants in criminal trials. But, as noted in footnote 11, we do agree with her assertion that in finding a violation of rule 1–300, the *evidentiary* standard in the instant case is that of beyond a reasonable doubt because the applicable South Carolina statute regulating the professions makes UPL a crime. As such, proof beyond a reasonable doubt is constitutionally required. (*In re Winship*, *supra*, 397 U.S. 358, 364.) We recognize that ordinarily in disciplinary proceedings "guilt need not be proved beyond a reasonable doubt [but] must be established by convincing proof and to a reasonable certainty. . . ." (*Emslie v. State Bar*, *supra*, 11 Cal.3d at pp. 225–226.) However, this standard does not apply where "otherwise provided by law." (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327.) We have found that the evidence here satisfies the higher standard of proof.

Court has previously rejected such broad due process challenges to our authority. (See, e.g., *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928.)

[9] Respondent's Sixth Amendment claim to a jury trial may be relevant to criminal proceedings in South Carolina, but such a right does not attach to these disciplinary proceedings in California. It has oft been said " 'that the purposes of the two proceedings are vastly different. A criminal proceeding has for its purpose the punishment of the accused if he is found guilty. A disciplinary proceeding . . . is not intended for his punishment, but is for the protection of the public, the courts, and the legal profession.' " (*Wong v. State Bar*, *supra*, 15 Cal.3d at pp. 531–532, citing *Best v. State Bar* (1962) 57 Cal.2d 633, 637.) For this reason these proceedings "are not governed by the rules of procedure governing . . . criminal litigation. . . . [Citation.]." (*Emslie v. State Bar*, *supra*, 11 Cal.3d at pp. 225–226.) Accordingly, we reject respondent's due process challenge.

III. DISCIPLINE

A. Mitigation

The hearing judge found clear and convincing evidence of "compelling mitigating factors." We consider respondent's mitigative evidence to be significant, although we do not view it as compelling, particularly because we do not agree with the hearing judge's finding that respondent's conduct was surrounded by good faith. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(ii).)[26] Respondent did in fact affirmatively disclose in her retainer agreement with Amyotte that she was licensed in California and would represent him in South Carolina on a *pro hac vice* basis along with local counsel Cruz. She further advised in a letter to opposing counsel in the Odeh case that her practice was in California and she made "appearances only if requested as pro hac vice counsel once a lawsuit is filed, [so] you may want to communicate directly with Mr. Wall, Ms. Odeh's local counsel." On much of her stationery, business cards and similar documents, she identified herself as licensed to practice in California, and denoted her office as an "Out of State Administrative Office." She also associated with local counsel in both the Amyotte and Odeh cases.

Based on these facts, we found, *ante*, that respondent's UPL activities did not involve dishonesty amounting to moral turpitude. However, this evidence is not sufficient to prove good faith mitigation. The State Bar correctly argues that "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. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) Respondent may have honestly believed that she could practice in South Carolina on a *pro hac vice* basis, but as an experienced practitioner who litigated employment discrimination cases in various jurisdictions, we find it was unreasonable for her to proceed on this basis. As the hearing judge acknowledged, "Respondent knew or should have known the proper procedures required to engage in multijurisdictional practice. Yet, she failed to comprehend the need to adhere to basic compliance with the South Carolina and federal procedures." We accordingly do not adopt the hearing judge's finding in mitigation that respondent's conduct was surrounded by good faith.

The hearing judge further found that respondent suffered from extreme emotional distress due to serious marital problems and hostility and racism directed at her by some members of the local population. (Std. 1.2(e)(iv).) The testimony of respondent and her marriage counselor, Stephanie Rauch, establishes this mitigating factor.

Respondent presented eight character witnesses, including a retired superior court judge and three attorneys. (Std. 1.2(e)(vi).) All of them testified as to her diligence, integrity, honesty and dedication to her clients. Five of the witnesses had known respondent for at least 15 years, and most, although not all, of the

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26. All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct.
We take judicial notice of the official State Bar Court records pertaining to respondent's prior record of discipline under Evidence Code section 452.

witnesses were aware of the charges against her. The hearing judge gave this testimony mitigative weight, and so do we.

We make the additional finding in mitigation that respondent cooperated with the State Bar by entering into a stipulation of material facts. (Std. 1.2(e)(v).)

B. Aggravation

We find respondent's strong showing of mitigation is balanced by the equally strong evidence in aggravation. The hearing judge found in aggravation that respondent has a prior record of discipline. (Std. 1.2(b)(i).) Respondent was privately reproved pursuant to a stipulation filed on January 4, 1993, for trust account violations in two client matters. The prior misconduct is similar to some of the misconduct in the current proceedings, and we consider it as a significant aggravating factor. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.)

We adopt the hearing judge's finding that respondent committed multiple acts of wrongdoing based on our determination that respondent is culpable of eleven separate counts of misconduct in two client matters. (Std. 1.2(b)(ii).)

[10] We agree with the hearing judge that respondent's conduct significantly harmed the public, the administration of justice and her clients. (Std. 1.2(b)(iv).) Respondent collected fees from two clients that were illegal and unconscionable. She also interfered with the investigations by the California State Bar and the State of South Carolina by giving false and misleading information.

[11] We also agree with the hearing judge that respondent demonstrated indifference towards the consequences of her misconduct (std. 1.2(b)(v)) since, as of the date of the hearing below, she had not yet refunded the fees and costs she wrongfully collected.

C. Level of Discipline

In making her discipline recommendation, the hearing judge focused on respondent's culpability for the unlicensed practice in South Carolina. We found additional culpability relating to respondent's collection of unconscionable fees on two occasions and her dishonesty in responding to the South Carolina deputy solicitor.[27] We also declined to adopt the hearing judge's findings of moral turpitude in two counts alleging dishonesty surrounding respondent's unauthorized practice. We consider as applicable standards 2.2, 2.3, 2.7 and 2.10.[28] Thus, the suggested range of discipline is a minimum of six months under standard 2.7 to disbarment under standard 2.3.

We look to the standards for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), but we also give due consideration to the decisional law. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30.) The hearing judge focused on cases involving UPL, including *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639; *Chasteen*

27. Our findings in mitigation and aggravation differ somewhat with those of the hearing judge, but on balance do not materially affect our disciplinary recommendation.

28. Standard 2.2(b) provides that violation of rule 4–100 which does not result in wilful misappropriation of entrusted funds "shall result in at least a three month actual suspension . . . irrespective of mitigating circumstances."

Standard 2.3 provides in relevant part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Standard 2.7 provides in relevant part that culpability for "collecting an unconscionable fee for legal services shall result in at least a six month actual suspension . . . irrespective of mitigating circumstances."

Standard 2.10 provides in relevant part: "Culpability of a member of any violation of any provision of the Business and Professions Code not specified in these standards or of a wilful violation of any Rule of Professional Conduct not specified in these standards shall result in reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ."

v. State Bar (1985) 40 Cal.3d 586; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585; and *Farnham v. State Bar* (1988) 47 Cal.3d 429. The discipline in those cases ranged from 30 days' to six months' actual suspension. The hearing judge cited respondent's deception to the State Bar investigator as reason for her recommendation of six months' actual suspension, citing *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200.

However, the hearing judge did not consider discipline cases involving unconscionable fees. For example, in the case of *Finch v. State Bar* (1981) 28 Cal.3d 659, which involved misconduct in five client matters that was at least as serious as the instant case, the Supreme Court imposed six months' actual suspension. In addition to collecting an unconscionable fee, Finch (1) misappropriated client funds in two matters totaling $5,750; (2) forged a client's signature on a settlement check; (3) failed to perform services in three matters; (4) failed to return unearned fees promptly; (5) failed to forward client files and documents to subsequent counsel; and (6) withdrew from representation without protecting his client's interests. (*Id.* at pp. 664–665.) The Supreme Court acknowledged in mitigation that Finch was an alcoholic when the misconduct occurred and that he had since stopped drinking. (*Id.* at p. 665.) The court also favorably noted Finch's acknowledgment of wrongdoing and his cooperation with the proceedings. (*Id.* at p. 666.) Finch had no prior disciplinary record, but this was given little weight in mitigation as he had only been practicing law for three years prior to his misconduct. (*Id.* at p. 666, fn. 3.) Similarly, the court ascribed little weight to Finch's payments of restitution because they had been made under pressure. (*Id.* at p. 666.)

The totality of the circumstances in *Finch* is more serious than in the instant case. The Supreme Court characterized the misconduct as "habitual" warranting "severe" discipline. (*Id.* at p. 665.) But in mitigation, Finch acknowledged his wrongdoing and was on a path towards rehabilitation, whereas respondent has demonstrated an unwillingness to recognize the consequences of her misconduct.

We also consider *In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. 266, where this court placed an attorney on six months' actual suspension because he concealed from his client and the court the statutory fee limit under the Medical Injury Compensation Reform Act (MICRA) and collected a fee that was $266,850 in excess of that limit. We noted that the "gravamen of this case is not simply respondent's collection of an illegal fee. . . . Rather, this case is about respondent's clear overreaching of his own client . . . and profiting handsomely as a result." (*Id.* at p. 284.) We found additional, serious misconduct, including violations of sections 6068, subdivision (b), 6068, subdivision (d), 6106 and rule 7–105. (*Id.* at p. 283.)

In mitigation, we found Harney had impressive character testimony reflecting a long history as an outstanding practitioner prior to his initial disciplinary encounter with the State Bar. (*In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 282.) We viewed as serious aggravation the fact that Harney had not gained any insight "into his duty to protect his client's entitlement to her full share of the recovery vis–a–vis his own self–interest in maximizing his fee." (*Id.* at p. 273.) Because of his intransigence, at least four clients were forced to sue him to obtain the fees he illegally collected. (*Ibid.*) We further considered as "very serious" aggravation Harney's breach of his duty of good faith and fair dealing to his severely disabled client. (*Id.* at p. 284.) Also aggravating was Harney's lack of candor to this court, his prior public reproval for similar misconduct in collecting fees in excess of MICRA limits, as well as "significant" harm to the administration of justice and to his client. (*Id.* at p. 283.) We concluded that six months' actual suspension was warranted because of our "grave concern" that he might continue to ignore the law and his duties to his clients. (*Id.* at p. 285.)

We consider *Harney* to be an apt comparison to the instant case, most significantly because the misconduct involved the collection of an excessive fee accompanied by overreaching of clients, and misrepresentations constituting moral turpitude, which caused harm to clients and the administration of justice. Harney and respondent had strong good character testimony, but both lacked insight into their wrongdoing, having failed to return their ill–gotten fees. However, we view the circumstances in the aggre-

gate to be more serious in *Harney* in that he displayed disdain for his client and the trial court, as well as lack of candor to this court. (*In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 283.) Although the hearing judge found respondent's testimony was "not entirely credible," we do not find on our independent review of the record that respondent has demonstrated contempt for these proceedings. Furthermore, we view Harney's prior disciplinary record to be more aggravating than in this case because it mirrored the misconduct that was of greatest concern in his second disciplinary proceeding, i.e., charging a fee that grossly exceeded the allowable MICRA limit. Finally, we consider the overreaching in *Harney* as more oppressive, given the size of the fee and the severity of the client's disability. (*Id.* at p. 284.)

We also look to *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, where we recommended a one–year actual suspension for misconduct including the collection of an illegal fee for services not performed. Burckhardt also was found culpable of UPL as the result of his representation of a client in a criminal matter while he was on suspension, as well as his improper withdrawal while representing a client, and acts of moral turpitude because he lied to his client on several occasions, telling him that he had filed a tort claim on his behalf, when he had not. In addition, Burckhardt was found culpable of failure to cooperate with the State Bar because he did not respond in any way during the investigation and ultimately defaulted to the entire disciplinary proceeding. We found no evidence in mitigation other than Burckhardt's thirteen years of practice without prior discipline. (*Id.* at p. 350.)

The misconduct in *Burckhardt* reasonably approximates that which occurred in this case. But, in recommending a one–year actual suspension, we focused on Burckhardt's prior discipline, which included a one–year actual suspension. (*In the Matter of Burckhardt*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 350.) We also emphasized that Burckhardt had utterly failed to cooperate, resulting in his default in the proceedings. (*Id.* at p. 351.) Burckhardt's serious prior discipline, which suggested a disciplinary floor of at least one year (see std. 1.7(a)), provides a significant distinction to the instant case, as does his default, which is to be contrasted with respondent's participation and cooperation in these proceedings.

Finally, we consider *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, wherein we recommended a three–year stayed suspension and three years' probation, conditioned on a one–year actual suspension. Yagman was a well–known civil rights attorney, who in one matter involving several clients, was found culpable of accepting an unconscionable fee of $378,175 awarded by the court, in addition to a $44,000 fee, representing 45 percent of the recovery in the same case. (Each plaintiff received $810.) (*Id.* at p. 800.) We found moral turpitude because Yagman knowingly failed to disclose in his fee application to the court that he had a contingency agreement with his clients. (*Id.* at p. 801.) He also was culpable of failing to communicate a settlement offer to his clients, commingling funds, failing to pay funds promptly and failing to account properly. Although we further found Yagman culpable of misappropriation, we did not give any material weight to this finding because of his honest but misplaced reliance on his fee agreement, which we found contained illegal restrictions on his clients' recovery. (*Id.* at p. 805.)

The misconduct in *Yagman* is similar to that in the instant case, except that *Yagman* involves unconscionable fees of far greater magnitude, i.e., $378,175 awarded by the court, *plus* a $44,000 contingent fee. The aggravating circumstances in *Yagman* included multiple acts of misconduct and significant harm to his clients. (*In the Matter of Yagman*, *ssupra*, 3 Cal. State Bar Ct. Rptr. at p. 806.) In mitigation, we found "compelling" evidence of good character, candor in the proceedings, and cooperation in that he entered into stipulation of facts where appropriate. (*Id.* at p. 807.) Unlike respondent, and to Yagman's credit, he promptly took action to resolve the fee disputes with his clients, refunded the disputed fees, and accepted responsibility for his misconduct. (*Ibid.*)

But, as with *Burckhardt*, our discipline recommendation in *Yagman* was in large measure influenced by his prior discipline, which consisted of six months' actual suspension as the result of the collection of an unconscionable fee. (*In the Matter of Yagman*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 807.) We noted

"a disturbing similarity" to the misconduct that was then before us (*ibid.*), and that Yagman "was only recently free of probation from that prior case at the time he committed the offenses now before us." (*Id.* at p. 807.) We accordingly looked to standard 1.7(a) as a basis for our recommendation of one–year actual suspension. (*Id.* at p. 808.) Standard 1.7(a) provides no such justification here for imposing a discipline significantly greater than that recommended by the hearing judge since respondent's prior discipline was a private reproval.

The State Bar cites two misappropriation cases, *Worth v. State Bar* (1978) 22 Cal.3d 707 and *Chang v. State Bar* (1989) 49 Cal.3d 114, in support of disbarment. But, these cases involved neither UPL nor unconscionable fee cases and are not as persuasive as those relied upon by the hearing judge or cited above. As we remarked in *Yagman*, "The gravamen of the case before us is not in the area of misappropriation, but rather in the area of . . . collecting unconscionable fees." (*Id.* at p. 809.) The State Bar also cites *Barnum v. State Bar* (1990) 52 Cal.3d 104, wherein the Supreme Court imposed disbarment for a wide range of misconduct including one count of charging an unconscionable fee. We do not believe the discipline analysis in that case is pertinent to the instant case, because in *Barnum*, the Supreme Court specifically found the attorney "[was] not a good candidate for suspension and/or probation" because the attorney had breached two terms of the prior disciplinary order, defaulted in a prior proceeding and once again was in default in the proceedings before the court. (*Id.* at p. 106.)

We conclude that the hearing judge's recommended discipline was well within the appropriate range based on our analysis of the unconscionable fee cases discussed above, all of which involved substantial additional misconduct. We are mindful that standard 2.7 expressly provides that culpability for charging an unconscionable fee "shall result in at least a six month actual suspension . . . irrespective of mitigating circumstances."[29] But, we do not believe that the six–month minimum suggested by standard 2.7 is necessarily additive, i.e., that actual suspension of greater than six months is prescribed whenever, in addition to the unconscionable fee, there is further misconduct warranting actual suspension.

Our conclusion is reinforced by the framework of the standards. Standard 1.6(a) provides in part that "[I]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions." The Board of Governors thus has expressly adopted a methodology for assessing the appropriate level of discipline in cases involving multiple acts of misconduct that directs us to calculate "the more or most severe of the different applicable sanctions." Had the Board of Governors intended that our discipline recommendations be based upon the mathematical *product* of each applicable standard, it presumably would have so stated.

Ultimately, our discipline analysis is guided by the unique facts of this case. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Because each case is sui generis, the standards of necessity are not binding, although they are to be afforded great weight because "'they promote the consistent and uniform application of disciplinary measures.' (Citation.)." (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

The above discussion of cases involving unconscionable fees is not intended to diminish the import of the hearing judge's analyses of those cases which focus on the unauthorized practice of law. Without question, respondent's UPL activities provided the underpinning to the misconduct that followed, including the unconscionable fees and the misrepresentations to the State Bar and the deputy solicitor for South Carolina. We are concerned that an experienced

29. Mitigating circumstances are balanced by aggravating circumstances in the instant case. Accordingly, we find no additional guidance in standards 1.2(b) and 1.2(e), which in this matter are in equipoise, the one standard suggesting that "a greater degree of sanction . . . for the particular act of professional misconduct . . . is needed" (std. 1.2(b)), while the other suggesting "a more lenient degree of sanction than set forth in [the] standards for the particular act of professional misconduct (std. 1.2(e))."

practitioner such as respondent was ignorant of the most basic rules regarding her license to practice, and as a consequence, the South Carolina Supreme Court was deprived of the ability to ensure she would adhere to that state's standards of professional responsibility. We are equally troubled by respondent's overreaching and her seeming disregard of her obligation to repay her clients.

[12] In spite of these misgivings, in light of the totality of the misconduct that has occurred here, we adopt the hearing judge's recommendation of two years' suspension, stayed, with two years' probation on the condition of six months' actual suspension, and until restitution is paid. The Supreme Court and this court have addressed these very same concerns as well as additional misconduct raising other "grave" concerns in *Finch v. State Bar*, *supra*, 28 Cal.3d 659 and *In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. 266, and nevertheless concluded that six months' actual suspension was sufficient to protect the public, courts and legal profession. While we have carefully considered and followed the level of discipline suggested by the relevant standards, including standard 2.7, we have also given appropriate deference to the decisional law, which provides substantial guidance under the facts of this case. Accordingly, we believe this recommendation appropriately satisfies the six–month minimum suggested by standard 2.7, while giving due consideration to the level of discipline imposed in previous cases where the misconduct was most similar to that which occurred here.

IV. RECOMMENDATION

We recommend that respondent Stephine M. Wells be suspended from the practice of law in the State of California for two years and until she shows proof satisfactory to the State Bar Court of her 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, that execution of that suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first six months of probation and until she has satisfied each of the conditions in this part 1:

   (a) pays restitution to Lance Amyotte, or the Client Security Fund if it has paid, in the amount of $11,000 plus simple interest thereon at the rate of 10 percent per annum from the dates respondent received the fees and costs from Amyotte, the Philpot Law Firm and Huddle House, until paid;

   (b) pays restitution to Hana Odeh, or the Client Security Fund if it has paid, in the amount of $6,500, plus simple interest thereon at the rate of 10 percent per annum from the dates respondent collected the fees and costs from Odeh and AUIA/Thaxton, until paid;

   (c) provides satisfactory proof of all such restitution as prescribed above to the State Bar's Office of Probation in Los Angeles; and

   (d) further provided that if under this provision, respondent's actual suspension remains in effect for more than two years, it shall continue until she shows proof satisfactory to the State Bar Court of her 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, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, her current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation

in Los Angeles, her current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation 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 her probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that 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.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. 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 such completion to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for two years will be satisfied, and the suspension will be terminated.

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 longer of one year after the effective date of the discipline herein or during the period of her actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

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 paragraphs (a) and (c) of that rule within 30 and 40

calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

We Concur:
STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TAMIR OHEB

A Member of the State Bar

No. 99–C–11161

Filed April 27, 2006

SUMMARY

Respondent was convicted of two felony counts of violating Penal Code section 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims. The hearing judge found that the circumstances surrounding respondent's crimes involved moral turpitude as well as violations of rules 1–311, 1–320, and 4–100(A) and recommended that respondent be placed on four years' stayed suspension and four years' probation with conditions, including two years' actual suspension. (Hon. Robert M. Talcott, Hearing Judge.)

The State Bar sought review contending the summary disbarment statute applies to all felonies which involve moral turpitude in their surroundings facts and circumstances.

The review department rejected some of the hearing judge's findings of misconduct, found additional misconduct, adopted the hearing judge's conclusion that the facts and circumstances surrounding respondent's conviction involved moral turpitude based on different grounds, and recommended disbarment.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon, Susan J. Jackson

For Respondent: Tamir Oheb, in pro. per.

HEADNOTES

[1 a–e] **1553.10 Conviction Matters–Standards–Enumerated Felonies–Summary Disbarment**
Current law does not provide for summary disbarment unless the elements of the conviction inherently involve moral turpitude. Thus, the State Bar's argument that summary disbarment applies to all felonies which involve moral turpitude in their surrounding facts and circumstances cannot be

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.

supported as it is contrary to the uniform meaning and interpretation of over 70 years of summary provisions of the State Bar Act flowing from an attorney's criminal conviction.

[2] **1512 Conviction Matters–Nature of Conviction–Theft Crimes**
1521 Conviction Matters–Moral Turpitude–Per Se
In order to warrant classification as a crime inherently involving moral turpitude, the least adjudicated elements of the crime must, as a matter of law, constitute moral turpitude no matter how the crime was committed. Given that either reckless disregard or knowledge of intent of another to commit insurance fraud is an element of respondent's violation of Penal Code section 549, this offense does not inherently involve moral turpitude, but rather is an offense for which there is probable cause to believe involves moral turpitude.

[3 a, b] **162.11 Proof–State Bar's Burden–Clear and Convincing**
Although the State Bar may prove an attorney's misconduct with clear and convincing circumstantial evidence, the fact that respondent knew his associate was buying personal injury cases involving vehicles with multiple occupants, had resigned with disciplinary charges pending, had stolen and forged settlement checks from respondent, and had negotiated settlements in cases he referred to respondent, was not clear and convincing evidence that respondent knew of the staged accidents when he was representing the clients his associate referred to him.

[4] **162.11 Proof–State Bar's Burden–Clear and Convincing**
Where the record supports an inference beneficial to respondent as equally as it supports an inference adverse to respondent, the inference favoring the attorney must be accepted.

[5] **191 Effect/Relationship of Other Proceedings**
1512 Conviction Matters–Nature of Conviction–Theft Crimes
An attorney's conviction of a crime pursuant to a plea of nolo contendere is conclusive proof that the attorney committed all acts necessary to constitute the offense. Thus, respondent's convictions on two counts of violating Penal Code section 549 based on respondent's recklessness and not his actual knowledge conclusively establish that he acted in reckless disregard of the unlawful intentions of others.

[6] **1523 Conviction Matters–Moral Turpitude–Facts and Circumstances**
Where respondent's convictions do not involve moral turpitude per se, the circumstances surrounding respondent's convictions are reviewed to determine whether they in fact involved moral turpitude or other misconduct warranting discipline. In reviewing the circumstances surrounding respondent's conviction, the fact finder is not restricted to examining the elements of the crime, but rather may look to the whole course of respondent's conduct which reflects upon his fitness to practice law because it is the misconduct underlying respondent's conviction, as opposed to the conviction itself, that warrants discipline.

[7] **159 Evidence–Miscellaneous**
162.20 Proof–Respondent's Burden
Where respondent failed to corroborate or substantiate his testimony with evidence that one would have expectedly produced, respondent's unexplained failure to produce such evidence is a strong indication that respondent's testimony is not credible.

[8] **1523 Conviction Matters–Moral Turpitude–Facts and Circumstances**
Where respondent knew that his associate was buying cases, where respondent paid his associate for buying, referring, and working on referred cases, and where respondent split attorney's fees on the referred cases in violation of rule 1–310, the facts and circumstances of respondent's misconduct involved moral turpitude.

[9 a, b] **1523 Conviction Matters–Moral Turpitude–Facts and Circumstances**
Where respondent entered into a business relationship with a resigned attorney without investigating him, where respondent knowingly permitted the resigned attorney to interview and sign up clients without respondent's knowledge or approval, and where respondent knowingly failed to monitor the cases the resigned attorney referred to him, such conduct establishes an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends. Respondent's manner and method of practicing law during his association with the resigned attorney and respondent's failure to protect himself from the actions of the resigned attorney were reckless and therefore involved moral turpitude.

[10] **1523 Conviction Matters–Moral Turpitude–Facts and Circumstances**
Respondent's misconduct in falsely recording in his financial and bank records the nature of his payments to a resigned attorney with the specific intent to conceal his improper fee splitting with a nonattorney from, inter alia, the State Bar involves moral turpitude.

[11] **1523 Conviction Matters–Moral Turpitude–Facts and Circumstances**
Where respondent learned that cases referred to him by a resigned attorney were based on staged accidents and thereafter failed to inform the clients in those cases that he had substantial information suggesting that the clients knowingly made a false claim based on a staged accident or give whatever legal counsel was appropriate, respondent's wholesale failure to competently represent these clients involves moral turpitude.

[12 a, b] **1531 Conviction Matters–Other Misconduct Warranting Discipline–Found**
Although respondent's violations of rules 1–311 and 4–100(A) did not involve moral turpitude, they did constitute additional misconduct warranting discipline.

[13] **691 Aggravation–Other–Found**
The fact that respondent intentionally engaged in misconduct for personal gain and, in fact, personally profited from his misconduct are aggravating circumstances.

[14] **735.30 Mitigation–Candor–Bar–Found but Discounted**
Because respondent's admissions of culpability for violating rules 1–320 and 1–311 were easily provable violations, his cooperation during the disciplinary proceedings did not warrant significant mitigative weight.

[15] **795 Mitigation–Other–Declined to Find**
Naivete had nothing to do with respondent's decision to enter into a business relationship with a resigned attorney that involved capping and fee splitting. Most importantly, naivete had little if anything to do with the criminal recklessness respondent engaged in which resulted in two felony convictions.

[16] **740.32 Mitigation–Good Character–Found but Discounted**
The fact that respondent's good character witnesses did not establish that they possessed adequate knowledge of respondent's convictions or of the facts and circumstances surrounding them and the fact that at least two witnesses rarely saw or interacted with respondent reduced the mitigating weight given to their testimony.

[17] **1610 Conviction Matters–Discipline–Disbarment**
Where the facts and circumstances underlying respondent's felony conviction involved moral turpitude due to respondent's capping, fee splitting, recklessness, deceit, and repeated failures to competently represent his clients, where the facts and circumstances involved additional misconduct warranting discipline, where there was little weight assigned to respondent's cooperation with the State Bar and to his evidence of good character, and where respondent engaged in multiple acts of misconduct, profited from that misconduct, harmed clients and insurers and failed to complete restitution, the appropriate level of discipline was disbarment.

ADDITIONAL ANALYSIS

Culpability
Found
252.21 Rule 1–310 [former 3–103]
280.01 Rule 4–100(A) [former 8–101(A)]
490.01 Miscellaneous Misconduct
Not Found
Aggravation
Found
521 Multiple Acts
582.10 Harm to Client
588.10 Harm–Generally
591 Indifference
Mitigation
Found but Discounted
710.33 No Prior Record
740.33 Good Character
Standards
801.30 Effect as Guidelines
801.45 Deviation From–Not Justified
Discipline
1552.10 Conviction Matters–Standards–Moral Turpitude–Disbarment
Other
135.84 Procedure–Revised Rules of Procedure–Division VIII, Specific Proceedings–Conviction

OPINION

STOVITZ, P. J.:

In this conviction referral proceeding, the State Bar sought our review of a hearing judge's decision recommending that respondent, Tamir Oheb, be placed on four years' stayed suspension and on four years' probation with conditions, including two years' actual suspension. On July 16, 2004, we filed our opinion in this case, concluding that summary disbarment was not authorized under Business and Professions Code section 6102, subdivision (c), but finding that the facts and circumstances surrounding the conviction of respondent, Tamir Oheb, of violation of Penal Code section 549 involved moral turpitude. We accordingly adopted the hearing judge's recommendation that respondent be suspended for four years, that execution be stayed and that respondent be actually suspended for two years, retroactive to October 1, 2001, the start of his interim suspension, and that his actual suspension should continue until he makes an acceptable showing under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, Rules of Procedure of the State Bar, title IV (Standards).

The State Bar sought Supreme Court review of our decision, arguing that disbarment is the appropriate discipline to recommend. In the alternative, the Bar sought a remand to us to reconsider the degree of discipline.

By order of June 15, 2005, the Supreme Court remanded the matter to us with directions to vacate our recommendation and reconsider it in light of standard 3.2. (Cal. Rules of Court, rule 953.5.)[1]

After an opportunity for the parties to brief the issue on remand, we have reconsidered our earlier discipline recommendation and now recommend, for the reasons stated, that respondent be disbarred.

I. PROCEDURAL HISTORY.

In September 2000, after pleading nolo contendere, respondent was convicted in the Los Angeles Superior Court on two felony counts of violating Penal Code section 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims.[2] Once the State Bar notified us of respondent's convictions, we filed an order in August 2001 that placed respondent on interim suspension because respondent's convictions were for (1) felony crimes and (2) crimes which there is probable cause to believe involve moral turpitude.[3] (Bus. & Prof. Code, § 6102, subd. (a); Cal. Rules of Court, rule 951(a); Rules Proc. of State Bar, rule 320(a).) In that same

1. Because of the Supreme Court's remand order, and pending our further order, we depublished our earlier opinion in *In the Matter of Oheb*. (See 4 Cal. State Bar Ct. Rptr. 697.) For ease of reference, we refer to that opinion as our "2004 opinion." We have construed the Supreme Court's order that we vacate our 2004 opinion as to our discussion and recommendation of the degree of discipline. (2004 typed opinion, Sections VII. and VIII., pp. 32–38.) We therefore re-adopt Sections I. through VI., pp. 3–32, of our 2004 opinion; and, accordingly, republish our previous statement as to procedural history, discussion of ineligibility of this case for summary disbarment, findings of fact, conclusions of law and discussion of aggravating and mitigating circumstances. In order to restore the portions of our 2004 opinion which we re-adopt, we set them forth anew, utilizing the same heading designations as in the earlier opinion.

2. Penal Code section 549 provides: "Any firm, corporation, partnership, or association, or any person acting in his or her individual capacity, or in his or her capacity as a public or private employee, who solicits, accepts, or refers any business to or from any individual or entity with the knowledge that, or with reckless disregard for whether, the individual or entity for or from whom the solicitation or referral is made, or the individual or entity who is solicited or referred, intends to violate Section 550 of this code or Section 1871.4 of the Insurance Code [by making false or fraudulent insurance claims] is guilty of a crime, punishable . . . ." Respondent pleaded nolo contendere only to the "with reckless disregard" portion of section 549 and not to the "with the knowledge" portion. In light of respondent's plea agreement, the People found it unnecessary to take a position on whether respondent had actual knowledge that his clients or the individual who referred the clients to him intended to make false or fraudulent insurance claims. At the hearing on respondent's plea agreement, the People told the court, that it was leaving for the State Bar the issue of whether respondent had such actual knowledge.

3. Either one of these grounds alone would authorize respondent's interim suspension. (Bus. & Prof. Code, § 6102, subd. (a).)

August 2001 order, following the customary practice for such crimes, we also referred respondent's convictions to the hearing department for a trial on the issues of whether the facts and circumstances surrounding the commission of the crimes involved moral turpitude (Bus. & Prof. Code, §§ 6101, 6102) or other misconduct warranting discipline (see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494); and, if so, for a recommendation as to the discipline to be imposed. (Cal. Rules of Court, rule 951(a); Rules Proc. of State Bar, rule 320(a).)

After he was placed on interim suspension in California under our August 2001 order, respondent practiced law in Las Vegas until he was suspended in Nevada in February 2002, which was only about two months before the State Bar Court trial. The record does not indicate whether respondent was physically present in Las Vegas or anywhere else in Nevada when he practiced law after his interim suspension in California.

After a trial of almost five days, the hearing judge found that the circumstances surrounding respondent's crimes involved moral turpitude because respondent accepted personal injury cases with knowledge that they were being purchased and took steps to conceal the fact that he was splitting attorney's fees with a nonattorney. The hearing judge further found that the circumstances surrounding respondent's convictions also involved respondent's (1) willful violation of rule 1-311 of the Rules of Professional Conduct of the State Bar[4] by employing a nonattorney whom respondent knew had previously resigned from the State Bar with disciplinary charges pending without complying with the requirements of rule 1-311, (2) willful violation of rule 1-320 by improperly entering into financial arrangements with nonattorneys to obtain clients, and (3) willful violation of rule 4-100(A) by making certain improper deposits into and payments from his client trust account.

After considering aggravating and mitigating evidence, which we discuss *post*, the hearing judge made his recommendation of four years' stayed suspension, four years' probation, and two years' actual suspension, and this appeal was filed by the State Bar.

II. CURRENT LAW DOES NOT PROVIDE FOR SUMMARY DISBARMENT UNLESS THE ELEMENTS OF THE CONVICTION INHERENTLY INVOLVE MORAL TURPITUDE.

[1a] At the outset, we discuss the State Bar's argument that the summary disbarment statute (Bus. & Prof. Code, § 6102, subd. (c)[5]), applies to all felonies which involve moral turpitude in their surrounding facts and circumstances and not just to those where the elements of the conviction involve moral turpitude per se. As we shall discuss, we disagree with the State Bar. In our view, the State Bar's position is contrary to the uniform meaning and interpretation of over 70 years of summary provisions of the State Bar Act flowing from an attorney's conviction of crime.

The State Bar offers several points in support of its argument. However, we have concluded that its points do not offer the support the State Bar claims.

Prior to 1955, the State Bar Act and predecessor laws provided for automatic disbarment upon an attorney's final conviction of a crime involving moral turpitude. (E.g., *In re Smith* (1967) 67 Cal.2d 460, 462; *In re Collins* (1922) 188 Cal. 701, 707–708.) It is clear that under the pre–1955 law, automatic disbarment was reserved for only those crimes which inherently involved moral turpitude. The Supreme Court made this point succinctly in *In re Hallinan* (1954) 43 Cal.2d 243, 248: "Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under [the State Bar Act]." Indeed, in those cases not inherently involving moral turpitude, before and after the earlier automatic disbarment law, the Supreme Court uniformly referred them to the State Bar not only for an evidentiary hearing on the question of whether the surrounding facts and circumstances involved moral turpitude or

4. All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

5. All further references to section(s) are to the Business and Professions Code unless otherwise indicated.

misconduct warranting lawyer discipline, but also for a recommendation as to the degree of discipline to impose depending on what was shown by the surrounding facts and circumstances. (In addition to *In re Hallinan*, *supra*, at pp. 253–254, see *In re Kelley*, *supra*, 52 Cal.3d 487, 492; *In re Strick* (1983) 34 Cal.3d 891, 897; *In re Higbie* (1972) 6 Cal.3d 562, 568–569; *In re Langford* (1966) 64 Cal.2d 489, 490.)

Effective January 1, 1986, a summary disbarment law was enacted in the State Bar Act. Although it is not the text of the law at issue here, its history is instructive to the issue in the 1996 law which is before us. The law between 1986 and 1997 provided for summary disbarment if "an element" of the convicted felony was the "specific intent to deceive, defraud, steal, or make or suborn a false statement." Other required elements not pertinent here were that the crime either occurred in the practice of law or such that the attorney's client was a victim. (See *In re Utz* (1989) 48 Cal.3d 468, 482, fn. 10.)

Although this law was cited by the Supreme Court in four decisions, none of these citations touch the issue under review. (See *In re Ewaniszyk* (1990) 50 Cal.3d 543, 549–550 [retroactive applicability need not be decided as disbarment was warranted irrespective of the summary disbarment law]; *In re Utz*, *supra*, 48 Cal.3d 468, 482–483 [insufficient basis to impose discipline under the 1985 summary disbarment law, as to the requirement that the offense occur in the practice of law]; *In re Basinger* (1988) 45 Cal.3d 1348, 1358, fn. 3 [since, inter alia, the State Bar did not rely on summary disbarment statute below, its applicability need not be decided]; *In re Ford* (1988) 44 Cal.3d 810, 816, fn. 6 [question of retroactive application of § 6102, subd. (c) need not be decided].)

Effective January 1, 1997, the law eliminated the requirement that the crime had to have occurred in the practice of law or such that the attorney's client was a victim and, as pertinent here, provided for summary disbarment "if the offense is a felony under the laws of California, the United States, or any state or territory thereof, 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 State Bar maintains that whatever the viability of the Supreme Court's earlier requirement limiting summary disbarment to crimes that inherently involve moral turpitude, that limit did not survive the 1996 amendments. We disagree.

[1b] The State Bar advances several arguments for its theory that a crime is eligible for summary disbarment even if it does not inherently involve moral turpitude. First it contends that the plain language of the 1996 amendment to section 6102, subdivision (c) demonstrates its applicability to crimes not inherently involving moral turpitude. But its explanation does not provide support for its argument. Indeed, we believe that the plain meaning of this provision, is to read the reference to moral turpitude as relating to "an element of the offense" just as other factors included in the statute relate. That would make the statute fully compatible with the long–standing judicial interpretation.

[1c] The State Bar also contends that the legislative history of the 1996 amendment to section 6102, subdivision (c) establishes its broader applicability of the law. According to the State Bar, the original form of this amendment contained the word "element" twice, in this array: "After the judgment of conviction . . . has become final . . . , the Supreme Court shall summarily disbar the attorney 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 an element of the offense involved moral turpitude." The State Bar argues that this original draft of the bill made clear that the moral turpitude element applied only to crimes inherently involving moral turpitude and that when the Legislature removed the second reference to "element of the offense" in the bill that that was a legislative intent that the provision relate to crimes not inherently involving moral turpitude. However, the State Bar concedes that there is no discussion by any legislator as to this subject and in our view, it is an equally reasonable conclusion that the deletion was made simply as a stylistic avoidance of redundancy. (Cf. *Price v. State Bar* (1982) 30 Cal.3d 537, 541 [Legislature's failure to remove a provision in section 6131 was deemed an oversight].) Moreover, given the nature of the statutory amendments, the Legislature is assumed to be aware of and to have acquiesced

in the lengthy, uniform history of the Supreme Court in requiring a crime inherently involving moral turpitude before invoking summary disbarment procedures (see *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734), and we see no evidence that the Legislature intended to alter this judicial construction. Indeed, any discussion that the State Bar does cite us to from the legislative history is merely explanatory and consistent with the long–standing interpretation that the crime must inherently involve moral turpitude as a precondition for summary disbarment. In that connection, we find it significant that, when defining an out–of–state felony which would qualify under section 6102 for either interim suspension or summary disbarment, the Legislature expressly referred to the "elements" of the offense. (§ 6102, subd. (d)(2).) Finally, we note that the legislative procedure for imposing final discipline after an attorney's criminal conviction for those offenses ineligible for summary disbarment, continues to recognize either crimes "involving" moral turpitude or, crimes in which the "circumstances" surrounding the commission involve moral turpitude. (§ 6102, subd. (e).) This is to us a strong legislative recognition that the term "involve" or "involving" moral turpitude as used in section 6102 means that the crime inherently involves moral turpitude as a matter of law, just as *In re Hallinan*, *supra*, 43 Cal.2d 243, contemplates.

[1d] The State Bar's citation of Supreme Court decisional law to support its position is similarly unavailing, for, if anything, *In re Lesansky* (2001) 25 Cal.4th 11, 16, appears to us to be guidance that the Supreme Court interprets the 1996 summary disbarment law in the same essential manner as the law prior to 1955, in requiring moral turpitude to be inherent in the criminal conviction as a prerequisite to summary disbarment. In *Lesansky*, the attorney claimed that his conviction of attempted child molestation under Penal Code sections 664 and 288, subdivision (c)(1), was not eligible for summary disbarment as it was not a crime inherently involving moral turpitude. The Supreme Court disagreed, stating that "An offense *necessarily* involves moral turpitude if the conviction would *in every case* evidence bad moral character. [Citing *In re Hallinan, supra*, 43 Cal.2d 243.] This is a question of law to be determined by this court. [Citation.]" (*In re Lesansky, supra*, 25 Cal.4th at p. 16, original italics.) Although Lesansky's crime had been classified as one which involves moral turpitude per se, unlike respondent's conviction of Penal Code section 549, if the Supreme Court determined that the 1996 summary disbarment law's "moral turpitude" element could be triggered by a lesser requirement than by a crime that inherently involved moral turpitude, it presumably would have so indicated instead of following its long–standing approach.

Similarly unavailing to the State Bar's argument is the State Bar's reliance on rule 606 of the Rules of Procedure of the State Bar which allows us to refer a conviction to the hearing judge solely to resolve factual issues regarding whether the criteria are present for summary disbarment. As the history of that rule reveals, it was adopted solely in response to the legislative enactment of criteria that existed until January 1, 1997, that in order to be eligible for summary disbarment, a crime must have occurred in the practice of law or in a way that a client was a victim. Since the presence or absence of those elements were not always obvious from the bare record of conviction, we were given referral authority to ascertain whether the statutory elements existed. Rule 606 did not, however, change the type of crimes eligible for summary disbarment.

[1e] Finally, we cannot agree with the policy arguments the State Bar cites for reading section 6102, subdivision (c) as applicable to crimes not inherently involving the prescribed elements. We simply observe that the policy of limiting crimes eligible for summary disbarment under the 1996 law to those which inherently involve the statutory elements appears the far better policy, for those crimes then depend on a *legal* definition of the crime's elements and are uniformly applied to all such convictions of the same crime, rather than turning on slight variations in facts and circumstances yielding varying moral turpitude outcomes for the same conviction, as can occur in every crime of an attorney not involving per se the prescribed summary disbarment elements. (Among many such crimes which could have a varying outcome, see, e.g., *In re Higbie*, *supra*, 6 Cal.3d 562; *In re Langford*, *supra*, 64 Cal.2d 489.)

[2] We have reviewed our order classifying this offense as one which there is probable cause to

believe involves moral turpitude, and we adhere to that classification. In order to warrant classification as a crime inherently involving moral turpitude, the least adjudicated elements of the crime must, as a matter of law, constitute moral turpitude no matter how the crime was committed. (Cf. *People v. Castro* (1985) 38 Cal.3d 301, 317 [classification of moral turpitude crimes for witness impeachment purposes].) Given that either reckless disregard or knowledge of intent of another to commit insurance fraud is an element of the offense — here respondent pled to the "reckless disregard" element — we cannot hold that Penal Code section 549 inherently involves moral turpitude.

III. FINDINGS OF FACT.

Turning to the facts and circumstances surrounding respondent's conviction, our independent review causes us to make the following findings of fact, which are established by clear and convincing evidence.

A. Respondent's background.

In 1982, when respondent was 17, his father had a severe stroke. The next year, respondent's family moved from New York to Tarzana, California, where they lived in an apartment near one of respondent's uncles. Respondent testified that, ever since his family moved to California in 1983, he has worked and provided 80 percent of his family's income. While respondent went to law school at night, he worked full-time during the day and all but completely supported his sister when she was in college in the late 1980's and early 1990's, paying for her food and college tuition, buying her a car, and paying for its insurance and related expenses.

Sometime while in law school, respondent moved out of his family's apartment and into a house that he purchased in the Northridge area. Thereafter, his parents purchased and moved into a house in or near Northridge. Respondent testified that, in addition to having to pay his monthly mortgage of about $2,000, he was responsible for his parents' mortgage.

After respondent graduated from law school in May 1992, he took and passed the July 1992 California General Bar Examination, was admitted to the practice of law in California on December 14, 1992, and has been a member of the State Bar since that time. Sometime thereafter, respondent was admitted to practice in Nevada. After his admission to practice, respondent received multiple job offers with salaries ranging from $25,000 to $30,000 a year. Respondent rejected each of those offers as insufficient to pay his living expenses and the financial assistance he gave his family. Respondent married in May 1995, and his first child was born in August 1996 and his second in July 1999. Respondent's wife did not work.

B. Respondent's law practice.

In early 1993, respondent opened his own law practice, which he limited almost exclusively to plaintiffs' personal injury. Except for the few months when he had a small office in Reseda, California, respondent practiced law out of his house. During that time, respondent had privileges in what is referred to as a "Fegen Suite," a law office suite where attorneys paid for office privileges such as receiving mail, forwarding their telephone calls, and meeting with clients in a conference room. Then, in October 1996, respondent moved into an office in Tarzana, California, which he thereafter maintained as his permanent and principal office. Over the years, respondent also opened "satellite" offices in a number of other cities such as Woodland Hills, California and Las Vegas, Nevada. Respondent testified that almost all of his satellite offices were open only for a short while because they were not profitable.

Respondent personally kept his financial records, maintaining particularly meticulous bank records for each of his accounts, including his client trust account. For each bank account, he kept a file containing a copy of each check written on the account and another file containing a copy of each check deposited into the account. Respondent was the only one who wrote or signed checks on his bank accounts.

When a case settled, respondent personally prepared the "settlement sheet," which set forth the division of the settlement proceeds, i.e., between the client, respondent, medical providers, and any other party entitled to a portion of the proceeds. The client had to approve division of the settlement proceeds

and sign the settlement sheet before respondent would pay out any proceeds.

One morning in October 1997, chiropractor Richard Monoson telephoned respondent. Respondent had met and dealt with both Monoson and Jack Hannah, Monoson's office manager and only employee, some 10 years earlier while respondent was in law school and worked as a law clerk for an attorney who referred clients to Monoson. Over the years, Monoson befriended respondent and, inter alia, employed respondent for three or four months in 1992 while he waited for his bar results at a salary of either $200 or $300 per week and apparently even loaned respondent money. Respondent considered Monoson like a brother; believed that Monoson saved his and his family's lives by employing him; and allegedly relied greatly on Monoson's purported honesty, integrity, and good judgment. From the time he started practicing law in 1993 through mid–December 1998, respondent referred all of his clients to Monoson for treatment.

When Monoson telephoned respondent that morning in October 1997, he asked respondent to come to his chiropractic office in Encino that afternoon to meet Kenneth Gottlieb, whom Monoson described only as a former attorney who could increase respondent's practice. When respondent went to Monoson's office that afternoon, Monoson introduced him to Gottlieb as well as to Keith R. Ohanesian, a chiropractor with whom Monoson did business and who knew Gottlieb, and Tony Folgar, an investigator who worked with Gottlieb.

At the meeting, no one told respondent that Gottlieb resigned with disciplinary charges pending in July 1992 or that Gottlieb had a criminal record. After the introductions were made that afternoon, the men met for about 30 minutes. At that meeting, respondent learned that Monoson just met Gottlieb the day before; that Gottlieb was working with Attorney Ronald Hettena in Hettena's personal injury practice, but that Gottlieb was looking for another attorney to work with because Hettena was allegedly closing his practice and moving out of state; and that Gottlieb was going to keep and to continue working out of an office in Van Nuys, California that he had shared with Hettena. In addition, respondent was told and believed that Gottlieb had been a very successful "attorney for 25 years plus, that [Gottlieb] was a litigator, [that Gottlieb] had worked for a number of famous attorneys," that Gottlieb had a "huge book of business" that he was willing to refer to respondent, and that he was willing to teach respondent how to litigate.

Respondent soon learned of Gottlieb's resignation when he looked Gottlieb's membership status up on the State Bar's web site. Even though the State Bar's web site indicated that Gottlieb's resignation was with disciplinary charges pending, it did not identify the pending charges, and respondent never requested that information from the State Bar. The State Bar's official public records, although not then available on its web site, disclosed that Gottlieb had been publicly reproved in May 1986 and that the disciplinary charges pending against Gottlieb involved both Gottlieb's September 1991 convictions on two counts of insurance fraud, two counts of grand theft, and two counts of forgery, and Gottlieb's failure to comply with rule 955 of the California Rules of Court as directed in an order we filed in fall 1991 placing Gottlieb on interim suspension.[6]

Respondent not only failed to seek additional information from the State Bar on Gottlieb's resignation, he waited a number of weeks before he even asked Gottlieb for more information. Respondent testified that, when asked, Gottlieb explained "that he had some issue with the State Bar over some – a med – a med pay matter or lien of a doctor that took years and years to resolve and he finally just resigned." Respondent also testified that he believed Gottlieb's explanation. While it is true that a number of respondent's witnesses corroborated respondent's testimony as to the basic content of Gottlieb's explanation, they did not corroborate respondent's testimony that he believed the explanation.

6. In 1994, Gottlieb was again convicted of insurance fraud involving staged automobile accidents and of grand theft. At that time, he was also convicted of money laundering. Because Gottlieb resigned in 1992, Gottlieb's public records at the State Bar did not disclose his 1994 convictions.

As the hearing judge correctly found, the parties agreed at the meeting that Gottlieb would transfer all of the personal injury cases that he had with Attorney Hettena to respondent, that respondent would be substituted in place of Hettena as the attorney of record in those cases, that Gottlieb would find and, when necessary, buy new cases and refer them to respondent to be the attorney of record, that Gottlieb would work for respondent on the cases he referred to respondent, and that the clients would be sent to either Monoson or Ohanesian for treatment. Moreover, as the hearing judge correctly found, respondent and Gottlieb agreed at the meeting to split the attorney's fees on each case Gottlieb referred to respondent: 25 percent to respondent and 75 percent to Gottlieb whenever Gottlieb had to buy the case or otherwise had to pay money to someone in connection with the case, and 50 percent each whenever Gottlieb did not have to buy the case or otherwise have to pay for some expense related to the case or whenever Gottlieb bought the case from a specific individual who did not charge much for cases.

In sum, by the end of this 30–minute meeting, respondent had entered into a business relationship with Gottlieb, whom he had just met, in which Gottlieb would buy and refer cases to respondent, work on those cases with respondent, and teach respondent how to litigate and in which respondent was to pay Gottlieb, under their fee splitting agreement, either 75 or 50 percent of any attorney's fees recovered in each case Gottlieb brought into respondent's law office. Respondent did this even though he knew that his fee splitting agreement with Gottlieb violated the Rules of Professional Conduct and that he viewed fee splitting agreements with nonattorneys as "not legal." However, respondent did testify that his law practice had slowed down considerably by October 1997, causing him severe financial difficulties, a great deal of anxiety, and to become very scared that he and his parents would lose their homes. Respondent and Gottlieb promptly began working together in mid–October 1997 and stopped working together in mid–December 1998.

Respondent admits that he agreed to permit Gottlieb, for the first couple of months of their business relationship, to operate his office in Van Nuys as an extension of respondent's law office and to work on the cases Gottlieb referred to him in that Van Nuys office without respondent's or another attorney's supervision. In fact, as late as February or March 1998, the name "Law Offices of Tamir Oheb" was still on the front door of Gottlieb's office and on the office building's central directory. About one month after the beginning of their relationship, i.e., about November 1997, and during the time Gottlieb was operating his Van Nuys office as an extension of respondent's law office, three settlement checks for clients Gottlieb referred to respondent were sent to Gottlieb's office. Gottlieb stole those checks, forged respondent's signature on them, and attempted to cash them, but was unable to do so. Respondent became very upset when he learned of Gottlieb's theft and forgery. One Sunday in November 1997, respondent, Gottlieb, Monoson, and Ohanesian met at Monoson's home to discuss the matter. Respondent told Gottlieb " 'That's it. You know, you forged my check[s]. I can't work with you. I mean, you're crazy.' " In addition, respondent told Monoson that he would never speak to or do business with him again if he kept doing business with Gottlieb. However, Monoson and Gottlieb quickly convinced respondent not to end his and Gottlieb's business relationship.

Respondent testified that Gottlieb pleaded that he was desperate and that he had been pressured into stealing the checks, forging respondent's signature, and trying to cash them. However, neither respondent nor Gottlieb offered any details of this pressure. Respondent further testified that Gottlieb promised to move into respondent's law office, to be in respondent's office everyday from 9:00 a.m. to 5:00 p.m., to have all the files under respondent's nose "all the time," and to let respondent read and sign everything.[7]

Monoson pleaded that he had provided treatments to and obtained x–rays on the clients in many

7. However, Gottlieb had already previously agreed to bring all the client files into respondent's Tarzana office after the first couple of months and to work on them there under respondent's supervision. In any event, throughout his relationship with Gottlieb, respondent periodically permitted Gottlieb to take client files to Gottlieb's Van Nuys office and to work on them there without attorney supervision. Gottlieb did not always return the files as he agreed, and respondent had to instruct him to go to his Van Nuys office and get the files and return them to respondent's office or had to have his secretary telephone Gottlieb and tell him to bring the files back to respondent's office.

of the cases that Gottlieb referred to respondent and that he, therefore, had a real financial interest in those cases, which would be jeopardized if respondent terminated his relationship with Gottlieb. Moreover, Monoson assured respondent that Gottlieb was " 'a good guy' " and promised to watch Gottlieb and to " 'make sure that everything's good and everybody's treating' [for their injuries]."

Finally, at the meeting at Monoson's home, respondent asked Gottlieb to modify the fee splitting agreement to give respondent more than 25 percent of the recovered attorney's fees because it was respondent's law license. Gottlieb refused and again explained that he could not agree to give respondent anymore than 25 percent because Gottlieb had to pay for the cases out of his 75 percent share.

In total, Gottlieb referred 50 to 60 automobile accident injury cases involving about 150 plaintiffs to respondent. Virtually all of the Gottlieb referred cases were based on fraudulent insurance claims arising from staged automobile accidents under a sophisticated scheme involving, at least, Monoson, Ohanesian, Gottlieb, and possibly Folgar. In a typical case, Monoson and Ohanesian bought the cars that were involved in the staged accident, which were ordinarily older model cars, and fraudulently obtained and paid for insurance on the cars. The insurance they bought on these older cars very frequently included property damage coverage and, about 85 percent of the time, included medical payment coverage ("med-pay"), which are both additional cost coverage items. Gottlieb and Folgar located the individuals to act as the fraudulent drivers and passengers, and Folgar apparently staged the automobile accidents, which were done by crashing the cars in an empty parking garage without any of the fraudulent drivers and passenger actors being present.

The hearing judge found that respondent's testimony that he did not know about the staged accidents was credible and supported by Gottlieb's and Hannah's testimony, which the hearing judge also found credible, that they did not tell respondent about the staged accidents because they were afraid that he would not participate in filing the insurance claims on the accidents. For reasons we discuss *post*, we adopt this finding.

Gottlieb first met with the fraudulent drivers and passengers, collected their personal information, and had them sign medical records releases and contingent fee agreements retaining respondent as their attorney. When Gottlieb signed these individuals up as respondent's clients, he virtually always did so outside of respondent's office and without respondent's supervision or even knowledge. Gottlieb told the clients the story of how the fake accident that they were "involved in" occurred and how they were supposed to have been injured in it. He also coached them to make sure that they remembered these necessary details before they met respondent, gave insurance statements, or had depositions taken.

Once Gottlieb signed up a new client and set up the client's file, he took the file into respondent's Tarzana office and put it in the file cabinet drawers reserved for Gottlieb's referrals. Respondent testified that, at some point during his representation of each client, he reviewed the client's file in detail and never discovered anything that led him to believe that fraud might be involved in a case.

More specifically, respondent testified that he reviewed every client file to, inter alia, make sure that it contained all the necessary documentation,[8] determined whether there was a limitations issue, reviewed how the accident happened and determined whether it made "sense," verified that the extent of the client's injuries were consistent with the property damage, determined whether he needed to research policy limits, and "see if everything is signed in the right place, if the dates are where they're supposed to be, if everything is in place." Respondent's testimony is corroborated by the credible testimony of David Loe, an attorney who referred between 10 and 20 personal injury cases to respondent between 1998 through respondent's interim suspension in 2001. Loe testified that respondent personally checked the validity

8. Respondent did not specify what documentation he considered to be necessary.

of the cases he referred to respondent to determine whether they involved staged accidents by personally interviewing the prospective clients, reviewing the police reports, and questioning him in great detail about cases, seeking such information as to how Loe got the case. Loe also testified that respondent told him that respondent followed these extensive review/investigative procedures every time respondent accepted a case that has been referred to him.

Respondent admitted that he often did not even meet the clients in the Gottlieb referred cases until an insurance company or someone wanted to take the clients' statements. However, respondent also admits that he was not always present when a client's statement was taken. Respondent explained that, whenever it was inconvenient for him to be present when a client's statement was taken, he sent Gottlieb to appear with the client.

Respondent permitted Gottlieb to work on the cases Gottlieb brought into the office with very little supervision or instruction. In addition to having Gottlieb appear with clients when their statements were taken, respondent had Gottlieb negotiate the settlements in the cases he brought in the office. Respondent asserts that he required Gottlieb to get his approval of any settlement offer before Gottlieb accepted it; however, the hearing judge made no finding on this issue. Moreover, as the State Bar points out, respondent testified that, because he thought that Gottlieb was such a good negotiator, he had Gottlieb call the insurance adjustor in one of respondent's own cases and that Gottlieb quickly negotiated a great settlement.

During his 14–month association with Gottlieb, respondent's practice increased substantially. During that time, respondent had somewhere between two and six individuals, excluding Gottlieb, working for him. Even though some of those individuals were independent contractors, others clearly were not.

In total, respondent paid Gottlieb about $148,300 (about $7,500 in 1997; about $127,000 in 1998; and about $13,800 in 1999) as Gottlieb's 75 percent share of the attorney's fees recovered on the cases that he brought into respondent's office. Respondent paid Gottlieb as an independent contractor, and ordinarily paid him with checks that described the nature of the payment in the memo section of the checks by writing "independent contractor." However, respondent occasionally attempted to conceal the true nature of his payments to Gottlieb by writing in the memo section of the check entries such as reimbursement of travel expenses, advance of wages, or new car. Moreover, respondent admits that, once or twice when he had a case with a particularly large settlement, he attempted to conceal the nature of his payment to Gottlieb by writing an incorrect description of the payment in the memo section with the intent to disguise or hide his fee splitting from the State Bar. Respondent testified that, other than keeping copies of the checks, he did not keep any records with respect to any of his payments to Gottlieb.

On December 8, 1997, respondent, with Attorney Jeffery Sklan appearing with him, was interviewed about his relationship with Gottlieb by Kelly Mercer, a peace officer with the Insurance Fraud Division of the California Department of Insurance. Because respondent and Sklan refused to permit officer Mercer to record the interview, she had to prepare a written report and summary of it shortly after it was over. There is no evidence in the record that indicates whether staged automobile accidents or any of Gottlieb's prior convictions were mentioned or discussed. However, officer Mercer did ask respondent whether he notified the State Bar of his employment of Gottlieb as required by rule 1-311. Respondent admits that he did not.

Moreover, relying on the written report she prepared of her interview with respondent to refresh her recollection, officer Mercer testified that respondent told her at the interview that, in an automobile accident case, he considered it to be a "red flag" of insurance fraud if there were more than two people in the car[9] and that respondent first told her that he paid Gottlieb by the hour and workload, but that

9. Gottlieb testified that in 99 percent of the cases he referred to respondent, there were either 3 or 4 people in the car. Hannah's testimony supported Gottlieb's testimony. Respondent contradicted Gottlieb's testimony and testified that the cases were evenly divided between 2, 3, or 4 people in the car. The hearing judge, however, found that there were typically 3 or 4 people in the cars; accordingly, it is clear that he rejected, albeit implicitly, respondent's testimony in favor of Gottlieb's testimony.

respondent and Sklan went outside and, when they returned, he told her that Gottlieb was paid when the case was settled. When respondent testified he did not contradict Mercer's testimony. Instead, he merely testified that he doubted that he told Mercer that he considered more than two people in a car to be a red flag and that he really didn't recall whether he told her that he paid Gottlieb by the hour and workload. To conclude, we find officer Mercer's uncontradicted and unequivocal testimony to be true.

In mid–December 1998, both Hannah and Gottlieb were arrested. Hannah was apparently released relatively soon, but Gottlieb remained in jail until sometime around February 24, 1999. Respondent quickly learned of the arrests. It was not until after respondent learned that Gottlieb had been arrested in mid–December 1998 that respondent retained Jeffery Sklan as his criminal attorney. At that time, Sklan advised respondent to end his relationship with Gottlieb and to change his office locks, which respondent did after Gottlieb was released from jail.

Even after Hannah and Gottlieb were arrested, and respondent was interviewed by investigator Mercer, respondent neither investigated the disciplinary charges pending when Gottlieb resigned, e.g., by contacting the State Bar, nor investigated the extent and nature of the money laundering charge respondent was told was the basis of Gottlieb's incarceration.

In early 1999, the client or clients in the Deleon matter claimed that they had not been paid their share of the settlement proceeds in their case. When respondent pulled the Deleon matter file, there were copies of negotiated drafts in it. Respondent and Sklan met with Gottlieb in respondent's office on February 26, 1999, to confront Gottlieb on this payment problem. Gottlieb wore a "wire" so that officer Mercer could record the meeting.[10] It was at this meeting that Gottlieb first told respondent that all the cases he brought into respondent's office were based on staged accidents.

Within a couple of days after this meeting, respondent's client Maria Arroyo, who was a Gottlieb referral, went to respondent's office and claimed that she had never received the med–pay proceeds in her case. She gave respondent a letter stating that her case was based on a staged accident and that she would tell the authorities about it and other cases respondent handled that she said were based on staged accidents if respondent did not pay her the $35,000 in med–pay benefits she was purportedly entitled to. Respondent asserts that he thought that Arroyo was lying about the staged accidents in order to get him to give her $35,000.

Both respondent and Sklan assert that, even after their February 26, 1999, meeting with Gottlieb and even after the Arroyo incident, they still had no knowledge of fraud in any Gottlieb referred case. To support this assertion, they contend that they did not know whether Gottlieb was telling the truth about staging accidents as they "felt that Gottlieb might be creating this in order to extort" money from respondent. The hearing judge's decision does not discuss the issue of when respondent had knowledge of the staged accidents, and we decline to independently address the issue for reasons we discuss *post*.

Even though respondent and Sklan claimed not to know whether cases referred to Gottlieb involved staged accidents, Sklan advised respondent, after the February 26, 1999, meeting "to get rid of any pending cases" referred to respondent by Gottlieb. By the end of March 1999, respondent had "dropped" all such pending cases. However, respondent did not return the client files to clients when he "dropped" them. In fact, as late as June 1999 other attorneys were requesting, from respondent, the client files in cases respondent dropped.

Respondent was arrested on June 29, 1999, and charged with a total of 36 counts of making false insurance claims, conspiracy to commit grand theft, and capping. As noted *ante*, respondent pleaded nolo contendere to two felony counts of violating Penal

10. The terms of Gottlieb's criminal probation required him to assist the Department of Insurance in its investigation of respondent.

Code section 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims. One count involved respondent's reckless conduct in the Arroyo matter in November 1997, which caused Western United Insurance Company and Progressive Insurance Company to pay a combined total of at least $130,000 to seven individuals on claims that were fraudulent and based on a staged accident. The other count involved respondent's reckless conduct in the Cowart matter in March 1998, which caused 20th Century Insurance Company and Financial Indemnity Company to pay a combined total of at least $25,000 to three people on claims that were fraudulent and based on a staged accident.

Even though respondent was sentenced to 364 days in the county jail, 304 of those days were stayed, so respondent spent only 60 days in jail. Respondent was also put on three years' formal probation. In addition, his sentence included a $200 fine, 500 hours of community service, and $40,000 in restitution, but did so only to the four insurance companies which paid out on the claims in the Arroyo and Cowart matters. Respondent left it up to the assistant district attorney to determine the amounts and the insurance companies to which he would be required to make restitution under his plea agreement.

Respondent completed all the terms of his sentence, and the superior court granted respondent's motion to reduce his convictions to misdemeanors, but it denied his motion to dismiss the case. In February 2004, the superior court terminated respondent's criminal probation, set aside his plea of guilty and his conviction, and dismissed the criminal proceedings in accordance with Penal Code section 1203.4.

IV. THE RECORD DOES NOT ESTABLISH RESPONDENT KNEW OF STAGED ACCIDENTS.

[3a] We reject the State Bar's contention that the hearing judge erred in not finding that respondent knew of the staged accidents when he was representing the clients Gottlieb referred to him. The State Bar contends that, based on the record as a whole, the evidence establishes that it is more likely to find that respondent knew of the staged accidents or intentionally insulated himself from the facts so that he could claim lack of knowledge if the insurance fraud was ever discovered. The State Bar argues that, inter alia, the following facts support its contention: that respondent knew that Gottlieb was buying cases, that Gottlieb resigned with disciplinary charges pending, that Gottlieb stole and forged three settlement checks; that Gottlieb's cases typically involved three or four people in the car, which respondent admitted is either a red flag or an issue of concern in insurance fraud and that respondent permitted Gottlieb to negotiate settlements in the cases Gottlieb referred to respondent. As the State Bar correctly notes, it may prove an attorney's misconduct with clear and convincing circumstantial evidence. (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237). However, we are unable to find such clear and convincing circumstantial evidence in the record to support such a finding.

[3b] As we discuss in detail *post*, these facts when viewed collectively and together with the remaining evidence unquestionably establish that respondent was exceedingly reckless in entering into and maintaining his business relationship with Gottlieb and suggest that respondent knew of some impropriety in the Gottlieb referred cases. Nonetheless, we are unable to conclude that the evidence, when taken as a whole, constitutes clear circumstantial evidence that respondent knew that the accidents were staged. **[4]** First, in our view, the record supports the inference that respondent knew of the staged accidents as equally as it supports the inference that respondent did not know of them. In such a case, we must accept the inference favoring the attorney. (E.g., *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793–794.) Second, the issue was litigated before the hearing judge in a multiple-day trial and was resolved against the State Bar. Because the hearing judge's finding was based on the credibility assessment of the witness, we properly give it great weight.[11] (Rules Proc. of State Bar, rule 305(a); e.g., *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 932.)

11. We recognize that, at times, the hearing judge rejected respondent's testimony. However, that fact does not compel a reversal of the hearing judge's finding on this issue. (See *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 19.)

V. CONCLUSIONS OF LAW.

[5] Under section 6101, subdivisions (a) and (e), "an attorney's conviction of a crime pursuant to a plea of nolo contendere is 'conclusive evidence of guilt of the crime' for the purpose of disciplinary proceedings. [Citations.]" (*In re Gross* (1983) 33 Cal.3d 561, 567.) In other words, the criminal conviction "is conclusive proof that the attorney committed all acts necessary to constitute the offense. [Citation.]" (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) Thus, respondent's convictions on two counts of violating Penal Code section 549, which are based on respondent's recklessness and not his actual knowledge, conclusively establish that he acted in reckless disregard[12] of the unlawful intentions of others such as Gottlieb, Gottlieb referred clients, Monoson, Ohanesian, and Hannah. This is particularly troubling since respondent engaged in this criminally reckless misconduct in the course of his practice of law in November 1997, less than one month after he entered into his improper business relationship with Gottlieb and then again only four months later in March 1998. If respondent had not repeatedly been criminally reckless in his practice, he would have quickly discovered Gottlieb, Monoson, and Ohanesian's fraud or, at least, would have had an opportunity to discover it.

[6] As noted *ante*, because respondent's convictions for violating Penal Code section 549 do not involve moral turpitude per se, we must review the circumstances surrounding respondent's convictions to determine whether they in fact involved moral turpitude or other misconduct warranting discipline. In reviewing the circumstances surrounding respondent's conviction, "we are not restricted to examining the elements of the crime, but rather may look to the whole course of [respondent's] conduct which reflects upon his fitness to practice law. [Citations.]" (*In re Hurwitz* (1976) 17 Cal.3d 562, 567.) That is because it is the misconduct underlying respondent's conviction, as opposed to the conviction itself, that warrants discipline. (*In re Gross, supra*, 33 Cal.3d at p. 568.)

Although we agree with and adopt the hearing judge's conclusion that the facts and circumstances surrounding respondent's conviction involved moral turpitude, we base our determination on somewhat different grounds in that we reject some of the hearing judge's findings of misconduct and find additional misconduct which the hearing judge did not find.

A. Respondent's involvement in capping and fee splitting involved moral turpitude.

As we noted *ante*, the hearing judge correctly found that respondent knew Gottlieb was buying almost all, if not all, of the cases Gottlieb referred to respondent. It is true that respondent, when testifying in the hearing department, adamantly denied knowing that Gottlieb was buying cases or that Gottlieb was paying for them out of Gottlieb's 75 percent share of the fees. However, Gottlieb unequivocally and credibly testified to the contrary. Thus, because the hearing judge's findings are consistent with Gottlieb's testimony, it is clear that he rejected respondent's testimony implicitly. Furthermore, because the hearing judge's finding resolved issues of credibility of the witnesses, we give it great weight (Rules Proc. of State Bar, rule 305(a)), and we adopt that finding.[13]

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12. In this state the phrase "reckless disregard" is to be construed according to the Model Penal Code's definition of the term "recklessness," which is "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." (Model Pen. Code, § 2.02, subd. (2)(c); *In re Steven S.* (1994) 25 Cal.App.4th 598, 615.)

13. [7] It is particularly appropriate for us to adopt the hearing judge's finding because respondent's testimony, when viewed collectively, demonstrates that he was either unable or unwilling to accurately recollect and communicate the events about which he testified, and at times, his testimony seemed confused. In addition, in a number of instances, respondent failed to corroborate or substantiate his testimony with evidence that one would have expectedly produced. Respondent's unexplained failure to produce such evidence is a strong indication that respondent's testimony is not credible. (Evid. Code, §§ 412, 413; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122; *Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 [when a party fails to introduce evidence that would naturally have been produced, the trier of fact may properly infer that the evidence is adverse to the party].)

[8] We conclude that the facts and circumstances of respondent's misconduct in knowing that Gottlieb was buying cases, in paying Gottlieb for buying the cases, referring the cases to respondent's law office, coming into respondent's office "everyday," and working on the referred cases by splitting any attorney's fees recovered on the referred cases in deliberate violation of rule 1-310, prohibiting fee splitting with nonattorneys, involved moral turpitude. What is more, respondent's misconduct in capping, under the facts of this case, involved moral turpitude. (See *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 652–653.)

B. Respondent's many demonstrations of recklessness involved moral turpitude.

[9a] Respondent was reckless in entering his business relationship with Gottlieb without investigating him and in not seeking additional information on Gottlieb once he learned at the outset that Gottlieb resigned with disciplinary charges pending. At that point, respondent had a direct and easy opportunity to investigate Gottlieb's background and, with the most minimal of effort, to learn of Gottlieb's prior record of discipline and 1991 convictions for forgery, grand theft, and insurance fraud.[14] Respondent's tolerance for Gottlieb should have ended completely when respondent later learned that Gottlieb stole and forged the three settlement checks.

[9b] Respondent knowingly permitted Gottlieb to, inter alia, interview and sign up clients without his knowledge or approval, and knowingly failed to monitor the cases Gottlieb referred to him, e.g., he did not review each Gottlieb referral when Gottlieb first brought it into the office. This conduct establishes "an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends." (*Waterman v. State Bar* (1936) 8 Cal.2d 17, 21.) Recklessness and gross carelessness in the practice of law, even if not deliberate or dishonest, violate "the oath of an attorney to discharge faithfully the duties of an attorney to the best of his knowledge and ability and involve moral turpitude, in that they are a breach of the fiduciary relation which binds him to the most conscientious fidelity to his clients' interests. [Citations.]" (*Simmons v. State Bar* (1970) 2 Cal.3d 719, 729; accord, *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978, and cases there cited.) Even repeated acts of mere negligence and omission can involve moral turpitude and "prove as great a lack of fituess to practice law as affirmative violations of duty. [Citations.]" (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 672.)

[9c] We hold that respondent's manner and method of practicing law, at least, during his 14–month association with Gottlieb, was reckless and, therefore, involved moral turpitude. Given the several opportunities respondent had to protect himself from Gottlieb early on, his failure to do so can only be seen as recklessness of the most acute nature.

C. Respondent's deceit involved moral turpitude.

[10] We also conclude that respondent's misconduct in falsely recording in his financial and bank records the nature of his payments to Gottlieb with the specific intent to conceal his improper fee splitting with a nonattorney from, inter alia, the State Bar involves moral turpitude. " 'An attorney's practice of deceit involves moral turpitude.' [Citations.]" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888; see also *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 474–475.)

D. Respondent's repeated failures to competently represent his clients involved moral turpitude.

[11] As noted *ante*, we do not address the issue of when respondent learned that the Gottlieb referred cases were based on staged accidents because respondent should have proceeded as if he had known

14. It is undisputed that respondent would have promptly obtained this information from the State Bar if he had requested it anytime except from the end of June 1998 through early 1999, when the State Bar had only a skeletal staff because it laid–off most of its employees after the governor vetoed the bar's 1998 fee bill. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 589, 591.)

about the staged accidents no later than February 26, 1999, when Gottlieb told him of the staged accidents. Respondent should have, at a minimum, met with each client referred to him by Gottlieb, whether their case was then pending or had already been settled, and told him or her that respondent had substantial information suggesting, inter alia, that the client knowingly made a false claim based on a staged accident and on fraudulently obtained automobile insurance and then given him or her whatever legal counsel was appropriate, e.g., advising the client to seek advice from a criminal defense attorney. (Cf. *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684–1687 [duty to competently perform requires attorneys to alert clients to all reasonably apparent legal problems even when they fall outside the scope of attorney's retention and to the possible need for other counsel to address those problems]; *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 178–179 ["attorney's duty to the client can extend beyond the closing of the file."]) Respondent, however, did not do so even though it was readily apparent that his clients might have been included in the Department of Insurance fraud investigation involving Gottlieb and prosecuted for client insurance fraud. In sum, respondent's wholesale failure to competently represent these clients by providing them with competent legal advice after the February 26, 1999, meeting also involves moral turpitude.

We reject as meritless the contentions respondent asserted while testifying that, to contact his clients and provide them such advice would have been improper because it would amount to accusing them of committing fraud, which Sklan advised him he could not do; and that, in any event, such advice was unnecessary with respect to the Gottlieb referred cases that were already settled because the clients in those cases would have already signed some insurance company form of affidavit or release, which all contain fraud warning language. That contention reflects a failure to appreciate the duties he owed to his clients.

E. Additional facts and circumstances showing misconduct warranting discipline.

[12a] Although the following acts of misconduct did not involve moral turpitude, we consider them in making our discipline recommendation for they show misconduct warranting discipline. Even though respondent employed resigned member Gottlieb within the meaning of rule 1-311(A)(1) and (3), he willfully failed to notify the State Bar of Gottlieb's employment and termination as required under rule 1-311(D) and (F). In addition, respondent willfully violated rule 1-311(B)(3) and (4) because he knowingly permitted and instructed Gottlieb to appear with clients when they had their statements taken and to negotiate settlements for clients.[15] Respondent is simply not excused of these serious acts of misconduct even if his testimony that he did not know about rule 1-311 is true. (E.g., *Abeles v. State Bar* (1973) 9 Cal.3d 603, 610–611; *Millsberg v. State Bar* (1971) 6 Cal.3d 65, 75.) Moreover, respondent's admitted misconduct in not notifying the State Bar is exacerbated by his failure to have done so after officer Mercer expressly told respondent about that rule.

[12b] Furthermore, respondent willfully violated rule 4-100(A) when he improperly deposited a $6,672.03 tax refund check of one of his employees into his client trust account. That check was given to respondent in repayment of a personal loan respondent made to the employee's life partner. Accordingly, when respondent deposited it into his trust account he improperly commingled his funds with those of his clients. "Commingling, like misappropriation . . ., is a serious offense involving funds entrusted to an attorney. [Citation.]" (*Grim v. State Bar* (1991) 53 Cal.3d 21, 32.)

15. In light of this conclusion, we need not and do not address the State Bar's contention that respondent aided and abetted Gottlieb in the unauthorized practice of law because, if we concluded that respondent did aid and abet Gottlieb, it would be duplicative. (Cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76–77.)

VI. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A. Aggravating circumstances.

1. Multiple acts of wrongdoing.

Respondent's misconduct involved numerous acts of misconduct. (Std. 1.2(b)(ii).)

2. Personal Gain.

[13] The fact that respondent intentionally engaged in the misconduct for personal gain and, in fact, personally profited from it are aggravating circumstances. (*In the Matter of Kreitenberg*, *supra*, 4 Cal. State Bar Ct. Rptr. 469, 475.)

3. Substantial Harm.

Respondent's crimes caused the involved insurance companies to suffer direct and substantial economic harm. (Std. 1.2(b)(iv).)

In addition, respondent harmed his clients, to whom he owed a fiduciary duty (*In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757, citing *Cox v. Delmas* (1893) 99 Cal. 104, 123), and a duty as an attorney "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just . . . ." (§ 6068, subd. (c)). By his recklessness, he was furthering exposure of his clients to prosecution and other serious legal difficulties. (See *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 475.)

4. Failure to make complete restitution.

Even though respondent made $40,000 in restitution to four insurance companies for the direct monetary harm his crimes caused them, the misconduct underlying his convictions directly caused those four insurance companies to pay out a total of $155,000 in fraudulent claims based on staged accidents ($130,000 in the Arroyo matter, and $25,000 in the Cowart matter). Respondent admits that he has not made restitution of the remaining $115,000 ($155,000 less $40,000).[16] In addition, respondent admits that, other than the $40,000 restitution he paid to the four insurance companies, he has not made any restitution to the other insurance companies which suffered direct economic harm as a result of his misconduct. This is an aggravating circumstance because it demonstrates respondent's indifference to rectification for the consequences of his misconduct. (Std. 1.2(b)(v).)

B. Mitigating circumstances.

1. Cooperation.

[14] We decline to place significant mitigative weight on respondent's cooperation during these proceedings (std. 1.2(c)(v)) as found by the hearing judge, since respondent's admissions of culpability for violating rules 1-320 and 1-311 were easily provable violations.

2. Naivete and trust in others.

We acknowledge that respondent testified and the hearing judge found that respondent is no longer the same person he was when he committed his misconduct, that respondent is contrite and has learned from this experience. However, other than the conclusory assertion that respondent is no longer the same person, the only specifics that respondent testified to support this assertion were generalizations such as "I'm going to be different . . . a little more jaded now or I look at it with a jaundiced eye . . ."; and "maybe a little more standoffish now than I was

16. With respect to the $130,000 involved in Arroyo matter, respondent paid a total of $30,000 as follows: $10,000 to Western United Insurance Company and $20,000 to Progressive Insurance Company. This leaves $100,000 unreimbursed in the Arroyo matter. However, the record does not establish how much of this unreimbursed $100,000 is attributed to Western United or Progressive Insurance losses. With respect to the $25,000 involved in the Cowart matter, respondent paid a total of $10,000 as follows: $5,000 to 20th Century Insurance Company and $5,000 to Financial Indemnity Company. This leaves $15,000 unreimbursed in the Cowart matter. However, the record does not establish how much of this unreimbursed $15,000 is attributed to 20th Century or Financial Indemnity losses.

before, more cautious." Similarly, none of respondent's character witnesses provided any substantial evidence as to how respondent has changed. Their testimony included such generalizations to the effect that respondent is more sophisticated now; that "he would take more care to investigate the background of the people that he was [sic.] doing business with"; and that he is remorseful. However, in explaining how respondent has changed, Attorney Loe testified that respondent is "remorseful for what happened. [But] as I said, I don't believe his character is completely different."

Second, even though respondent is contrite, " '[r]emorse does not demonstrate rehabilitation.' " (*In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 477, quoting *In re Conflenti* (1981) 29 Cal.3d 120, 124.)

[15] What is more, assuming, arguendo, that respondent was naive in business, it would not be a mitigating factor. Naivete had nothing to do with respondent's decision to enter into his business relationship with Gottlieb, involving capping and fee splitting, both of which respondent knew were improper if not criminal. Most importantly, naivete had little if anything to do with the criminal recklessness respondent engaged in his practice of law and for which he was convicted of two felonies. (Cf. *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 479.)

Respondent's reliance on the hearing judge's findings that he "accepted at face value Monoson's assurances that Gottlieb was an all–right person with whom to work" and that he "trusted Monoson implicitly and, by association, Gottlieb" as mitigation is misplaced because, in our view, there is not clear and convincing evidence to support those findings. Respondent knew that Monoson had no prior dealings with Gottlieb and that Monoson met Gottlieb only one day before respondent met him. Accordingly, respondent was well aware that Monoson had no rational basis on which to make his generic assurance that Gottlieb was " 'a good guy.' " Any trust that respondent may have had in Monoson and any reliance that respondent may have placed on Monoson's purported honesty, integrity, and good judgment, could not have plausibly or believably continued after the October 1997 meeting at Monoson's office at which respondent met Gottlieb and at which Monoson encouraged respondent to enter into a business relationship with Gottlieb that involved both capping and fee splitting.

3. Good character evidence.

[16] Respondent presented testimony as to his good character and abilities from five attorneys, one of whom is also a C.P.A., one who is a businessperson, one C.P.A. who is not an attorney, and an insurance adjustor. While we agree in substance with the hearing judge's summaries of their testimony, we are unable to give the witnesses' testimony as much mitigating weight as did the hearing judge. First, in our view, the witnesses did not establish that they possessed adequate knowledge of respondent's convictions or of the facts and circumstances surrounding them. This reduces mitigating weight we may give to this testimony. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939–940.) At least two witnesses rarely saw or interacted with respondent. At least one attorney all but blamed Gottlieb and Monoson.

VII. DEGREE OF DISCIPLINE DISCUSSION.

Paramount in the Supreme Court's concern in remanding this matter to us is the issue of what is the proper function and role of the Standards, and in standard 3.2 in particular, in arriving at a recommendation of discipline.

A brief background summary will aid our discussion. The Standards were adopted by the Board of Governors of the State Bar effective January 1, 1986. (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) At that time, the State Bar disciplinary system used about 300 volunteers who sat on local panels as referees to hear disciplinary cases. (See generally *In re Rose* (2000) 22 Cal.4th 430, 438.) These volunteers made recommendations to a State Bar Disciplinary Board (Review Department), itself composed of 18 volunteers. Given the large number of volunteers and the decentralized nature of the disciplinary trial system, consistency of recommendation for similar offenses was a major concern. (See Introduction to Standards.) Supreme Court decisions

filed in the first few years after the adoption of the Standards described their function variously[17] but made it clear that they neither were "talismanic" (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221–222), nor were they binding. (E.g., *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454.) Thus, although the Standards were established as guidelines, ultimately, the proper recommendation of discipline rested on a balanced consideration of the unique factors in each case. (E.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 798.)

Effective July 1, 1989, adjudication of attorney disciplinary matters was altered dramatically in California as a small cadre of appointed professional State Bar Court judges displaced the work of the many volunteers. (E.g., *In re Rose, supra*, 22 Cal.4th at p. 438.) After 1989, discipline recommendations were made by a small number of pro tempore judges, and therefore consistency appeared no longer to be as acute an issue. Following the change in the method of adjudicating disciplinary cases, the Supreme Court reduced substantially its issuance of written opinions in attorney disciplinary matters and also, as an exercise of its inherent powers over the regulation of attorneys in the State, made the granting of review discretionary rather than as a matter of course. (Cal. Rules of Court, rule 954; *In re Rose, supra*, 22 Cal.4th at pp. 440–441.)

The Supreme Court has issued four opinions in attorney disciplinary cases arising from recommendations of the current appointed State Bar Court. (*In re Silverton* (2005) 36 Cal.4th 81; *In re Rose, supra*, 22 Cal.4th 430; *In re Brown* (1995) 12 Cal.4th 205; and *In re Morse* (1995) 11 Cal.4th 184.) These opinions, which collectively span ten years, demonstrate the significance that the court continues to place, in general, on the Standards as important and useful guidelines for assessing the appropriate degree of discipline.

In addition to their value in providing consistency, we view the Standards as useful today in serving added functions. First, they promote the achievement of fair and informed consensual dispositions by the parties in appropriate cases. (Rules Proc. of State Bar, rules 133–134.) Indeed, in recent years, about half of the formal charges filed in the State Bar Court have resulted in such consensual dispositions. These dispositions have expedited the resolution of cases noticeably, compared to cases which are tried. Moreover, the Standards provide a valuable educative function for California's sizeable legal profession, courts and public – just as when the Standards were first adopted – as to the appropriate factors for assessing the degree of discipline and how they may lead to an appropriate disciplinary result. However, in the final analysis, as the Supreme Court has made clear, our consideration of the Standards cannot yield a recommendation which, on the record, is arbitrary or rigid (see *In re Nadrich* (1988) 44 Cal.3d 271, 277), or about which "grave doubts" exist as to the recommendation's propriety. (*In re Young* (1989) 49 Cal.3d 257, 268.) Moreover, the weight to be accorded the Standards will depend on the degree to which they are apt to the case at bench. (*In re Brown, supra*, 12 Cal.4th at pp. 220–221 [but see discussion at p. 221 in which the court concluded that although the Standards were of limited utility in the particular case, they did suggest that the level of discipline recommended by the review department was inadequate].)

With this background, which makes clear the overall guiding value of the Standards, we re–state the initial points we made in discussing discipline in our 2004 opinion. In determining the appropriate level of discipline, we first look 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.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal

17. See, e.g., *Greenbaum v. State Bar*, supra, 43 Cal.3d at p. 550 (the Standards are "simply guidelines"); *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 198, fn.14 (same); *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602 (same); but see *Natali v. State Bar* (1988) 45 Cal.3d 456, 468 (the Supreme Court will not reject a recommendation arising from application of the Standards unless it has "grave doubts as to the propriety of the recommended discipline").

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*, *supra*, 49 Cal.3d 103, 111.) The applicable sanction in this proceeding is found in standard 3.2, which provides: "Final conviction of a member of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two–year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances."

In our 2004 opinion, we stated and re–state here that the Supreme Court has rejected the standard's mandate that any two–year actual suspension recommended must be prospective to the attorney's interim suspension. (*In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 307, citing *In re Young* (1989) 49 Cal.3d 257, 268.) However, we failed to state the role that standard 3.2 as a whole played in our ultimate recommendation, instead proceeding to review disciplinary decisions in other comparable cases. We now correct our mistake; and, when we do so, we must conclude that our 2004 recommendation was inadequate.

By its language quoted *ante*, standard 3.2 guides strongly to disbarment for crimes which involve moral turpitude. We already have found moral turpitude surrounding respondent's conviction and those facts show that the acts of moral turpitude were repeated and had the potential to create serious harm. As we found in our 2004 opinion, respondent engaged in recklessness of the most acute nature. Respondent was recklessly indifferent to the clear potential of danger presented by Gottlieb and respondent's recklessness commenced with his failure to take simple steps available to any citizen to ascertain Gottlieb's criminal history when he should have been on notice to do so. It continued with respondent's intentional decision to act unethically by paying Gottlieb for cases brought to respondent's office and by splitting fees with him, knowing that Gottlieb was no longer a member of the State Bar. When respondent learned early–on in his relationship with Gottlieb that the latter had stolen and forged three settlement drafts, respondent did not cease dealing with Gottlieb. Rather, he was prevailed on to continue his relationship with Gottlieb. Finally, respondent accorded Gottlieb extensive freedom to interview and retain clients for respondent without respondent's knowledge and approval, and respondent did not adequately monitor the cases which Gottlieb brought to the office.

Wholly apart from the recklessness which respondent demonstrated in his 14–month relationship with Gottlieb, we found that respondent engaged in moral turpitude by his illegal activities of furthering capping. Moreover, respondent's repeated failure to represent his clients competently involved moral turpitude, particularly after he learned in late February 1996 that the cases brought to the office by Gottlieb rested on staged accidents.

Finally, respondent's practice of deceit by falsely recording in his records the nature of his payments to Gottlieb, in order to conceal their illegal or unethical purpose, unquestionably involved intentional acts of moral turpitude.

When we review the numerous ways respondent committed moral turpitude, we can only conclude that his conviction for violating Penal Code section 549 was most serious for disciplinary purposes, fully warranting following the guidance of standard 3.2 for disbarment. Indeed, "'"[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude. [Citations.]"'" (*In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 317.)

Reviewing the balance of mitigating and aggravating circumstances also supports a disbarment recommendation here. We have assigned little weight to respondent's cooperation with the State Bar and to the evidence offered as to his character. Also, respondent's misconduct commenced less than five years after his admission to practice so that his lack of prior discipline was not entitled to mitigating credit. (E.g., *Amante v. State Bar* (1990) 50 Cal.3d 247, 255–256; *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.) In contrast, the weight of aggravating circumstances decisively predominates. As we found *ante*, respon-

dent engaged in multiple acts of misconduct, he profited from that misconduct, his conduct harmed insurers and he either jeopardized legitimate clients or exposed persons engaged in potential or actual fraudulent conduct to even greater civil or criminal liability. (Compare *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 475). Moreover, respondent failed to complete restitution of losses resulting from his misdeeds. Thus, the record here does not provide a basis to reject the guidance of disbarment in standard 3.2.

Although there have been no published decisions of disciplinary cases following an attorney's violation of Penal Code section 549, we have found persuasive opinions which recommend or impose discipline on account of the presence of moral turpitude to a serious degree similar to that found here.

We start by reiterating, as we stated *ante*, that the usual discipline for an attorney's conviction of a crime which involves serious acts of moral turpitude is disbarment. This principle is well established in this state. (E.g., *In re Crooks* (1990) 51 Cal.3d 1090, 1101; *In re Bogart* (1973) 9 Cal.3d 743, 748; *In re Smith* (1967) 67 Cal.2d 460, 462.) Indeed, had respondent been convicted of a felony which, inter alia, inherently involved moral turpitude, he would have been subjected to summary disbarment. (§ 6102; *In re Paguirigan* (2001) 25 Cal.4th 1, 8.) That respondent's offense did not inherently involve moral turpitude does not immunize him from the appropriate discipline for the serious misconduct surrounding his conviction. No intent to lower professional standards is evident in the procedures allowing for referral to the State Bar Court for hearing of attorney convictions not inherently involving moral turpitude. (E.g., *In re Smith, supra*, 67 Cal.2d at p. 462.)

We deem the case of *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. 469 to be guiding. That case involved a conviction of conspiring to defraud the Internal Revenue Service (IRS), a crime which has been classified for moral turpitude purposes as one which does not inherently involve moral turpitude. (*Id.* at p. 474, fn. 3.) Nevertheless, we held that the facts and circumstances surrounding Kreitenberg's offense involved several aspects of moral turpitude. His acts, together with those of his cousin, spanned six years, starting just about three years after his admission. He wrote over 680 fraudulent checks totaling over $1.6 million in legal fees which were not reported to the IRS. Much of this money was used to pay cappers to bring more cases to the law office. We noted the positive aspects of Kreitenberg's mitigating evidence, but weighed it less heavily than did the hearing judge. Among the several aggravating circumstances we found were that Kreitenberg's misconduct "touched on virtually every aspect of his law practice" and, in establishing a fraudulent check writing scheme, he jeopardized the names of his clients while seeking to conceal legal fees from the IRS and to conceal that capping also occurred. (*Id.* at pp. 475–476.) We also noted that Kreitenberg did not withdraw from the conspiracy and did not cooperate until the IRS had started an audit of him. We recommended, and the Supreme Court imposed, disbarment. Although acknowledging that respondent's misconduct occurred over less time and appeared of less seriousness, we find many similarities between *Kreitenberg* and this case. In particular, we note that in both, the attorneys realized from early on that misconduct was being committed; neither acted timely to stop the practices; in both cases, the attorneys' misconduct imbued most of the activities of their practices; and in both, their clients were jeopardized. Although Kreitenberg's misconduct was arguably more serious, that does not demonstrate that disbarment is excessive here.

We have examined *In re Arnoff* (1978) 22 Cal.3d 740, in which the Supreme Court suspended the attorney for two years following his conviction of conspiracy to commit capping. A layperson effectively controlled Arnoff's law office and the relationship between that person and Arnoff lasted two years and involved about 500 cases. Arnoff agreed to split fees with the layperson but there was insufficient evidence that Arnoff knew that the layperson was making kickbacks to doctors for referrals to Arnoff. However, in *Arnoff*, the Supreme Court considered a number of mitigating factors not present in the case before us, including heavy emotional duress and health pressures bearing on Arnoff during the time of his misconduct, favorable character evidence, evidence of rehabilitative treatment and his record of 20 years of practice without discipline.

Similarly, several original proceedings which had been decided over the years[18] resulting in suspension involved either less serious misconduct, more mitigation or both. Nevertheless, the Supreme Court did disbar an attorney found culpable of widespread capping violations over a three–year period. (*Kitsis v. State Bar* (1979) 23 Cal.3d 857.) In *Kitsis*, the attorney misled one of his cappers that her (the capper's) actions were legal. Kitsis had practiced for eight years when this misconduct started but he had been privately reproved earlier for improper payment of client expenses. Kitsis pled guilty to a misdemeanor charge of capping and, in original disciplinary proceedings, had been found culpable of, inter alia, committing acts of moral turpitude. Kitsis presented 19 favorable character reference letters from other attorneys, friends and clients but the Supreme Court noted that the letters did not demonstrate awareness of the extent of Kitsis's misconduct. (*Id.* at p. 867.)

As noted in *In re Young*, *supra*, 49 Cal.3d at p. 268, the Supreme Court has not always imposed the degree of discipline called for in standard 3.2 if it had "grave doubts as to the propriety of the recommended discipline."

[17] In this case, we find no grave or even serious doubts as to the propriety of the recommendation. It was purely fortuitous that more harm did not occur as a result of the facts and circumstances surrounding respondent's criminal offense, given especially that the accident claims pressed in the name of respondent's office appear to have arisen from fraud and that respondent's conduct was both grossly reckless in a number of ways and, by disguising financial entries, intentionally dishonest. As the overriding purposes of lawyer discipline are to protect the public, maintain high professional standards and preserve the integrity of the legal profession (std. 1.3), disbarment is appropriate based on applying the Standards to this case and also appropriate when measured against decisional law.

VIII. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Tamir Oheb, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice in the state. We further recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, and perform the acts specified within 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 costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable as provided in Business and Professions Code, section 6140.7 and as a money judgment. As respondent has been suspended continually by interim order following his felony conviction, we do not impose an order of inactive enrollment incident to this recommendation.

We concur:

WATAI, J.
EPSTEIN, J.

18. *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838; *In the Matter of Scapa & Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. 635; and *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID ERIC BROCKWAY

A Member of the State Bar

No. 01–O–03470

Filed May 15, 2006

SUMMARY

While representing clients in four separate matters involving a personal injury lawsuit, traffic citations, and immigration matters, respondent required the clients to execute retainer agreements describing their advance payments as a "True Retainer Fee." Thereafter respondent repeatedly failed to perform and effectively abandoned his clients. The hearing judge found respondent culpable of four violations of failing to perform competently, four violations of improper withdrawal from employment, two violations of failing to render an accounting, and single violations of failing to respond to client inquiries, failing to refund unearned fees, failing to return client files, and agreeing to withdraw a State Bar complaint. The hearing judge found in aggravation a prior record of discipline, multiple acts of wrongdoing, significant client harm and indifference toward rectification. In mitigation, the hearing judge assigned minimal weight to respondent's evidence of good character. The hearing judge recommended respondent be actually suspended from the practice of law for one year. (Hon. Joann M. Remke, Hearing Judge.)

The review department adopted the hearing judge's findings and conclusions regarding culpability and aggravation and also found additional uncharged misconduct in aggravation as the result of respondent's overreaching of his clients, constituting acts of moral turpitude in violation of section 6106. The review department did not adopt the hearing judge's finding in mitigation, determining instead that respondent failed to establish any mitigating circumstances. The review department recommended that respondent be suspended for five years, stayed, that he be placed on probation for five years on the condition that he be actually suspended for two years and until he complies with Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For State Bar: Paul T. O'Brien

For Respondent: David E. Brockway, in pro. per.

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

HEADNOTES

[1] **270.30 Rule 3–110(A) [former 6–101(A)(2)/(B)]**
To find a violation of Rules of Professional Conduct, rule 3–110(A) due to respondent's failure to perform any service of benefit to his client, it must be determined that respondent acted in reckless disregard of his client's cause and not merely that respondent acted negligently. Where a client needed to urgently remedy her illegal immigration status, and where respondent waited at least nine months after being retained before completing meager research on the client's behalf, respondent's conduct constituted a reckless failure to perform in violation of rule 3–110(A).

[2 a–d] **270.30 Rule 3–110(A) [former 6–101(A)(2)/(B)]**
Although respondent's contract for hire stated it was for "Purchase of Availability" and described his legal fee as a "True Retainer Fee," such characterization did not determine the obligations of the parties. Where the contract did not define the term "True Retainer Fee" and did not expressly state that the fee was due and payable regardless of whether any professional services were actually rendered, where the contract did not require respondent to make any particular provision to allot or set aside blocks of time specifically devoted to pursuing the client's claims, where the contract did not set forth a specific period of time when respondent was obligated to turn away other business in order to proceed with the client's matter, and where the individual who paid the fee understood that the fee was an advance against respondent's future services, respondent had an obligation to take timely, substantive action on the client's behalf rather than merely make himself available to the client.

[3 a–c] **277.20 Rule 3–700(A)(2) [former 2–111(A)(2)]**
An attorney may effectively withdraw from a case without an intent to do so when the attorney virtually abandons a client and is grossly negligent in communicating with the client. If an attorney is essentially withdrawing from employment he or she is obligated to give due notice to the client. Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. Where respondent's strategy was to do nothing in anticipation that the immigration laws might be amended to be more favorable to his client, where respondent did not advise his client of his intention to adopt a wait–and–see approach, where respondent failed to communicate with his client for nearly one year, and where time was plainly of the essence to the services requested, respondent's failure to timely provide the necessary services constituted an effective withdrawal which prejudiced his client's ability to file a timely application for asylum in violation of Rules of Professional Conduct, rule 3–700(A)(2).

[4] **280.40 Rule 4–100(B)(3) [former 8–101(B)(3)]**
The obligation to render appropriate accounts to the client found in Rules of Professional Conduct, rule 4–100(B)(3) does not require as a predicate that the client demand such an accounting.

[5 a, b] **270.30 Rule 3–110(A) [former 6–101(A)(2)/(B)]**
Where a client hired respondent to resolve the client's traffic violations in Arizona so that they would not result in the loss of the client's California license, respondent's payment of the client's traffic fines without conducting research or doing any investigation of the relationship of Arizona and California motor vehicle laws and their effect on the client's status as a licensed driver in California constituted a violation of Rules of Professional Conduct, rule 3–110(A).

[6] **277.50 Rule 3–700(D)(1) [former 2–111(A)(2)]**
By waiting at least two months to send client files to the client's new attorney and by not providing the client files until after the client's new attorney sent three additional requests, respondent violated Rules of Professional Conduct, rule 3–700(D)(1).

[7] **221.00 State Bar Act–Section 6106**
560 Aggravation–Other uncharged violations (1.2(b)(iii))
Where respondent's clients had English language limitations and where respondent used technical legalese in his engagement agreements in an effort to exempt himself from providing any service of consequence to his clients, respondent's exploitation of his superior knowledge and position of trust to the detriment of his vulnerable clients was evidence of overreaching that constituted moral turpitude forming the basis for additional uncharged misconduct in aggravation.

[8] **740.50 Mitigation–Good Character–Declined to find**
Respondent failed to establish mitigating circumstances by clear and convincing evidence, where respondent presented the testimony of only one character witness who had only limited knowledge of the disciplinary issues. The testimony of this witness does not constitute a broad range of references from the legal and general communities.

[9] **1015.08 Discipline–Actual Suspension–2 years**
Where respondent abandoned four clients and failed to competently perform, failed to communicate, failed to provide accountings, failed to refund unearned fees, failed to return client files, and improperly agreed to withdraw a State Bar complaint, and where there was no mitigation but aggravation due to a prior record of discipline, multiple acts of wrongdoing, significant client harm, a failure to atone for the consequences of his behavior, and additional uncharged misconduct involving an act of moral turpitude due to overreaching, the appropriate disciplinary recommendation was a five–year stayed suspension, five years of probation on conditions which included two years of actual suspension and until compliance with Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).

ADDITIONAL ANALYSIS

Culpability

Found

218.01 Section 6090.5
221.19 Section 6106–Other factual basis
270.31 Rule 3–110(A) [former 6–101(A)(2)/(B)]
277.21 Rule 3–700(A)(2) [former 2–111(A)(2)]
277.51 Rule 3–700(D)(1) [former 2–111(A)(2)]
277.61 Rule 3–700(D)(2) [former 2–111(A)(3)]
280.41 Rule 4 -100(B)(3) [former 8–101(B)(3)]

Not Found

214.31 Section 6068(m)

Aggravation

Found

511 Prior Record
521 Multiple Acts
561 Uncharged Violations
582.10 Harm to Client
591 Indifference

Declined to Find
535.10 Pattern

Mitigation

Declined to Find
740.51 Good Character
740.52 Good Character

Discipline
1013.11 Stayed Suspension–5 Years
1017.11 Probation–5 Years
1030 Standard 1.4(c)(ii)

OPINION

EPSTEIN, J.:

On four separate occasions, Asian immigrants, who spoke little or no English, sought the services of respondent, David Eric Brockway, to help them with pressing legal problems. In each instance, respondent accepted several thousand dollars in legal fees and then failed to perform the agreed–upon legal services.

The hearing judge found respondent culpable of 14 counts of misconduct in four client matters, including, inter alia, failure to perform services competently, improper withdrawal from employment, failure to render an accounting, failure to promptly return unearned fees, failure to communicate, and failure to release files. The hearing judge recommended that respondent be actually suspended from the practice of law for one year.

Respondent is appealing the hearing judge's findings and the discipline recommendation, seeking dismissal of all charges against him. Respondent argues that he had no duty to perform the contemplated services, communicate with his clients or account for unearned fees because in each client matter he entered into a "true retainer" fee agreement that secured only his availability, and not his services. According to respondent, the fees paid by the four clients were "earned upon receipt to ensure my availability to these people for the resolution of a problem that will, in my opinion, arise in the future." His former clients testified that they hired respondent to resolve their *immediate* legal concerns, rather than merely to secure his availability for future inchoate problems, and that respondent abandoned their matters to their detriment.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and in so doing, we adopt the hearing judge's findings and conclusions, as discussed more fully below. We find additional uncharged misconduct as aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35–36.) Based upon all relevant circumstances, as well as the standards[1] and guiding case law, we conclude that the hearing judge's discipline recommendation is insufficient to protect the public, the courts and the profession, and instead we recommend respondent be suspended for five years, stayed, and placed on five years' probation on the condition that he be actually suspended for two years and until he has satisfied the requirements of standard 1.4(c)(ii).

I. BACKGROUND

Respondent was admitted to practice law in October 1977. He has one prior discipline resulting in a three–month actual suspension with two years' probation, effective April 17, 1991, for wilfully misappropriating $500 from one client and improperly acquiring an adverse interest against a second client. (*Brockway v. State Bar* (1991) 53 Cal.3d 51.)

The State Bar filed a Notice of Disciplinary Charges (NDC) on November 14, 2003, alleging 14 counts of misconduct in four separate client matters (case numbers 01-O-03470; 01–O–04083; 01-O-04120; 02–O–12367). On January 7, 2004, respondent filed a response denying culpability. The parties filed a stipulation as to certain facts on August 13, 2004, which was the last day of the four–day trial. On November 16, 2004, the hearing judge filed a decision finding culpability on all 14 counts, including four violations of rule 3–110(A) of the Rules of Professional Conduct[2] (failure to perform competently), four violations of rule 3–700(A)(2) (improper withdrawal from employment), one violation of Business and Professions Code section 6068, subdivision (m)[3] (failure to respond to client inquiries), and two violations of rule 4–100(B)(3) (failure to render an accounting). The hearing judge recommended a two–year stayed suspension, a two–year probation, and a one–year actual suspension. Respondent requested

1. This and all further references to "standards" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

2. All further references to "rule" or "rules" are to these Rules of Professional Conduct, unless expressly noted.

3. Unless otherwise noted, all further references to "section" refer to the Business and Professions Code.

review of this decision on December 15, 2004. The State Bar did not request review but is here seeking disbarment, as it did below.

II. FINDINGS OF FACTS AND CULPABILITY DISCUSSION

A. The Le Matter (Case No. 01-O-03470)

1. Factual Findings

Ly Thi Le (Le) hired respondent to obtain legal immigration status for her daughter–in–law, Tran Truc Ly (Ly), who was living in the United States illegally. At their initial meeting on March 27, 2000, Le paid respondent $5,800 and signed a contract for legal services, which was written in English. The agreement, entitled "Contract of Hire – Purchase of Availability," provided that respondent would "represent Tran Truc Ly, in the case of: INS Asylum." The agreement further provided that Le would pay a "True Retainer Fee" of $5,800 and that "there will be attorneys' fees in addition to the Retainer Fee above. . . .[U]nless otherwise denoted, retainer fees are not refunded." Le, who is Vietnamese, did not speak or read English, but Robert Luu (Luu), an employee of respondent, acted as an interpreter at the meeting and translated the legal services agreement. Le testified that Luu described the "step by step" process respondent would take "in order to ask INS for my [daughter–in–law] to be here."

From the outset, respondent recognized that Ly was in grave danger of arrest and deportation. He testified: "[O]f course [Ly] was illegal so she was subject to arrest at any time day or night, with or without a warrant, with or without reasonable cause. She had no papers. She didn't speak English. She could be turned in by anybody at any time. A bus could be stopped and she could be taken off the bus and immediately be taken into custody." Nevertheless, respondent did not contact Le or Ly for nearly ten months after he was hired, despite the fact that Le made three telephone calls to inquire about the status of the case. Each time, she left a message asking Luu to call her. Le made 18 more calls between April 2001 and July 2001, and Luu occasionally returned some of those calls.

Frustrated with respondent, Le and Ly sought new counsel, Van Thanh Do, to assist them. It is not clear whether Le and Ly intended to terminate respondent's services at this point, but on February 7, 2001, Do notified respondent in writing that she had been retained to handle Ly's immigration matter and she requested Ly's entire file. Do enclosed a copy of a Notice of Entry of Appearance (INS Form G–8) on behalf of Ly. Do testified she did not receive a response from respondent for several months, and when she ultimately received the file, it consisted of only three pages of a partially–completed asylum application.

In rebuttal, respondent offered into evidence a file purportedly containing his work product for the Ly case, which he testified he prepared prior to receiving the February 7, 2001, letter from Do. This file contained 75 pages of research and a partially–completed asylum application. Also included in this file were copies of Senate Bill 778 and House of Representatives Bill 1615, authorizing certain changes in immigration status. Respondent testified that he delivered Le's file to Do no later than two or three weeks after he received her request. Of the 75 pages of work product in the file, 35 pages were a computer printout of the interim rule implementing section 1104 of the Legal Immigration Family Equity (LIFE) Act from the Federal Register, volume 66, number 106, dated June 1, 2001, which was four months after Do sent her request for the file and three months after he testified he delivered the file to her. Also, the federal legislation in this file, Senate Bill 778 and House of Representatives Bill 1615, was dated April 26, 2001, which was almost two and a half months after Do sent her letter to respondent.[4] Respondent provided no other evidence of services performed on behalf of Ly.

4. The remaining research in the file referenced the LIFE Act, and was dated December 26, 2000 and January 16, 2001, which was nine months after Le hired respondent.

On July 16, 2001, Le requested an accounting in a letter to respondent that was written by an acquaintance. In this letter, she also asked for copies of the immigration documents prepared for Ly and a refund of the $5,800 fee, noting, "I called you many times, left my number, and you never returned my calls." She further complained: "You missed the deadline of April 30, 2001 for the final filing of forms to get legal status. I could have my [daughter–in–law] on the road to legal status now instead of uncertainty & worry. [Para.] You did nothing and still want to keep my hard earned money for doing nothing." Respondent denied receiving this letter, but the hearing judge found his testimony to be not credible.

Ly did in fact miss the April 30, 2001, filing deadline for an adjustment to her status under the LIFE Act, in part due to respondent's inaction and lack of cooperation with Do. Le sued respondent in Small Claims court for return of the legal fee she paid to respondent. He appealed the judgment, but after he failed to appear, a final judgment was entered on March 28, 2002, awarding $5,000.00 to Le. Respondent's motion to set aside the judgment was denied, and he then paid the $5,000.00 to her.

2. Culpability Discussion

Count One: Rule 3–110(A) – failure to perform with competence

The hearing judge found respondent culpable of repeatedly failing to perform legal services competently in violation of rule 3–110(A) because he did not complete or file any documentation in the immigration matter and failed to perform any service of benefit to Ly.

[1] To find a violation of rule 3–110(A) in this context, we must determine that respondent acted "'in reckless disregard of a client's cause'" and not merely that respondent acted negligently. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155, fn. 17.) We do indeed find that respondent's failure to perform was reckless. In view of Ly's illegal status and her urgent need to remedy her situation, respondent's most meager and incomplete effort to address the matter after nearly one year constituted a reckless failure to perform. (See, e.g., *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7 [delay of six months in filing bankruptcy petition, despite need for prompt action to protect clients from creditors, is reckless failure to perform]; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641–642 [delay of over two months in obtaining temporary restraining order to protect client from stressful, harassing telephone calls constituted reckless failure to perform].) We do not find convincing respondent's evidence of work product he purportedly generated in Ly's case. Most of his research and documentation was dated several months *after* Do sent the request for the file and several weeks *after* he claimed he had delivered the file to Do. The only other research in his file was dated December 26, 2000, and January 16, 2001, which was nine months after Le hired him.

[2a] Respondent here argues that he had no obligation to provide *any* services to Ly and that his only duty was to be available to her because the Contract for Hire stated it was for "Purchase of Availability" and described his legal fee as a "True Retainer Fee." He cites to *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4, wherein the Supreme Court defined a true retainer as "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." (*Ibid.*)

[2b] Even though the fee was designated in the contract as a "True Retainer Fee," we look beyond this characterization to determine the obligations of the parties. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [characterization of a "non–refundable retaining fee" not determinative]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757 [fee not a true retainer because no provision to set aside available blocks of time].) Respondent's engagement agreement did not define the term "True Retainer Fee" and it did not expressly state that the fee was due and payable regardless of whether any professional services were actually rendered. Moreover, although the contract stated it was for "Purchase of Availability," it did not require that respondent make

"any particular provision to allot or set aside blocks of time specifically devoted to pursuing these clients' claims. . . ." (*In the Matter of Fonte, supra,* 2 Cal. State Bar Ct. Rptr. at p. 757.) The contract also did not set forth a specific period of time when respondent was obligated to turn away other business in order to proceed with the Le matter. (*Ibid.*) To the contrary, respondent testified he had as many as 600–700 client matters in a year.

[2c] Generally, an engagement agreement between a client and an attorney is construed as a reasonable client would construe it. (Rest.3d Law Governing Lawyers §38, com. d; see also *Lane v. Wilkins* (1964) 229 Cal.App.2d 315, 323 [in construing contracts between attorneys and clients concerning compensation, construction should be adopted that is most favorable to the client as to the intent of the parties].) Moreover, "it is well established that any ambiguities in attorney–client fee agreements are construed in the client's favor and against the attorney." (*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 676; see also *S.E.C. v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205.) Le testified that she understood that the fee she paid to respondent was an advance against his future services for obtaining asylum for Ly. The hearing judge found Le's testimony credible. We give great deference to this credibility determination. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 780.)

Moreover, the language of the contract supports Le's testimony. It expressly provided that respondent would "represent Tran Truc Ly, in the case of: INS Asylum." Given the urgency and seriousness of the situation, we do not believe a reasonable client would have understood that her payment of $5,800 merely assured her of respondent's "availability" and did not include respondent's actual performance of services. Furthermore, Le could not read the contract and instead reasonably relied on Luu's "step by step" description of the services respondent would provide. Le's repeated phone calls (numbering in excess of 20), also are consistent with her expectation that respondent would take affirmative steps to rectify Ly's illegal status in a timely manner.

[2d] We accordingly reject respondent's argument that he had no obligation under the Contract for Hire to perform any services on behalf of Ly. Rather, we find that respondent had an "obligation to take timely, substantive action on the client's behalf" and he failed to do so. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554.) We therefore adopt the hearing judge's finding that respondent wilfully violated rule 3–110(A).

Count Two: Rule 3–700(A)(2) – improper withdrawal from employment

The hearing judge found that by failing to perform services of any benefit to Ly for almost one year and failing to communicate with her during this time, respondent "effectively withdrew from employment." The hearing judge further found that respondent withdrew without taking reasonable steps to avoid foreseeable prejudice to Ly, thereby violating rule 3–700(A)(2). We agree.

[3a] Respondent maintains he did not intend to withdraw from Ly's case and was in fact terminated by her. However, an attorney may effectively withdraw from a case without an intent to do so, when the attorney virtually abandons a client and is grossly negligent in communicating with the client. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816–817, fn. 5 [withdrawal occurs under former rule 2–111(A)(2) when an attorney ceases coming to his office and cannot be reached by his clients, even absent an intent to withdraw]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 187 [violation of former rule 2–111(A)(2) occurs when an attorney ceases to provide services and fails to inform client of adverse decision].)

[3b] "It is misconduct for an attorney to wilfully fail to perform the legal services for which he or she has been retained, and to wilfully fail to communicate with a client. If an attorney is essentially withdrawing from employment, he or she is obligated to give due notice to the client [citation]." (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.) Although respondent argues that his strategy was to do nothing in anticipation that the immigration laws might in the future be amended to be more favorable to Ly, "he did not clearly advise her of [his intention to adopt a wait–

and–see approach] and obtain her consent to a strategy for handling the case. He neither sought to terminate his employment nor aggressively pursued the matter." (*In the Matter of Kaplan, supra,* 3 Cal. State Bar Ct. Rptr. at p. 557; see also *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 232.) Not only did respondent fail to communicate with Ly for nearly one year, he did nothing to advance her interests, and she was thereby prejudiced in her ability to file a timely application for asylum under the LIFE Act.

[3c] "Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. . . .The circumstances, however, were such that time was plainly of the essence to the services requested." (*In the Matter of Bach, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 641–642.) Under the exigent circumstances presented by the Ly matter, respondent's failure to timely provide the necessary services constituted an effective withdrawal. (*Ibid.*) We accordingly find that respondent prejudicially withdrew from employment in wilful violation of rule 3–700(A)(2).

Count Three: Section 6068, subdivision (m) – failure to respond to client inquiries

In view of Le's testimony and her letter of July 16, 2001, which establish that she called respondent's office frequently to check on the status of her daughter–in–law's case, and that most of these calls were not returned, we agree with the hearing judge's conclusion that respondent wilfully violated section 6068, subdivision (m).[5] However, because culpability for this violation is based on the same facts that support our culpability determinations for rule 3–110(A) and rule 3–700(A)(2), we give no additional weight in determining the appropriate discipline. The appropriate level of discipline does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

Count Four: Rule 4–100(B)(3) – failure to render an accounting

[4] Respondent argues on appeal that he had no obligation to account for the $5,800 fee he received from Le, again asserting it was a true retainer and therefore earned and accounted for upon receipt. As we discussed above, we find that Le paid the money as an advance against future services and not as a true retainer. As such, the accounting requirements of rule 4–100(B)(3) apply. (*In the Matter of Fonte, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 757–758.) Respondent's testimony that he did not receive Le's letter requesting an accounting was deemed not credible by the hearing judge, and we again give great deference to this credibility determination. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar, supra,* 41 Cal.3d at p. 780.) Furthermore, the obligation to "render appropriate accounts to the client" found in rule 4–100(B)(3) does not require as a predicate that the client demand such an accounting. We therefore find respondent wilfully violated rule 4–100(B)(3) because he failed to render an accounting to Le or Ly.

B. The Chen Matter (Case No. 01–O–04083)

1. Factual Findings

[5a] On September 13, 2000, You Zhong Chen (Chen) met with respondent's interpreter, Luu, who presented Chen with a "Contract for Hire,"[6] which Chen signed. The contract was in English, although Chen did not speak or read English, and Luu did not explain or translate the contract. The next day, September 14, 2000, Chen met with respondent and Luu. Chen spoke to respondent in Mandarin Chinese, utilizing Luu as a translator. He advised respondent of his grave concerns about six traffic violations he had been cited for on September 8, 2000, while driving a bus in Arizona for a tour operator. Chen emphasized that the citations were "a very big problem" because they could result in

5. We are deeply troubled by respondent's attitude towards his responsibility to respond to reasonable status inquiries. In his brief on appeal, he stated "it really isn't necessary that every hysterical phone call from an annoying, molesting nut case of a difficult non–client concerned with 'her child' be taken . . . ."

6. The Contract for Hire was identical in form to the contract described, *ante*, in the Le matter, and as such, it stated that it was for "Purchase of Availability" and that the $4,500 was a "True Retainer Fee."

traffic points on his driving record and the loss of his California driver's license. Chen testified: "I very clearly spoke to [respondent through Luu] and said the main thing that I want is I don't want any points because then I wouldn't have any work to do." Respondent testified Chen never told him about his concern with the traffic points.

Chen paid respondent $4,500 at the September 14th meeting. That was the last time Chen had any face–to–face communication with respondent. At the time he paid the money, Chen asked Luu why the legal fee was so high and was told that it would cover respondent's travel and living expenses while he was in Arizona taking care of Chen's traffic violations.[7]

Respondent testified that he traveled to Arizona the very next day, which was Friday, September 15, 2000, ten days before Chen was scheduled to appear in traffic court, and spoke to the court clerk, who advised him that he should pay the bail. He further testified: "I then returned to California, bought a postal money order and mailed the ticket money to the Court [on Monday, September 18, 2000,] with a cover letter and a brief message to the clerk. And that took care of the matter as far as I was concerned for Mr. Chen." Respondent provided no evidence of his travel to Arizona or his expenses incurred while he was there.

Approximately six months later, Chen was driving for another tour bus company when he learned his California driver's license was suspended due to his violations in Arizona. Chen was surprised and upset because he thought respondent had resolved his Arizona citations favorably. Chen immediately called respondent's office and talked to Luu. Respondent then called the clerk of the traffic court in Arizona and asked if it were possible for Chen to go to traffic school in order to expunge the prior traffic citations, but he was advised it was too late. Chen thus lost his job and was unemployed for the six months while his license was suspended. During this period, Chen testified he repeatedly called Luu, who either avoided his calls or hung up on him. Chen then followed up with a letter, dated July 27, 2001, addressed to Luu and "the attorneys" complaining that "we had come to an agreement that if I paid you $4,500, you would get rid of the points of the ticket. After I paid $4,500 to you, you didn't do anything, just told me to pay the $210 ticket fine." Respondent responded to the July 27 letter stating: "My original understanding was that you wanted your ticket to be taken care of without going back to Arizona. Frankly, I didn't know that Arizona ticket points would go against your California license."

On April 11, 2002, Chen and respondent participated in a mediation over their fee dispute, which resulted in a written settlement agreement. By its terms, respondent agreed to refund $2,500 to Chen, and Chen agreed to withdraw his complaint to the State Bar against respondent

2. Culpability Discussion

Count Five: Rule 3–110(A) – failure to perform with competence

We adopt the hearing judge's finding that respondent is culpable of violating rule 3–110(A) by failing to perform legal services competently. We agree with the hearing judge that respondent's testimony is highly suspect that he traveled to Arizona the day after he was retained by Chen merely to talk to the traffic court clerk in order to determine the best course of action, which was to pay the traffic fine of $210. The only evidence of any work performed on behalf of Chen is the postal order for payment of the fine, mailed from California and accompanied by a transmittal letter, dated September 18, 2000, addressed to the Arizona Justice Court stating: "Please find enclosed the citation and the money order for Mr. Chen. . . . I hope this will take care of the matter." There was no reference in this transmittal letter to his supposed meeting and discussion with the court clerk on the previous Friday, September 15. Nor did respondent recount any trip to Arizona or provide any

7. The decision of the hearing judge misstates Chen's testimony as questioning the reason for the $210 he paid to cover the *cost* of the traffic ticket. In fact, Chen questioned the high *fee* charged by respondent. In his opening brief, respondent characterized the judge's de minimis error as "either an intentional lie or the hallucination of a very ill person."

documentation of his travels in his letter to Chen of August 23, 2001, responding to Chen's written demand that respondent provide "evidence of your effort toward my case."

[5b] Even if we were to adopt respondent's version of the facts, we would find a wilful violation of rule 3–110(A). Respondent concedes that Chen hired him "to take care of [Chen's] Arizona concerns, without [Chen] going to Arizona."[8] Respondent further acknowledges that Chen hired him "to do his professional best in regard to Mr. Chen's problems in Arizona. . . ." Respondent admits that when he accepted Chen's case, respondent did not know about the relationship of Arizona and California motor vehicle laws and their effect on Chen's status as a licensed driver in California. Yet he did not research the law or do any investigation. Instead, respondent asserts that he immediately traveled to Arizona and, on the basis of information respondent received from a court clerk, simply paid the traffic fine, thereby compromising Chen's right to appeal the citations. As we explained in *In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 557 with respect to an attorney's failure to properly investigate an assault and battery case: "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 [his client's] interests. . . ." Respondent failed to make even the most "meager efforts to investigate the matter." (*Ibid.*) If respondent had conducted even a modest investigation, he would have learned what he admittedly did not know and what Chen feared most: by paying the fine in Arizona, rather than contesting the matter, Chen's traffic citation in Arizona would cause him to lose his California driver's license and ultimately his job.

Count Six: Rule 3–700(A)(2) – improper withdrawal from employment

After Chen paid $4,500 to respondent, he did not hear from him again. Yet, much to Chen's surprise and chagrin, his California driver's license was suspended six months later. It was only then, in response to Chen's repeated phone calls, that respondent called the Arizona traffic court clerk to ask about traffic school. By that time, it was too late for any corrective action. The circumstances in the Chen matter clearly required swift action by respondent, which he failed to take. "[T]ime was plainly of the essence to the services requested." (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 641–642.) Respondent thus effectively abandoned Chen and wilfully violated rule 3–700(A)(2) because he failed to communicate with Chen or take timely steps to protect foreseeable harm to Chen's interests. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117 [gross carelessness in failing to communicate or attend to needs of client is sufficient to establish abandonment]; *Kapelus v. State Bar, supra,* 44 Cal.3d at p. 187.)

Count Seven: Rule 4–100(B)(3) – failure to render an accounting

Respondent concedes he did not render an accounting to Chen, but he argues that no such accounting is due since his fee was a true retainer. We have already addressed the issue of true retainer fees in footnote 8, *ante*, finding that the $4,500 fee paid by Chen was an advance payment for future services rather than a true retainer. Accordingly, the accounting requirements of rule 4–100(B)(3) apply, and respondent violated them by failing to account to Chen. (*In the Matter of Fonte, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 757–758.)

Count Eight: Section 6090.5, subdivision (a)(2) – withdrawal of State Bar complaint

Section 6090.5, subdivision (a)(2) prohibits an attorney from seeking an agreement by a complainant to withdraw a disciplinary complaint pending

8. Respondent's admission that the funds were paid for the performance of legal services vitiates his claim that the fee he received from Chen was a "true retainer." Indeed, it is inconceivable that Chen would have paid respondent $4,500 to do no more than what Chen himself could have accomplished by simply mailing a check for $210 to the traffic court to pay the fine. We thus find that the $4,500 fee was a an advance payment against future services. (*In the Matter of Fonte, supra,* 2 Cal. State Bar Ct. Rptr. at p. 757.)

against the attorney with the State Bar. We agree with the hearing judge that respondent violated section 6090.5, subdivision (a)(2) when he entered into a Settlement Agreement with Chen on April 11, 2002, which provided that Chen "agreed to settle [their fee] dispute and to withdraw the complaint pending before the State Bar, all in accordance with the terms of this Agreement."

C. The Sun Matter (Case No. 01–O–04120)

1. Factual Findings

Rui Fang Sun (Sun) first met with respondent's interpreter, Luu, on August 31, 2000, to discuss a matter involving an alleged rapist. Sun spoke Mandarin Chinese, hut she did not speak or read English. Respondent was not at that meeting, although Sun asked to meet with him. Luu told her respondent was too busy. Sun met with respondent several weeks later, which was the only time they met during the entire time that he represented her.[9]

Sun testified that at the August 31st meeting, Luu advised her that respondent could assist her with the criminal investigation, so the rapist would be sent to jail, and that she could obtain $200,000 in "reparations" against the rapist for the injuries she sustained. Sun further testified that Luu told her respondent would "help me find a very famous doctor to check me out. . . ." Respondent testified that Sun retained him merely to facilitate the filing of a criminal complaint and assess the viability of a civil suit. The hearing judge found Luu and respondent's testimony not to be credible, and Sun's testimony to be credible. We give deference to this determination.

At the meeting on August 31, 2000, Sun signed a "Contract of Hire – Purchase of Availability,"[10] that was written in English, and she agreed to pay respondent a total of $5,000, which she did in four installments between August 31, 2000, and November 13, 2000. According to the Contract of Hire, respondent would "represent Sun in the case of: Rui Fang Sun vs [the alleged rapist]."[11]

Sun testified that during the two–year period after her first meeting with Luu, respondent never asked her to obtain a psychological or medical evaluation and never advised her she would have to pay for a medical exam. She further testified respondent essentially "wasted my time and he cheated me" because he did not find a doctor for her and did nothing to assist with the criminal matter or the civil case. Respondent testified that during the 18 months following his retention by Sun, he spent about two hundred hours on her case, including contacting the sheriff's investigators, attempting to schedule a polygraph test and arranging for treatment at a free clinic, but Sun refused to take a polygraph test or sign a medical release. Luu testified that Sun called and spoke with him frequently. However, there is no documentary or other evidence in the record of any work performed on behalf of Sun.

Frustrated with respondent's inaction, on January 17, 2002, Sun sent a letter, which was prepared by a friend, stating: "During the time I met you Robert Luu at the law office, I was promised that I have a case against [the alleged attacker] and be awarded $200,000.00 in compensation. I repeatedly communicated with you for refund to my best ability, and I even tried to contact with [respondent], but so far nothing was accomplished and the fee of $5,000.00 was a waste." Respondent responded five months later, on May 2, 2002, sending her a letter and enclosing a check for $4,000. He also enclosed a document entitled "Acknowledgment and Receipt" containing the following language: "I hereby release attorney David E. Brockway, and his Law Firm, from any and all liabilities" and a notification to the State Bar for her signature withdrawing her complaint. He requested in his letter that she sign the notification "only if you wish to withdraw your complaint." Sun did not cash

9. Sun met with respondent one more time in August 2002, when she collected the refund of the fees she had paid to him.

10. Luu signed the Contract of Hire on behalf of respondent. The contract is identical in form to the contracts discussed *ante*, in the Le and Chen matters.

11. There is no evidence in the record of a conviction of Sun's alleged attacker for rape or assault. While the absence of such evidence is not relevant to our analysis of the duties owed by respondent to Sun, under the circumstances, we decline to identify the alleged perpetrator.

the check at that time because she felt she was entitled to a refund of her entire $5,000 payment. There is no evidence that Sun signed the letter withdrawing her complaint from the State Bar, but she did sign the Acknowledgment and Receipt on July 9, 2002, and respondent refunded the additional $1,000 by a check issued the same date. Sun then negotiated both checks.

2. Culpability Discussion

Count Nine: Rule 3–110(A) – failure to perform with competence

The hearing judge found respondent culpable of violating rule 3–110(A) for his failure to perform competently on behalf of Sun. Respondent testified that he performed approximately 200 hours of work in the Sun matter, but the hearing judge found this testimony to be "self–serving." Other than Luu's testimony about his numerous conversations with Sun concerning the emotional effects of her trauma, there is no evidence in the record, such as file notes, work product or other documentation, to establish that any work was performed on behalf of Sun. Even if Luu assumed the task of listening to Sun's complaints, it was respondent's duty to take substantive action on her behalf. Respondent met with Sun just once to discuss her case during the almost two years he represented her. The hearing judge found Sun's testimony about respondent's inaction to be credible, and her testimony was corroborated by her letter to respondent, dated January 17, 2002, stating: "I was promised that I have a case against [the alleged rapist] and be awarded of $200,000.00 in compensation. . . .[N]othing was accomplished and the fee of $5,000.00 was a waste." The hearing judge found that respondent performed no work on behalf of Sun and provided no service of benefit to her. We adopt this finding and conclude that respondent wilfully violated rule 3–110(A).

Count Ten: Rule 3–700(A)(2) – improper withdrawal from employment

The hearing judge further found that respondent's failure to perform any service of benefit to Sun and his failure to communicate with her for more than 18 months constituted an impermissible withdrawal under rule 3–700(A)(2). We agree. "Gross carelessness and negligence in failing to communicate with clients or to attend to their needs may suffice" to establish that an attorney has improperly withdrawn from employment. (*Walker v. State Bar, supra,* 49 Cal.3d at p. 1117.) Indeed, "[t]he requirement of rule 2–111(A)(2) [now rule 3–700(A)(2)] that requires an attorney to take steps to avoid prejudice to his client prior to withdrawing . . . may reasonably be construed to apply when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client." (*Baker v. State Bar, supra,* 49 Cal.3d at pp. 816–817, fn. 5.) There is no evidence respondent did anything to pursue the civil suit or facilitate the criminal investigation or perform any other service of consequence, and he failed to communicate the fact of his inaction to her. We therefore find respondent, in essence, abandoned Sun, and accordingly he is culpable of wilfully violating rule 3–700(A)(2). (*In the Matter of Kaplan, supra,* 3 Cal. State Bar Ct. Rptr. at p. 554.)

Count Eleven: Rule 3–700(D)(2) – failure to refund unearned fees

We adopt the hearing judge's conclusion that respondent failed to refund unearned fees promptly in violation of rule 3–700(D)(2). We find that the fee that Sun paid respondent pursuant to the Contract of Hire was an advance against future services and was not a true retainer, as respondent asserts, for the reasons discussed in the Le matter, *ante*. Respondent's own testimony of the "two hundred hours" of service he purportedly provided confirms that he did not believe that his fee was intended merely to secure his availability, but instead was intended as an advance for future services. Accordingly, respondent was obligated to promptly return the unearned, advance fee. (*In the Matter of Lais, supra,* 3 Cal. State Bar Ct. Rptr. at p. 923.)

Sun repeatedly requested a refund of the $5,000 fee from August through November of 2000, but it was only after January 2002, when Sun wrote to him and stated in her letter that she intended to refer the matter to the State Bar, that he finally agreed to return the fee. Even then, respondent waited six months,

until July 2002, to refund the fee in full.[12] This six–month delay constituted a wilful violation of rule 3–700(D)(2). (*In the Matter of Lais, supra,* 3 Cal. State Bar Ct. Rptr. at p. 923 [two and one–half month delay in returning unearned fee violated rule 3–700(D)(2)].)

D. The Zhao Matter (Case No. 02–O–12367)

1. Factual Findings

Li Zhao (Zhao) and her husband, Qiang Liu (Liu) owned a small Chinese herb business. They received letters from the United States Department of Justice, Immigration and Naturalization Service (INS), dated April 25, 2000, advising them that their Petitions for Nonimmigrant Worker Status had been denied. Zhao and Liu had 30 days to appeal, and Zhao immediately sought the help of respondent, whom she met on April 28, 2000. At the initial meeting, which also was attended by the interpreter, Luu, Zhao advised respondent of the urgent need to immediately appeal the denial of her L1 visa renewal. Zhao, who signed a "Contract of Hire: Purchase of Availability"[13] at the initial meeting, gave respondent a check for $6,500, believing that the fee was to take care of "my L1 appeal and my husband's and myself's legal status changes." (The Contract of Hire referenced the case as an "L1 INS Appeal.") Zhao and her husband spoke Chinese, and they had a very limited ability to speak or read English. However, Luu did not translate the contract for Zhao.

Respondent clearly understood the urgency of Zhao's situation. He testified: "Zhao's status had expired and the INS had determined that she should be removed from the United States and she had been ordered to appear at the INS for deportation." In spite of her precarious situation, respondent testified that he told Zhao that she and her husband were not eligible for legal status and that she should wait a year or two in order to prove to the INS her herb business was "a going concern" and profitable.[14] Respondent said he would then "resubmit the application kind of going through the back door rather than an appeal to a proper authority with the INS." The hearing judge found this testimony was not believable.

Almost one year later, in February or March of 2001, after respondent had taken no action, Zhao requested the return of her files. She followed up with a letter on April 10, 2001, which was written by a friend pursuant to her instructions, demanding a refund of the $6,500 fee and the return of her "papers." In the letter, she complained that respondent failed to provide any evidence that he had done any work on her or her husband's behalf. She wrote: "You and Mr. [Luu] not only have misled us. You and Mr. [Luu] have also failed to refund my money and all papers timely."

Frustrated and fearful of possible deportation, Zhao hired another attorney, Frank Carleo. On April 15, 2001, Carleo wrote to respondent demanding the return of the $6,500 and the entire file for Zhao and her husband Liu.[15] In the letter, Carleo stated that Zhao and Liu "signed a contract to have you represent them in their appeal and to otherwise apply, on their behalf for permanent residence status. You asked for them to pay a retainer of $6,500. They immediately gave you the requested sum. [Para.] The appeal had to be filed within 30 days. From April 28, 2000, they heard nothing regarding your efforts. They contacted your offices many times asking if there was anything more for them to do. They could never reach anyone to discuss the progress of their appeal. . . . It was not until March of 2001 that they learned that you had not filed anything. Ms. Zhao and her husband Mr. Liu have been severely prejudiced by your inaction. They are now out–of–status and subject to incarceration at any time by the INS!"

12. Respondent improperly conditioned the return of the fees upon Sun's signing a document entitled "Acknowledgment and Receipt" which released respondent "and his Law Firm, from any and all liabilities." We discuss this act of overreaching as aggravation, *post.*

13. The Contract for Hire was in English and the same form as respondent used in the other three matters discussed *ante.*

14. Respondent testified that the L1 status was available for individuals who were "in a managerial position of a foreign country operating a branch organization for the United States." According to respondent, it is essential the organization "employs at least five citizens or permanent residents and essentially makes a profit."

15. Carleo sent a second, identical letter on April 25, 2001.

When respondent finally returned the file in late April of 2001, it contained nothing but the papers that Zhao initially had given to respondent. Ultimately, Zhao and her husband sued respondent for the return of the fee and for other damages. On June 4, 2002, respondent paid $12,500 by cashier's check issued to Carleo in settlement of the suit.

2. Culpability Discussion

Count Twelve: Rule 3–110(A) – failure to perform with competence

The hearing judge found respondent culpable of violating rule 3–110(A) by failing to file any papers or take any action on Zhao's behalf with respect to her appeal in the immigration matter. We agree. Additionally, we find that respondent's failure to perform was reckless given the urgency of the situation and the grave consequences attendant to Zhao's loss of status as an immigrant. We find respondent's explanation highly implausible that he intended to build a case for Zhao and her husband over a one– to two–year period so that he could "resubmit the application kind of going through the back door rather than an appeal to a proper authority . . . ."

Count Thirteen: Rule 3–700(A)(2) – improper withdrawal from employment

The hearing judge found that respondent's failure to perform any service of benefit to Zhao and his failure to inform her that he had basically abandoned her appeal was a violation of rule 3–700(A)(2). We agree. (*Walker v. State Bar, supra,* 49 Cal.3d at p. 1117; *Baker v. State Bar, supra,* 49 Cal.3d at pp. 816–817, fn. 5.) The 30–day time period needed to perfect Zhao's appeal required a rapid response. Respondent's failure to take action for one year under these circumstances constituted an effective withdrawal under rule 3–700(A)(2). (*In the Matter of Bach, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 641–642.

Count Fourteen: Rule 3–700(D)(1) – failing to return client file[16]

[6] The hearing judge found that respondent failed to promptly release Zhao's file. We adopt this finding. Zhao made several verbal requests for the return of her "papers," but it was only after she and her new attorney, Carleo, followed up with three letters demanding the return of her file that respondent finally complied. By waiting at least two months to send Zhao's files to her attorney, respondent willfully violated rule 3–700(D)(1). (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377.)

III. DISCIPLINE

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including aggravating and mitigating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

A. Aggravation

We adopt all of the hearing judge's findings in aggravation, and also find acts of moral turpitude as uncharged misconduct constituting additional aggravation.[17]

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) Effective April 1991, respondent was actually suspended for three months, with conditions,

16. The hearing judge noted in her decision that the NDC incorrectly numbered this count as "Thirteen" rather than "Fourteen." Her decision also inadvertently mislabeled Count Fourteen as "Failure to Accounts [sic] of Client." However, the hearing judge's analysis clearly addresses the substance of respondent's failure to timely return Zhao's file.

17. Although evidence of uncharged misconduct may not be used as an independent ground for discipline, it may be considered in aggravation where appropriate. Here, the evidence of overreaching came from respondent's own testimony and that of the witnesses. (*Edwards v. State Bar, supra,* 52 Cal.3d at pp. 35–36.)

for wilfully misappropriating $500 from a client in 1981 and for acquiring an adverse interest against a client by accepting a quitclaim deed in 1982. (*Brockway v. State Bar, supra,* 53 Cal.3d 51, 58–59, 64–65, 67 (*Brockway I*).) Although the gravamen of respondent's prior misconduct differs from the present misconduct, there are areas of common concern. The hearing judge found respondent to be not credible, and we also consider much of his testimony to be inherently improbable. So, too, the Supreme Court made the same finding in *Brockway I* (*id.* at p. 58), characterizing his testimony as "artful and hard to believe." (*Id.* at p. 66.) Also, in *Brockway I*, respondent utilized an ambiguous retainer agreement with an incarcerated criminal defendant of questionable competence and failed to disclose the nature of the adverse property interest he was acquiring from the defendant. (*Id.* at pp. 65, 67.) To some extent these facts mimic the misconduct in the instant case, and we accordingly ascribe moderate weight in aggravation because of respondent's prior discipline.

Respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) He is culpable of 14 counts of misconduct in four client matters. The State Bar argues this amounted to a pattern of client abandonment. We disagree. Only the most serious instances of repeated misconduct over a prolonged period of time have been considered as evidence of a "pattern of misconduct." (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217; *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1079–1080.)

We agree with the hearing judge's finding that respondent significantly harmed his clients (std. 1.2(b)(iv)), because two clients were required to hire new counsel to recover fees and obtain their files and one client lost his job due to respondent's failure to perform. Indeed, all four of respondent's clients sought his professional help to remedy serious, pressing problems. Respondent not only failed to make himself available to these clients, but his inaction exacerbated their desperate situations.

Respondent has made no attempt to atone for the consequences of his misconduct. (Std. 1.2(b)(v).) His demonstrated indifference towards the plight of his clients is nothing less than astonishing. For example, in his Opening Brief, respondent questions the relevance and import of Chen's loss of employment: "As far as Chen's job, well that is the way the cookie crumbles. Also what difference does Chen's 'concerns' have on this case?" (See also footnote 5 *ante*.)[18] In fact, respondent repeatedly has attempted "to shunt the responsibility for his misconduct onto others, including the very victims of that misconduct." (*Bernstein v. State Bar, supra,* 50 Cal.3d 221, 232.) Accordingly, we assign substantial weight in aggravation to respondent's indifference and failure to atone for his misconduct.

[7] We find additional uncharged misconduct in aggravation as the result of respondent's overreaching of his clients, constituting acts of moral turpitude in violation of section 6106. (Std. 1.2(b)(iii).) Knowing of his clients' English language limitations, respondent nevertheless used technical legalese in his engagement agreements, such as the term "true retainer," in an effort to exempt himself from providing any service of consequence to them. Furthermore, respondent required one client to withdraw his complaint to the State Bar as a condition of settlement, and another was required to sign a release as a condition of settlement, releasing respondent from all legal liability.[19] "'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 . . . is in a superior position to exert unique influence over the dependent party.'" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent's exploitation of his superior knowledge and position of trust to the detriment of his vulnerable clients clearly

18. Respondent's Opening Brief also contains comments that show disrespect towards the hearing judge. For example, he states: "[I]f the judge weren't so undereducated, inexperienced and ignorant of how real attorneys conduct their profession in an ethical manner, and was of course anything but arrogant, biased and unthinking; then a more correct finding of the fact and/or opinion would have been forthcoming."

19. Respondent sent an "Acknowledgment and Receipt" with the refund of Sun's $4,000, which provided: "I hereby release attorney David E. Brockway, and the Law Firm, from any and all liabilities." Sun thought she was merely signing a receipt for the money. Parenthetically, a release of all liabilities may well violate rule 3-400(A).

constituted moral turpitude within the meaning of section 6106. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 244.)

B. Mitigation

[8] Respondent presented the testimony of one character witness, Rebecca Elayache. The testimony of this witness does not constitute a broad range of references from the legal and general communities. (See *In the Matter of Myrdall, supra,* 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients do not constitute a broad range of references from legal and general communities].) Moreover, the witness had only limited knowledge of the disciplinary issues in this proceeding. The hearing judge assigned "minimal weight" to respondent's evidence. (Std. 1.2(e)(vi)). We assign no weight in mitigation, as it was respondent's burden to establish mitigating circumstances by clear and convincing evidence, which he failed to do. (Std. 1.2(e); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311.)

C. Level of Discipline

In determining the appropriate level of discipline, we look to the applicable standards and case law for guidance. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although the standards are not binding, they are to be afforded great weight because "'they promote the consistent and uniform application of disciplinary measures.' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The hearing judge considered as applicable standards 1.6, 1.7(a), 2.2(b), 2.4(b), 2.6, and 2.10.[20] Based on our additional finding of moral turpitude as the result of respondent's overreaching, we add standard 2.3 to the discipline equation.[21] Thus, standards 2.3 and 2.6, providing for suspension or disbarment, are the most relevant to this case.

Our discipline analysis is tempered by the decisional law, and a review of similar cases leads us to conclude that greater discipline than the one-year actual suspension recommended by the hearing judge is required under the circumstances presented here. The range of discipline imposed in cases focusing on client abandonment and failure to communicate is extremely broad, ranging from six months' actual suspension to disbarment. In recommending one year actual suspension, the hearing judge considered *In the Matter of Bach, supra,* 1 Cal. State Bar Ct. Rptr. 631 and *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73. These cases, however, involved less serious misconduct than that which occurred here. In the case of *In the Matter of Bach, supra,* 1 Cal. State Bar Ct. Rptr. 631, we recommended nine months' actual suspension where the attorney abandoned two clients, who suffered only modest harm as the result of the attorney's inattention. In *In the Matter of Peterson, supra,* 1 Cal. State Bar Ct. Rptr. 73, we recommended one year's actual suspension where the attorney abandoned three clients and the consequences of the attorney's inattention were not serious. (See also, *Lester v. State Bar* (1976) 17 Cal.3d 547 [four instances of abandonment, six months' actual suspension]; *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 [one-year actual suspension for failure to perform and improper withdrawal in one client matter, plus an act involving

20. Standard 1.6 provides when there are two or more acts of professional misconduct in a single proceeding, the sanction imposed will be the more severe of the applicable standards.

Standard 1.7(a) provides that a greater degree of discipline should be imposed than was imposed in a prior disciplinary proceeding.

Standard 2.2(b) provides for a 90-day actual suspension for a violation of rule 4-100 not involving a wilful misappropriation.

Standard 2.4(b) provides failure to perform services not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides for suspension or disbarment, depending on the gravity of the offense, for violations of section 6068, subdivisions (i) and (m).

Standard 2.10 provides reproval or suspension, depending on the gravity, for all other violations of the Business and Professions Code and rules not specifically addressed in the standards.

21. Standard 2.3 provides in relevant part: "Culpability of a member of an act of moral turpitude . . . shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

dishonesty and moral turpitude and a prior record of serious, but dissimilar, misconduct].)

Generally, where four to six clients have been abandoned or suffered from incompetent representation, the discipline has included an actual suspension of two years. (cf. *Martin v. State Bar* (1978) 20 Cal.3d 717 [six instances of abandonment resulting in one year actual suspension].) Of the cases imposing two years' actual suspension, we consider as particularly apt the cases of *Bernstein v. State Bar, supra,* 50 Cal.3d 221, *Nizinski v. State Bar* (1975) 14 Cal.3d 587 and *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220.

In *Bernstein v. State Bar, supra,* 50 Cal.3d 221, the Supreme Court imposed a five–year stayed suspension and five years' probation on the condition of two years' actual suspension, plus payment of restitution due to the attorney's failure to perform, return files and refund unearned fees to five clients in three separate matters. Many of Bernstein's clients were vulnerable, as were those of respondent. In one instance, Bernstein told one of his students in a class where he was a part–time instructor, that he was a highly sophisticated appellate practitioner. (*Id.* at p. 225.) The student borrowed $2,500 to pay Bernstein to represent him in an appeal. Bernstein then failed to prosecute the appeal or respond to the student's inquiries. After he was fired, Bernstein refused to return the $2,500 fee or the student's file, and as a consequence, the student was unable to hire another attorney.

In a second matter, another student of Bernstein and the student's husband hired him to represent them in litigation involving an automobile lease. (*Bernstein v. State Bar, supra*, 50 Cal.3d at p. 226.) They paid $1,500 as advanced fees, but after Bernstein took no action, two default judgments were entered against them and they were required to pay the judgments, one of which was for the leasing company's attorney's fees. Their bank accounts were levied and their wages garnished. Bernstein refused to return the legal fees when the student demanded them. In a third matter, Bernstein was hired by an immigrant, who paid him $2,500 to obtain permanent residency status for himself and his wife. (*Id.* at p. 227.) Bernstein took no action, would not respond to client inquiries, and as a consequence, the clients were forced to hire a notary in Mexico, who obtained legal residency status for them. As in the instant case, Bernstein attempted to exempt himself from responsibility by hiding behind his retainer agreement, which referred to his corporate law firm and not to himself individually. The Supreme Court rejected this, stating "he cannot rely on the corporate veil to cloak his own professional lapses." (*Id.* at p. 231.) There was significant aggravation because the attorney failed to cooperate with the State Bar, was indifferent to the consequences of his misconduct, and lacked candor. Bernstein, like respondent, had a prior discipline resulting in thirty days' actual suspension for misappropriation of a client's funds, and there was no mitigation evidence.

In *Nizinski v. State Bar, supra,* 14 Cal.3d 587, the Supreme Court imposed two years' actual suspension and until restitution was made, where an attorney failed to perform on behalf of four clients, several of whom were unsophisticated and at least one of whom did not speak English well. In one matter, Nizinski failed to prosecute a criminal appeal after he was paid a $1,000 fee by the client, who was incarcerated. (*Id.* at p. 589.) Nizinski never returned the fee. In a second matter, two individuals retained him and gave him $500 plus a ten percent contingency to represent them in a will contest. (*Id.* at p. 591.) Nizinski took no action on the clients' behalf in spite of repeated assurances to them that he was taking care of everything. (*Ibid.*) Instead, he claimed that the $500 was paid to represent the son of one of the clients, which was untrue. In another matter, Nizinski failed to pursue a criminal appeal on behalf of a client, and it was dismissed for want of prosecution. (*Id.* at p. 592.) The defendant's mother then paid Nizinski $500 to institute a habeas corpus proceeding. (*Ibid.*) Nizinski used the money for his own purposes and took no further action. The defendant ultimately was deported to Mexico. In addition, Nizinski was found culpable of acts of moral turpitude for knowingly misrepresenting to his clients the status of their cases, and in two instances, of accepting the clients' funds without using them for their intended purpose. Nizinski had a prior 30–day suspension involving failure to perform competently and making misrepresentations to his clients and the State Bar.

In the case of *In the Matter of Bailey, supra*, 4 Cal. State Bar Ct. Rptr. 220, which was a default proceeding, the attorney was found culpable of abandonment and improper withdrawal in four client matters, as well as failure to perform competently, return files and respond to client inquiries. In one client matter, Bailey collected an illegal probate fee of $1,500 and demanded an additional fee to complete the probate, which Bailey never accomplished. (*Id.* at p. 224.) In a second probate matter, Bailey failed to prevent secured creditors from foreclosing on real property due to her inaction. (*Ibid.*) In yet another probate matter, Bailey collected $4,000 in advanced fees and then failed to provided any service, forcing the client to probate the estate herself. (*Id.* at pp. 224–225.) In the fourth matter, Bailey collected an advance fee of $1,990, then made several errors in the disposition of assets. (*Id.* at p. 225.) She demanded additional fees to correct the errors, then failed to take any action. Other than absence of a prior discipline, there was no mitigation. Aggravation included client harm, multiple acts of wrongdoing and lack of cooperation with the State Bar. Bailey received a five–year stayed suspension with two years' actual suspension and until restitution was paid. (*Id.* at p. 230; see also, *Bledsoe v. State Bar, supra*, 52 Cal.3d 1074 [two years' actual suspension where attorney with no prior record found culpable of failing to perform on behalf of four clients, failing to communicate, failing to forward a client file and refund unearned fees, withdrawing without notice, and failing to cooperate with the State Bar].)

The State Bar here asks for disbarment even though it did not appeal the hearing judge's decision. There are a number of cases where client inattention and/or abandonment have resulted in disbarment, but these cases generally have involved more instances of misconduct, such that the behavior was characterized as a habitual disregard of clients' interests or a pattern of misconduct under standard 2.4(a).[22] (See e.g., *In re Billings* (1990) 50 Cal.3d 358 [disbarment for 18 matters involving abandonment resulting in serious harm to clients, practicing law while on suspension and conviction for misdemeanor drunk driving resulting in grave injuries to a passenger]; *Farnham v. State Bar* (1988) 47 Cal.3d 429 [seven instances of abandonment with prior disciplinary record, disbarment]; *Slaten v. State Bar* (1988) 46 Cal.3d 48 [disbarment because failed to perform for seven clients, commingled funds, advised client to act in violation of law and had an extensive discipline record]; *McMorris v. State Bar* (1983) 35 Cal.3d 77 [disbarment for habitual failure to perform in seven matters involving five clients, with two prior suspensions for the same misconduct]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416 [disbarment for 16 counts of misconduct in nine client matters and one non–client matter for failing to perform competently, to return a client's file promptly, to respond to client inquiries, and to notify clients of significant developments, plus commingling funds and an act of moral turpitude for issuing checks on account with insufficient funds, aggravated by prior six–month suspension for the same misconduct, multiple acts of misconduct, significant harm to clients and indifference toward rectification]; cf. *Pineda v. State Bar* (1989) 49 Cal.3d 753 [although a common pattern of failure to perform, communicate and refund unearned fees, plus misconduct involving misrepresentation and misappropriation in seven client matters, only two years' actual suspension warranted because of strong mitigative evidence].) As discussed *ante*, we do not find on this record clear and convincing evidence of a pattern of abandonment or habitual disregard of clients' interests mandating disbarment under standard 2.4(a).

We recommended disbarment in *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, which involved misconduct in only three client matters, including the unauthorized practice of law, failure to keep clients reasonably informed of significant developments, failure to refund unearned fees and an act of moral turpitude arising from appearing on behalf of a client and using a pre–signed verification without the client's authority. However, our primary concern in that case was the attorney's failure to comply with the terms and conditions of his criminal probation by disobeying two child support

22. Standard 2.4(a) provides: "Culpability of a member of a pattern of wilfully failing to perform services demonstrating the member's abandonment of the causes in which he or she was retained shall result in disbarment."

orders and his failure to participate in his two disciplinary proceedings. We thus concluded Taylor was not a good candidate for suspension and/or probation because of his "disdain and contempt for the orderly process and rule of law [that] clearly demonstrate that the risk of future misconduct is great." (*Id.* at p. 581.) In contrast, respondent participated in the hearing below and in this appeal.[23] His single prior record of discipline was remote in time, although his prior conduct is suggestive to some extent of the misconduct of concern here.

In considering the appropriate discipline, we find respondent's overreaching of his clients to be of serious concern. But it does not approach the grievous lack of client fidelity that occurred in *In the Matter of Brimberry, supra*, 3 Cal. State Bar Ct. Rptr. at p. 405, where we recommended disbarment for an attorney who affirmatively disregarded her clients' instructions and "became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees." Indeed, in *Brimberry*, we found the attorney's actions to be "'reprehensible, corrupt, [and] dishonest . . . .'" (*Id.* at p. 393.)

Nor do respondent's actions approach the attorney's overreaching in *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, wherein we recommended disbarment for an attorney who "made a habit of ignoring his clients and their interests. . . ." (*Id.* at p. 346.) We found Phillips culpable of overreaching of several clients who "were of modest means and apparently modest education . . . ." (*Id.* at. p. 346.) In two matters, Phillips attempted to settle cases without client authority, and in one matter without having met the client. He also filed a lawsuit on behalf of former clients against their wishes, spoke to his clients rudely and hung up on them, and ignored their correspondence and telephone calls and those of other counsel. (*Ibid.*) Looking at the facts as a whole, we were compelled in *Phillips* to conclude that the attorney had demonstrated "clear disrespect for his clients and a nearly complete lack of appreciation for his professional obligations." (*Ibid.*) In all, Phillips was culpable in seven separate matters involving five clients and two former clients of repeatedly and intentionally failing to perform services competently, failing to return files, charging an illegal fee, failing to return unearned fees, sharing fees with a non–lawyer, and forming a law partnership with a non–lawyer. (*Id.* at p. 345.) In aggravation, we found Phillips' misconduct was surrounded by considerable dishonesty and concealment and that he "demonstrated a willingness to disregard the truth whenever the need arises . . . ." (*Id.* at p. 346.)

[9] Based on the unique facts of the instant case, and looking to the decisional law and the standards for guidance, we are persuaded that disbarment is too severe and is unnecessary to protect the public and the courts. Nevertheless, respondent's abandonment of his clients, together with his overreaching, militates in favor of a longer period of actual suspension than the one year recommended by the hearing judge. We accordingly recommend a five–year suspension, stayed, and a five–year period of probation on the condition of two years' actual suspension and until respondent satisfies the requirements of standard 1.4(c)(ii), which will carry with it the condition that respondent establish his rehabilitation, fitness to practice and learning and ability in the general law before being allowed to commence practice again. This requirement serves the important goal of public protection, especially necessary in this case in view of the absence of any recognition by respondent of the seriousness of his misconduct.

IV. RECOMMENDATION

We recommend that respondent David Eric Brockway be suspended from the practice of law in the State of California for five years, that execution of that suspension be stayed, and that respondent be placed on probation for five years on the following conditions:

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23. We agree with the State Bar that respondent's participation in these proceedings is marred by his testimony below, which the hearing judge found to a large extent was not credible, as well as his brief on appeal, which the State Bar asserts demonstrates a "manifest disrespect for the courts." Respondent's brief does indeed contain several unfounded and inflammatory statements, but we already have assigned weight in aggravation to these statements in finding respondent is indifferent towards rectification and is unwilling to atone for his misconduct. (Std.1.2(b)(v).)

1. That respondent be actually suspended from the practice of law in the State of California during the first two years of probation and until respondent shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to 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, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation 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 his 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that 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.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. 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 such completion to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end

of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for five years will be satisfied, and the suspension will be terminated.

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 during the period of his actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

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 paragraphs (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

We concur:

STOVITZ, P.J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS NEIL THOMSON

A Member of the State Bar

No. 02–O–0930; 03–O–02209 (Consolidated)

Filed July 12, 2006; reconsideration denied August 24, 2006.

SUMMARY

While representing a client in bankruptcy proceedings, respondent violated injunctions and was ordered to pay sanctions. In two other matters, respondent negotiated on behalf of clients while suspended from the practice of law. The hearing judge found respondent culpable of disobeying court orders, failing to report judicial sanctions, engaging in the unauthorized practice of law, and failing to comply with probation conditions and recommended a four–year actual suspension. (Hon. Robert M. Talcott, Hearing Judge.)

The review department concluded that the probation violations were duplicative of underlying charged misconduct and did not consider them in assessing the appropriate discipline. The review department adopted all other findings and conclusions of the hearing judge but because of the repetitive nature of respondent's four prior incidents of discipline, recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon, Kimberly Anderson

For Respondent: Thomas N. Thomson

HEADNOTES

[1 a–c] 191 Effect of/Relationship to Other Proceedings
220.00 Section 6103

Where preliminary and permanent injunctions prohibited respondent's client and the agents of respondent's client from filing any actions relating to certain realty, respondent's filing of a quiet title action in superior court and recording of a lis pendens on behalf of a company the client owned violated Business and Professions Code section 6103 because respondent had actual knowledge of the restraints imposed by the injunctions and because respondent was acting as an agent of the client.

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] **213.10 State Bar Act–Section 6068(a)**
230.00 State Bar Act–Section 6125
231.00 State Bar Act–Section 6126

Where respondent wrote letters to negotiate claims on behalf of clients while suspended from the practice of law, respondent was still culpable of engaging in the unauthorized practice of law despite having filed a motion to stay his suspension.

[3 a, b] **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. To conclude otherwise would reward an attorney for his unreasonable beliefs and for his ignorance of his ethical responsibilities. Where injunctions proscribed certain conduct, respondent's claim that he believed he was not subject to the injunctions was not reasonable, particularly because the Federal Rules of Civil Procedure made them binding on him.

[4] **806.10 Standards–Disbarment After Two Priors**
When there is a repetition of offenses for which an attorney has previously been disciplined that demonstrates a pattern of professional misconduct, the Supreme Court and this court have found disbarment appropriate under Standards for Attorney Sanctions for Professional Misconduct, standard 1.7(b).

[5] **1010 Discipline Imposed in Disciplinary Matters Generally–Disbarment**
Where respondent disobeyed court orders, failed to report judicial sanctions, engaged in the unauthorized practice of law, failed to comply with probation conditions, and committed multiple acts of wrongdoing, surrounded by bad faith, dishonesty, and concealment, where respondent demonstrated indifference toward rectification or acknowledgment of wrongdoing and had four prior incidents of discipline involving similar misconduct, and where there was no mitigation, the appropriate disciplinary recommendation was disbarment.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
214.11 Section 6068(k)
214.51 Section 6068(o)
220.01 Section 6103
230.01 Section 6125
231.01 Section 6126

Aggravation

Found

511 Prior Record of Discipline
521 Multiple Acts of Misconduct
541 Bath faith, dishonesty, concealment
591 Indifference to Rectification/Atonement

Other

106.30 Procedure–Pleadings–Duplicative Charges
191 Effect of/Relationship to Other Proceedings
204.10 Culpability–Willfulness Requirement

OPINION

EPSTEIN, J.:

A bankruptcy court issued preliminary and permanent injunctions enjoining a debtor, his agents, representatives and those acting in concert with him from bringing or maintaining any action affecting certain real property. Respondent, Thomas N. Thomson, who was the attorney for the debtor, his brother and a corporation co–owned by the debtor and the brother, commenced an action in state court on behalf of the corporation that adversely affected title to the real property. Respondent then filed and recorded a notice of lis pendens against the property. The bankruptcy court found the debtor, his brother and respondent in contempt of the injunctions and imposed sanctions on respondent in the amount of $46,359.72. Respondent did not report the sanctions order.

Respondent appeals a hearing judge's decision finding him culpable of disobeying a court order, failing to report judicial sanctions, engaging in the unauthorized practice of law and failing to comply with probation conditions. The hearing judge recommended a five–year stayed suspension, a five–year probation, and a four–year actual suspension with conditions, including compliance with Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[1]

Upon our independent review (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the findings and conclusions of the hearing judge with minor modification. However, inasmuch as this is the fifth time that respondent has been disciplined, and his misconduct in the present matter repeats much of the misconduct that gave rise to his prior discipline, we do not believe that the hearing judge's recommended discipline of four years' actual suspension is sufficient to protect the public, the courts and the profession. Instead, we look to *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829 and standard 1.7(b) for guidance, and in so doing, we feel compelled to recommend that respondent be disbarred.

I. FACTS

A. Background

Respondent was admitted to practice in January 1971. He has a record of discipline in four previous matters. Pursuant to Supreme Court Order S039144, effective July 17, 1994, respondent was placed on probation for three years and received a one–year stayed suspension for misconduct in two client matters (*Thomson I*). In one client matter in 1992, the superior court sanctioned respondent $12,667.40 due to his actions in maintaining a quiet title action involving questionable ownership interests of his clients in certain real property. The superior court found respondent's actions were in bad faith, frivolous and intended to cause unnecessary delay. Respondent failed to pay the sanctions or report them to the State Bar. Respondent stipulated to violations of Business and Professions Code sections 6103, 6068, subdivisions (a), (b), and (o)(3),[2] and rule 3–200 of the Rules of Professional Conduct.[3]

In the other client matter, respondent was twice sanctioned by a superior court for failing to appear at two hearings. He failed to timely pay the two sanctions as ordered. Thereafter, on October 13, 1992, the court imposed a further sanction of $1,000 as the result of respondent's pattern of failing to timely pay the two previous monetary sanctions and three other sanctions in unrelated matters. Respondent then failed to pay the October 1992 sanction, or report it to the State Bar. Respondent's multiple failures to comply with the court orders were deemed an aggravating factor in *Thomson I*.

In *Thomson II* (Supreme Court Case No. SO39144), effective March 1997, respondent's probation was extended for two years due to his failure

1. All further references to "standards" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

2. Unless otherwise noted, all further references to "section" refer to the Business and Professions Code.

3. All further references to "rule" or "rules" are to the Rules of Professional Conduct, unless expressly noted.

to comply with a probation condition requiring completion of three hours of continuing legal education in law office management by 1995.

In *Thomson III* (Supreme Court Case No. SO59080), also effective March 1997, respondent was placed on probation for two years and received a 30–day actual suspension for commingling funds on multiple occasions between October and December 1993 in violation of rule 4–100(A) and engaging in the unauthorized practice of law in December 1995 in violation of section 6125. Respondent's unauthorized practice occurred when he filed a complaint, initiating a lawsuit in the superior court on behalf of a client while he was suspended from practice for failing to pay his State Bar dues. Respondent was ordered to pay $12,667.40 in restitution.

Finally, in June 2001, pursuant to Supreme Court Order S095884 (*Thomson IV*), respondent was placed on probation for three years and received a two-year stayed suspension for violations of sections 6068, subdivision (k) and 6103 as the result of his failure to pay the restitution ordered in *Thomson III*.

On July 1, 2003, the State Bar filed a Notice of Disciplinary Charges (NDC) in the proceeding we now review, alleging that respondent failed to obey a court order, failed to report judicial sanctions, engaged in the unauthorized practice of law, and failed to comply with probation conditions imposed under Supreme Court orders S039144, S059080, and S095884. On September 10, 2003, the State Bar filed a second NDC alleging respondent engaged in the unauthorized practice of law in a second matter and committed an additional violation of his probation conditions imposed under Supreme Court order S095884. The matters were consolidated and a two–day trial was held in the hearing department on February 23 and 24, 2004. On August 2, 2004, the hearing judge filed his decision, finding respondent culpable on all charged counts.

Respondent is appealing the hearing judge's decision, claiming that there is no evidentiary or legal basis for finding that he wilfully violated either the preliminary or permanent injunctions that provide the basis for the section 6103 charge or that he willfully engaged in the unauthorized practice of law. He also contends that the hearing department's recommended discipline is excessive. The State Bar did not request review, but upon its consideration of disciplinary cases that were decided post–trial in this matter, the Bar is now seeking disbarment.

B. Lamanna Matter

1. Findings

For many years, respondent represented Frank and Carlos Lamanna as well as Anniello, Inc. (Anniello), a privately–held corporation co–owned by Frank and Carlos Lamanna.[4] Carlos was the president of Anniello. Respondent was the incorporator of Anniello in 1989 and its designated agent for service of process until 1998.

In January 1987, Frank and Carlos Lamanna became indebted to Security Pacific National Bank (Bank)[5] on a $1,110,000 note, secured by a deed of trust on property located at 8600 South Sepulveda Boulevard (Sepulveda Property). In October 1993, the Lamannas defaulted on the loan and the Bank filed a Notice of Default. In March 1994, respondent filed a lawsuit against the Bank in Los Angeles County Superior Court on behalf of Frank Lamanna to prevent the non–judicial foreclosure of the Sepulveda Property. In June 1994, before the Bank could foreclose on the Sepulveda Property, Frank Lamanna filed for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California, case number 94–33978–GM. The matter was converted to a Chapter 7 proceeding upon motion of the Bank.

4. Respondent testified at the hearing below that Carlos Lamanna was a shareholder of Anniello, but he was not sure of the remaining ownership of Anniello. However, in various pleadings that he filed in state court, including an ex parte application for a temporary restraining order in a quiet title action on behalf of Anniello, which we discuss *post*, he averred that Frank Lamanna was a co–owner of Anniello. Frank Lamanna's declaration in support of that pleading was consistent with the representations made by respondent in the pleadings.

5. Bank of America, N. T. & S. A. is successor–in–interest to Security Pacific National Bank.

In August 1995, the Lamannas and their wives, who shared ownership interests with others in the Sepulveda Property, entered into a general release and settlement agreement (Settlement Agreement) with the Bank resolving various disputed claims relating to the Sepulveda Property and other assets. The Settlement Agreement was complex, 33 pages long, and included, inter alia, an agreement by the Bank not to foreclose on the Sepulveda Property until after October 11, 1995. In exchange, the Lamannas were given an option to purchase the Sepulveda Property by a certain date, and if they did not do so, they agreed to vacate the Sepulveda Property within 90 days of a timely foreclosure by the Bank. The Lamannas also agreed to dismiss a number of other lawsuits against the Bank. They further agreed that the Settlement Agreement would be binding on "their family members, agents, employees, representative officers, directors, subsidiaries, affiliates, assigns, heirs, successors in interest and shareholders." The bankruptcy judge approved the Settlement Agreement in September 1995. One month later, the Lamannas failed to meet a condition of the Settlement Agreement and the Bank foreclosed on the Sepulveda Property on October 26, 1995.

Initially, Frank Lamanna was represented in the bankruptcy proceedings by other counsel, but in February 1996, respondent appeared as counsel of record when he filed a motion to vacate the Settlement Agreement on behalf of Lamanna, which the bankruptcy judge denied on March 28, 1996. Notwithstanding their obligation to vacate the Sepulveda Property, the Lamannas remained in possession after the Bank foreclosed. On April 17, 1996, the Bank filed an unlawful detainer complaint in Los Angeles Municipal Court of the West Los Angeles Judicial District, and in April 1996, respondent filed an answer to the complaint on behalf of Frank Lamanna. As a result of these actions by the Lamannas, on August 16, 1996, the judge in the bankruptcy proceeding issued a preliminary injunction which ordered as follows:

> "[Frank] Lamanna, his agents, officers, employees and representatives and all persons acting in concert with him, are hereby enjoined from commencing or continuing any judicial, administrative or other action or proceeding, relating to the Settlement Agreement or any dispute, loan or obligation encompassed thereby, including, but not limited to, the real propert[y] located at . . . 8600 South Sepulveda Boulevard, Los Angeles, California, in any court other than this Court . . . ."

Respondent was served with the preliminary injunction and was present at the hearing when it was issued.

In spite of the preliminary injunction, in October 1996 respondent filed a quiet title action with respect to the Sepulveda Property, suing the Bank in Los Angeles County Superior Court on behalf of Anniello (the Anniello Lawsuit). As discussed *ante* at footnote 2, Frank and Carlos Lamanna were co–owners of Anniello, which was a privately–held corporation, and respondent was the initial incorporator and agent for service of process.[6] Carlos Lamanna signed the verified complaint, as president of Anniello, commencing the Anniello Lawsuit.

In November 1996, the bankruptcy court judge issued a permanent injunction enjoining Frank and Carlos Lamanna and "their agents" from committing any further breaches of the Settlement Agreement and from "filing any legal action or proceeding in any court of the United States or of the State of California, relating to the Settlement Agreement or any dispute, loan or obligation encompassed thereby, without first obtaining an Order of this Court granting the Lamannas leave to file such an action . . . ." Respondent appeared on behalf of the Lamannas at the hearing on the permanent injunction and subsequently was served with the court's injunctive order.

Also in November 1996, Frank and Carlos Lamanna were cited for criminal contempt for their failure to comply with a bankruptcy court order compelling them to stipulate to a judgment in the unlawful detainer action. In its order, the bankruptcy court stated: "The court has been involved with one or more of the [Lamannas] since 1991 and is aware

6. According to respondent's testimony, Anniello operated a restaurant on the Sepulveda Property and according to declarations of Carlos and Frank Lamanna, Anniello owned an interest in the Sepulveda Property since 1993.

of their history of doing any and everything possible to stay in possession of the Sepulveda Property without making any payments to [the Bank] including filing multiple lawsuits to prevent the Bank from taking possession of the Sepulveda Property."[7] Respondent represented both Frank and Carlos in the criminal contempt proceedings.

After the issuance of the permanent injunction and the Lamannas' criminal contempt citations, respondent continued to represent the Lamannas in actively litigating matters relating to the Sepulveda Property. For example, on January 24, 1997, respondent filed an Ex Parte Application for a Temporary Restraining Order and Preliminary Injunction against the Bank, which was denied. In September 1997, respondent recorded a "Notice of Pending Action" (Lis Pendens) with the Los Angeles County Recorder's office with respect to the Sepulveda Property. On December 11, 1997, respondent filed an opposition to the Bank's demurrer in the Anniello Lawsuit. On December 22, 1997, respondent filed a motion for reconsideration of the order sustaining the demurrer and a request for leave to file a second complaint. On January 8, 1998, respondent filed an opposition to the Bank's motion to expunge the Lis Pendens and declared under penalty of perjury that "[t]here are no injunctive orders by the Bankruptcy Court or any other court of law enjoining, restraining or prohibiting the prosecution of this action by plaintiff."

On January 23, 1998, the bankruptcy court issued an order to show cause directed to the Lamannas and respondent regarding contempt of the injunctions. Five days after the order to show cause was issued, the bankruptcy court filed its Memorandum on Order to Show Cause re Contempt, making numerous findings of fact, including: 1) that respondent was acting as the agent of Frank Lamanna when he filed the Anniello Lawsuit; 2) that respondent was acting in concert with Frank Lamanna and his brother Carlos when respondent filed the Lis Pendens; and 3) that these actions violated the preliminary injunction because they related "to a dispute, loan or obligation encompassed in the settlement agreement concerning the [Sepulveda Property]." Also, because leave of court was not obtained, the judge further found that respondent's recording of the Lis Pendens violated the permanent injunction. Undeterred by the order to show cause, on February 20, 1998, respondent filed a second complaint in the Anniello Lawsuit on behalf of Anniello after the Bank's demurrer to the first complaint was sustained.

In June 1998, the bankruptcy judge found respondent in civil contempt because he, together with Carlos Lamanna, acted as an agent of Frank Lamanna "and acted in concert with him to commence and continue [the Anniello Lawsuit]." The court further found respondent in contempt because, as counsel for Carlos Lamanna and Anniello, he acted as an agent of and in concert with Frank Lamanna in causing the lis pendens to be recorded against the Sepulveda Property after the preliminary and permanent injunctions were issued. Respondent attended the hearing on the contempt order and was served with a copy of the order. Nevertheless, respondent continued to litigate the Anniello Lawsuit until August 1998. The bankruptcy court ordered respondent to pay the Bank $46,359.72 in attorneys' fees. He did not report the court-ordered sanctions to the State Bar, although he knew of his obligation to do so.

Respondent appealed the order finding him in contempt, and in December 1999, the United States Bankruptcy Appellate Panel of the Ninth Circuit affirmed the contempt order. Respondent thereafter

7. Respondent represented the Lamannas in several matters where the courts have ruled the matters were brought in bad faith. The Los Angeles Superior Court on two occasions ruled Frank and Carlos vexatious litigants under California Code of Civil Procedure section 391, subdivisions (b)(1) and (2). In 1991, the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, dismissed a bankruptcy petition involving Frank Lamanna because the court was persuaded the matter was brought in bad faith in order to stay various lawsuits pending in California. The Ohio Bankruptcy Court found that respondent and Lamanna "were evasive and less-than-candid in their testimony" and indeed may have committed or assisted in committing a criminal fraud in causing the petition to be filed. It accordingly referred the matter to the United States Attorney as well as to the State Bar of California "for its evaluation and review of Mr. Thomson." The record does not reflect the outcome of these investigations.

appealed to the United States Court of Appeals for the Ninth Circuit, and in November 2001, that court affirmed the contempt order, finding respondent had full knowledge of the injunctions and, as counsel for the Lamannas in the bankruptcy court, he was bound by the injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Ninth Circuit further found that respondent "as counsel for the Debtors, was the Debtor's agent. As such, he was restrained from commencing or continuing any action affecting title to the [Sepulveda] Property." The court concluded respondent violated the injunctions when he filed the Anniello Lawsuit. Respondent did not pursue a further appeal.

2. Discussion

[1a] The hearing judge concluded that respondent failed to report judicial sanctions in violation of section 6068, subdivision (o)(3) and that he wilfully disobeyed a court order when he filed the Anniello Lawsuit and Lis Pendens in violation of section 6103. Because respondent was on disciplinary probation when he committed these violations, the hearing judge also found respondent culpable of two counts of failing to comply with probation conditions (§ 6068, subd. (k)).

Respondent does not dispute the finding that he failed to report the sanctions imposed by the bankruptcy court and concedes he "has no excuse" for this misconduct. Given respondent's extensive history as a recipient of court–ordered sanctions and his prior discipline for failure to report the sanctions, we are compelled to conclude he wilfully violated section 6068, subdivision (o)(3).

Respondent vigorously disputes that he wilfully disobeyed the orders of the bankruptcy court in violation of section 6103. He argues that the bankruptcy judge was in error when she found him in contempt of her two injunctive orders, and other than the bankruptcy judge's incorrect findings and conclusions, according to respondent, there is no legal or factual basis for the hearing judge's finding of culpability under section 6103. Respondent further asserts that the hearing judge below improperly applied the doctrine of collateral estoppel in order to arrive at his culpability determination.[8] Based on our independent review of the record, we reject respondent's arguments and find on this record clear and convincing evidence that respondent wilfully violated the bankruptcy court's injunctive orders when he filed the lawsuit and Lis Pendens on behalf of Anniello which affected the title to the Sepulveda Property.

Although respondent was not a signatory to the August 1995 Settlement Agreement, and he did not represent the Lamannas during the negotiations of that agreement, he was well aware of the specifics of the Settlement Agreement as the attorney of record who filed the motion to set aside the agreement well before the issuance of the preliminary injunction. He also represented Frank and Carlos in the criminal contempt proceedings wherein the court sanctioned the Lamannas for their failure to adhere to the terms of the Settlement Agreement.

As a consequence of the Lamannas' unabated litigation efforts involving the Sepulveda Property, the bankruptcy court issued the preliminary injunction. Section 105 of the Bankruptcy Code (11 U.S.C. § 105) authorizes the bankruptcy courts to enjoin proceedings in other forums and to enjoin parties from commencing litigation that is inconsistent with a settlement agreement. Indeed, it has been held that the bankruptcy courts have the inherent power to summarily enforce settlement agreements (*In the*

8. It is not clear from the decision of the hearing judge whether he applied the doctrine of collateral estoppel. However, the hearing judge correctly noted that this may well be an appropriate case in which to apply that doctrine since the standard of proof in civil contempt proceedings in the Ninth Circuit is clear and convincing evidence (*FTC v. Affordable Media* (9th Cir. 1999) 179 F.3d 1228, 1239), and the issue here of the wilful violation of the bankruptcy judge's order is identical to the issue in the contempt proceedings. Respondent was a party to those contempt proceedings and unsuccessfully appealed the contempt order to the Bankruptcy Appellate Panel (Appellate Panel) and to the Ninth Circuit. That decision is now final. Because we find independent evidence in the record that provides clear and convincing support for the hearing judge's culpability determinations, we need not address the applicability of the collateral estoppel doctrine to this case. Moreover, as the hearing judge also noted correctly, at a minimum, the findings of the bankruptcy judge in support of her civil contempt order are entitled to a strong presumption of validity. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.)

Matter of Springpark Assocs. (9th Cir. 1980) 623 F.2d 1377, 1380), including the power to impose sanctions (*In re Rainbow Magazine* (9th Cir. 1996) 77 F.3d 278, 283–285).

[1b] Respondent's argument that he was not named in the injunctive orders and was not subject to the bankruptcy court's jurisdiction misses the point. As explained by the United States Supreme Court, "a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." (*Regal Knitwear Co. v. Nat. Lab. Relations Bd.* (1945) 324 U.S. 9, 14.) Moreover, injunctions in bankruptcy adversary proceedings are governed by rule 65 of the Federal Rules of Civil Procedure, which "is a codification of the common–law rule allowing a non–party to be held in contempt for violating the terms of an injunction when a non–party is legally identified with the defendant. . . ." (*Illinois v. U.S. Dept. of Health and Human Serv.* (7th Cir. 1985) 772 F.2d 329, 332.) Rule 65(d) expressly provides that it is binding upon the attorneys of enjoined parties who have actual notice of the order.[9] (See also *In re D.H. Overmyer Telecasting Co.* (Bankr. N.D. Ohio 1983) 30 B.R. 755.) Thus, the issue here is not whether respondent was *named* in the injunctions, but whether he had *notice* of the court's injunctive orders. (*California v. Campbell* (9th Cir. 1998) 138 F.3d 772, 783.) Without question, respondent had actual knowledge of the restraints imposed by the bankruptcy court pursuant to the preliminary and permanent injunctions.

[1c] Respondent also argues, as he did unsuccessfully in the bankruptcy court, the Appellate Panel, the Ninth Circuit and at the hearing below, that he was not in contempt of the injunctive orders because he filed the quiet title action on behalf of Anniello, which was not named in the injunction or subject to the bankruptcy court's jurisdiction. Each of these courts rejected this argument, and so do we. The bankruptcy judge did not find *Anniello* was subject to the injunctions, but rather *respondent* was bound by them.[10] The bankruptcy judge also explicitly found respondent was acting as an agent of and in concert with the Lamannas in bringing the Anniello Lawsuit. The record here amply supports this finding. We further find that there is clear and convincing evidence in this record to conclude that respondent is culpable of wilful disobedience of the bankruptcy court's injunctive orders in violation of section 6103.

Although we also adopt the hearing judge's conclusion that as a result of the violations of the injunctive orders and failure to report sanctions, respondent is culpable of two probation violations under section 6068, subdivision (k), we deem these violations to be essentially duplicative of the culpability determinations under section 6103 and 6068, subdivision (o)(3). We therefore ascribe no additional weight to these violations for purposes of our discipline analysis. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76–77 [where the same misconduct forms the basis for a violation of probation as well as original discipline, it is inappropriate to discipline a respondent for both].)

C. Zafran and PESH'A Matters

1. Findings

On June 24, 2002, the State Bar Membership Billing Services notified respondent that he had not fully paid his membership fees, penalties, or costs and that failure to correct the delinquency by August 24, 2002, would result in the Board of Governors recommending his suspension. Respondent failed to timely pay the outstanding funds, and accordingly, on August 30, 2002, the Supreme Court filed an order suspending him from the practice of law effective September 16, 2002.

9. Rule 65(d) provides: "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, *and attorneys* . . . who receive actual notice of the order by personal service or otherwise." (Italics added.)

10. Parenthetically, Anniello was a closely held corporation that could only act through its officers, directors, legal representatives and agents. Thus, Anniello was only able to commence and maintain the litigation affecting the Sepulveda Property through the overt, intentional acts of the Lamannas and respondent.

On September 13, 2002, respondent filed a motion with the State Bar Court to stay his suspension, but the court did not rule on the motion until October 7, 2002, when it denied the motion. Thus, respondent's suspension commenced on September 16, 2002.[11]

On September 24, 2002, while he was on suspension, respondent wrote a letter on his office letterhead to an insurance adjuster at Lancer Insurance Company in an effort to negotiate a settlement for a client. Respondent asserted in the letter that he was an attorney representing Claudine Zafran, that the insurer's $250 settlement offer was inadequate, and that he should be contacted to negotiate proper payment. Respondent wrote the adjuster again on October 10, 2002, asserting that failure to pay his client's claim would constitute bad faith and that his client would pursue her claim in court if necessary.

On September 17 and 23, 2002, respondent wrote letters on his office letterhead to the president of Greenspan Company Adjusters asserting, inter alia, that he was an attorney representing PESH'A Corporation in its $30,000 claim against Greenspan and that a federal lawsuit would be filed if the matter was not resolved.

In both the Zafran and PESH'A matters, the hearing judge concluded that respondent engaged in the unauthorized practice of law in violation of sections 6125 and 6126 and thereby failed to support the Constitution or laws of the United States or California (§ 6068, subd. (a)). Because respondent was on disciplinary probation when he committed these violations, the hearing judge also found respondent culpable of two counts of failing to comply with probation conditions. (§ 6068, subd. (k).)[12]

2. Discussion

[2] Without question, the communications by respondent on his letterhead stationery, while he was suspended from practice, attempting to settle two matters constituted the unauthorized practice of law. As the Supreme Court explained in *Morgan v. State Bar* (1990) 51 Cal.3d 598, 604: "[W]e conclude that engaging in negotiations with opposing counsel concerning settlement . . . constitutes the practice of law." Moreover, the unauthorized practice of law encompasses the holding out by the attorney that he or she is entitled to practice. (*Bluestein v. State Bar* (1974) 13 Cal.3d 162, 175, fn. 13 [use of term "Of Counsel" on letterhead to describe an unlicenced person constitutes unauthorized practice]; *In re Naney* (1990) 51 Cal.3d 186 [suspended attorney implied to a prospective employer that he was entitled to practice taxation law by using his bar admission date on a resume].) Respondent, however, contends that the facts do not support a finding of wilfulness on his part because he believed his motion requesting a stay "protected him from the claim of unauthorized practice of law with respect to the four letters." Wilfulness for purposes of disciplinary "proceedings is simply a general purpose or willingness to commit an act or to make an omission. . . . [Citations.]" (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309; *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) This element is established here because there is clear and convincing evidence that respondent acted purposely when he created the impression he was entitled to represent Zafran and PESH'A as their attorney. Moreover, respondent testified that he understood merely requesting a stay did not actually constitute a stay, and he admitted that he did not believe the stay was even in effect when he wrote the letters on behalf of Zafran and PESH'A.

We accordingly adopt each of the hearing judge's conclusions regarding culpability in these matters but, as in the Lamanna matter, deem the section 6068, subdivision (k) violations to be duplicative of the section 6068, subdivision (a) violations and therefore assign no weight to them for disciplinary purposes.

II. EVIDENCE RE MITIGATION AND AGGRAVATION

A. Mitigation

[3a] The hearing judge found no mitigating factors, and properly rejected respondent's claim that he

11. Respondent's suspension continued until October 17, 2002, when he paid his outstanding fees.

12. Between June 2001 and June 2004, respondent was on disciplinary probation.

acted in good faith. "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. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.)

[3b] Even if, arguendo, respondent honestly believed he was not subject to the preliminary and permanent injunctions, it was not reasonable for him to do so, particularly since rule 65(d) of the Federal Rules of Civil Procedure makes injunctions binding on the parties to the action and their attorneys. In view of respondent's representation of both Frank and Carlos Lamanna in the bankruptcy proceedings, his attempt to thread the ethical needle by filing a lawsuit and recording a lis pendens in the name of Anniello is unavailing to this court.

B. Aggravation

We agree with the hearing judge's finding in aggravation that respondent's misconduct involved multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Because respondent filed quarterly probation reports indicating he was in compliance with the State Bar Act and Rules of Professional Conduct and failing to disclose the 1998 order finding him in contempt and sanctioning him in the amount of $46,359.72, the hearing judge found that respondent's misconduct was surrounded or followed by bad faith, dishonesty, and concealment. (Std. 1.2(b)(iii).) We agree. The hearing judge also found in aggravation that respondent has not accepted responsibility for his misconduct, and "repeatedly made spurious arguments and rationalizations which showed a lack of appreciation for his misconduct." Respondent has continued to assert to this court the same baseless arguments rejected by three federal courts and the hearing judge. His truculence is reminiscent of that in *In re Morse, supra*, 11 Cal.4th at page 209.

Moreover, he continues to demonstrate an utter lack of understanding of the consequences of his misconduct, maintaining that his unlawful practice of law was minor and "hardly a reason for any discipline." "[B]y implying . . . that his misconduct constituted a mere technical lapse, [respondent] evinces a lack of understanding of the gravity of his earlier misdeeds and the import of the State Bar's regulatory functions." (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 806.) We therefore adopt the hearing judge's finding of demonstrated indifference. (Std. 1.2(b)(v).)

We also adopt the hearing judge's finding that respondent's four prior instances of discipline constitute a significant aggravating factor. (Std. 1.2(b)(i).) Respondent has been committing misconduct since 1989 and has continuously been on probation and/or before this court since 1993. Respondent received a one–year stayed suspension in 1994 for misconduct occurring between 1989 and 1992 involving two clients. Previously, respondent was sanctioned $12,667.40 under circumstances remarkably similar to those in the instant case due to his bad faith actions in maintaining a frivolous quiet title action that was intended to cause unnecessary delay. In the past, respondent also has failed on numerous occasions to comply with court orders and failed to report court–ordered sanctions in violation of sections 6103 and 6068 subdivisions (a), (b), and (o)(3). In March 1997, respondent's probation was extended for two years due to his failure to comply with a probation condition requiring completion by 1995 of continuing legal education. Also, in March 1997, respondent received a 30–day actual suspension for commingling funds and engaging in the unauthorized practice of law under circumstances very much the same as his unauthorized practice of law in the instant matter. Finally, in June 2001, respondent received a two–year stayed suspension for failing to make court–ordered restitution imposed in a prior disciplinary proceeding. In fact, he was on probation when he committed the misconduct that is before us now.

III. DEGREE OF DISCIPLINE

Respondent asserts that the four–year actual suspension the hearing judge recommended is excessive and should be reduced to, at most, two months. The State Bar requested a two–year actual suspension at trial and did not request review in this matter. However, because of recent opinions issued after

respondent filed his opening brief, the State Bar has reconsidered its position and now seeks respondent's disbarment. Although we discourage the practice of requesting, in a responsive brief, review of issues not raised by the appellant, our duty to conduct de novo review authorizes us to increase the discipline if we deem it appropriate regardless of whether the State Bar appealed. (*In re Morse, supra,* 11 Cal.4th 184, 207; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

The primary purposes of disciplinary proceedings 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.) In determining the recommended degree of discipline, we consider the standards, which serve as guidelines entitled to great weight, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) When there are two or more acts of misconduct, the disciplinary sanction shall be the most severe sanction applicable. (Std. 1.6(a).) Standard 2.6 applies to all of respondent's misconduct and provides for sanctions ranging from suspension to disbarment depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline.

[4] Central to our disciplinary analysis is standard 1.7(b), which, because of respondent's extensive record of prior discipline, must be considered in conjunction with standard 2.6. If an attorney has two or more prior offenses, standard 1.7(b) provides for "disbarment unless the most compelling mitigating circumstances clearly predominate." However, rather than apply standard 1.7(b) rigidly, we "consider the facts underlying the various [prior disciplinary] proceedings in arriving at the appropriate discipline." (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507.) When there is a repetition of offenses for which an attorney has previously been disciplined that "demonstrates a pattern of professional misconduct," the Supreme Court and this court have found disbarment is appropriate under standard 1.7(b). (*Morgan v. State Bar, supra,* 51 Cal.3d 598, 607; *In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. 829.)

When viewed in its totality, respondent's current offenses plainly echo his prior record of discipline and provide "a disturbing repetitive theme." (*In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. at p. 841). The actions for which respondent was disciplined in 1994, 1997, and 2001 all involved a continued disregard of court orders. Rather than comply with several court orders requiring him to pay sanctions and with multiple Supreme Court orders suspending his right to practice law and requiring him to comply with conditions of probation, respondent, instead, has simply ignored them. Respondent persisted in such misconduct when he defied two bankruptcy court injunctions. We also note that respondent's failure to report court–ordered sanctions and unauthorized practice of law are repeat offenses for which he was previously disciplined in 1994 and 1997.

The State Bar relies on several cases in support of its argument that respondent should be disbarred. Most recent is the case of *In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. 829, where we applied standard 1.7(b) and recommended disbarment of an attorney who had been disciplined four times previously. We found Shalant culpable of committing an act involving moral turpitude and collecting an illegal fee which was aggravated by client harm and Shalant's indifference toward rectification. Shalant was previously disciplined for trust account violations, failure to perform competently and to communicate with clients, improper communication with represented parties, and violation of a court order. The centerpiece of our analysis in *Shalant* was the attorney's prior record of discipline, contrary to respondent's claim that "The 'common thread' argument [was] hardly the reason for the discipline ultimately handed out in *Shalant.*" (*Id.* at p. 841.) Because Shalant's repeated misconduct was tempered by only minimal mitigation in the form of community service, we applied standard 1.7(b) and recommended disbarment. (*Id.* at pp. 841–842.) The Supreme Court adopted our recommendation and, effective January 13, 2006, Shalant was disbarred by order of the Supreme Court.

In *In the Matter of Hunter, supra,* 3 Cal. State Bar Ct. Rptr. 63, we recommended disbarment of an

attorney who had been disciplined once before for trust account violations and the unauthorized practice of law. Thereafter, the attorney failed to perform competently or to communicate with four clients and violated conditions of his disciplinary probation by failing to file his first quarterly report, failing to communicate with his probation monitor, and failing to notify the probation department of his change of address. We found no mitigating circumstances to counter the attorney's multiple acts of misconduct, failure to cooperate with the State Bar, significant harm to a client and significant harm to the administration of justice. In applying standard 1.7(b), we observed that the attorney committed misconduct in 1985, 1987, 1988, 1991, and 1992 and that the matters under review represented the attorney's second and third disciplinary matters. Because the attorney's misconduct reflected his disdain for the rule of law and his inability to conform his conduct to the most basic duties of an attorney, we concluded that disbarment was appropriate. Because the risk of future misconduct was so great, the attorney was not a good candidate for probation and/or suspension. (*Id.* at p. 79.)

Although not discussed by either party, we find instructive the cases of *Morgan v. State Bar*, *supra*, 51 Cal.3d 598, and *Barnum v. State Bar* (1990) 52 Cal.3d 104 (*Barnum*). The attorney in *Morgan* had four prior disciplinary proceedings for misconduct involving misappropriations, the unauthorized practice of law, settling cases without authorization, failing to perform competently, and failing to communicate with a client. The attorney was before the court for again engaging in the unauthorized practice of law and obtaining a pecuniary interest adverse to a client. Observing that "this is the *second* time that [the attorney] has been found culpable of practicing law while under suspension," the Supreme Court concluded that "[the attorney's] behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders." (*Id.* at p. 607, original italics.) Since the attorney's character evidence and community service did not constitute compelling mitigating circumstances, the court applied standard 1.7(b) and disbarred the attorney. (*Id.* at pp. 607–608.)

In the *Barnum* case, the Supreme Court disbarred an attorney, finding that the risk of recurrence of professional misconduct was high and the attorney was not a good candidate for suspension and/or probation after he collected an unconscionable fee, disobeyed court orders compelling him to return the fee, and failed to cooperate with the State Bar's investigation. The attorney previously had been disciplined for failing to perform competently and failing to return unearned fees. He was then suspended for failing to timely pass the Professional Responsibility Examination. Thereafter, his probation was revoked and he was actually suspended for one year after failing to file probation reports. No mitigating circumstances were found and the court was greatly concerned with the attorney's wilful violation of court orders stating that "[o]ther than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney." (*Id.* at p. 112.) The Supreme Court observed that the attorney appeared unwilling or unable to learn from past professional mistakes because he repeated the same misconduct that gave rise to the prior disciplinary proceeding and because no compelling mitigating circumstances existed to preclude application of standard 1.7(b). (*Id.* at pp. 111, 113.) Following the holding in *Barnum*, we consider the risk of recurrence of professional misconduct is high and therefore conclude that respondent is not a good candidate for probation or suspension.

We find the decision in *Arm v. State Bar* (1990) 50 Cal.3d 763, distinguishable. In *Arm*, the Supreme Court declined to apply standard 1.7(b) and disbar an attorney who had been disciplined three times previously because "compelling mitigating circumstances clearly predominate[d]." (*Id.* at p. 779.) The attorney had commingled funds and committed an act of moral turpitude when he misled a court about an impending suspension from practice. The court found these acts of misconduct "quite different from the [prior misconduct]." (*Id.* at p. 780.) The attorney had been previously disciplined for giving false information to a police officer, accepting employment adverse to a former client without consent, filing a false declaration, and improperly entering into a business transaction with a client. The Supreme Court thus rejected the State Bar's position that a "common thread" existed between the misconduct in the matter before the court and the prior three disciplinary proceedings. We accordingly consider *Arm* inapplicable to this proceeding since no mitigating circumstances exist in

respondent's case and because respondent's present misconduct is a repetition of prior ethical transgressions for which he has been previously disciplined.

IV. RECOMMENDATION

[5] This matter represents respondent's fifth disciplinary proceeding. He has been continuously on probation since 1994, yet he has repeatedly violated court orders, failed to report court sanctions, and engaged in the unauthorized practice of law. Aggravating circumstances abound, untempered by any mitigating circumstances. Respondent has demonstrated no meaningful appreciation of his ethical responsibilities and has established himself as unsuitable to practice law and not amenable to efforts at reform. We therefore recommend that respondent Thomas Neil Thomson be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in paragraphs (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 costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

We concur:
STOVITZ, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID M. VAN SICKLE

A Member of the State Bar

No. 99–O–12923

Filed August 24, 2006

SUMMARY

While representing a client in three separate matters involving a personal injury lawsuit, a workers' compensation claim, and a fee dispute with the client's previous attorney, respondent required the client to execute a lien on her home as security for respondent's appearance fee and required the client to pay more than half of the settlement in the personal injury case in attorneys fees. The hearing judge found respondent culpable of charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failing to represent the client competently. The hearing judge found in aggravation multiple acts of wrongdoing, significant client harm, indifference toward rectification, and overreaching and no circumstances in mitigation. The hearing judge recommended respondent be suspended for one year stayed and that he be placed on probation for three years on condition of actual suspension for six months. (Hon. Patrice McElroy, Hearing Judge.)

The review department found that respondent entered into an improper business transaction and charged or collected an unconscionable fee in only two of the five instances identified in the notice of disciplinary charges. The review department dismissed as duplicative the charge that respondent failed to competently perform and determined there was insufficient evidence to find that respondent failed to disclose a financial interest or that his misconduct rose to the level of acts involving dishonesty, corruption, or moral turpitude. The review department disagreed with the hearing judge's findings of overreaching and indifference toward rectification and found additional factors in mitigation. The review department recommended that respondent be suspended for one year, stayed, and that he be placed on probation for two years on the condition that he be actually suspended for 30 days.

The Supreme Court granted the State Bar's petition for writ of review and remanded the matter to the review department with specific directions to vacate the recommendation as to discipline. After considering the briefs on remand, the review department re–adopted those portions of its prior opinion discussing underlying facts, culpability, aggravation, and mitigation, and recommended that respondent be suspended for one year, stayed, and that he be placed on probation for two years on the condition that he be actually suspended for 90 days.

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

COUNSEL FOR PARTIES

For State Bar: Esther J. Rogers

For Respondent: Vicki L. Fullington

HEADNOTES

[1 a–d] **290.00 Rule 4–200 [former 2–107]**
Respondent violated the unconscionable fee prohibitions in Rules of Professional Conduct, rule 4-200 in connection with his client's personal injury case when he failed to disclose to the client that he intended his 35 percent contingency fee to be in addition to the fee earned by the client's previously discharged attorney. Respondent failed to disclose the true facts so that the fee charged under the circumstances constituted a practical appropriation of the client's funds under the guise of retaining them as fees. Respondent's written contingent fee agreement with his client was materially ambiguous resulting in his client's understanding that she would pay a total of 35 percent of any settlement or judgment to both respondent and her previously discharged attorney. Since neither respondent nor the client knew that each of them had a different interpretation of the contract language, there was no meeting of the minds and thus no agreement as to fees. In the absence of a valid fee agreement, respondent's compensation is based on a theory of quantum meruit rather than the full contract price and the agreed upon contingent fee acts as an upper limit on the amount to be divided on a quantum meruit theory between the discharged and retained attorneys hired on a contingency basis in the same case.

[2 a–c] **290.00 Rule 4–200 [former 2–107]**
Where respondent charged a fee in a personal injury matter that was more than twice as much as his client agreed to and also double what he was entitled to under a quantum meruit theory, the charged fee was unconscionable. The fact that respondent's fee agreement in a personal injury matter contained two provisions that were void for public policy evidences respondent's overreaching which in turn supports a finding that he charged and collected an unconscionable fee.

[3] **290.00 Rule 4–200 [former 2–107]**
Where respondent collected a fee in a workers' compensation case in which the contingency for the fee did not occur and where the fee agreement contained provisions void for public policy evidencing respondent's overreaching, respondent collected an unauthorized fee in violation of the unconscionability provisions of Rules of Professional Conduct, rule 4–200.

[4 a, b] **290.00 Rule 4–200 [former 2–107]**
Where respondent was not obliged to arbitrate a fee dispute between his client and the client's prior attorney, there is no basis to conclude that the fees respondent charged in preparing the client for the fee arbitration involving the client's prior attorney were unconscionable.

[5 a, b] **273.30 Rule 3–310 [former 4–101 & 5–102]**
Where respondent believed that his contingency fee would be independent of the amount of fees his client was obligated to pay a prior attorney after fee arbitration, there is not clear and convincing evidence that respondent knew he had a financial interest in the outcome of the client's fee arbitration with the prior attorney and respondent was therefore not culpable of failing to disclose that interest to his client in writing before accepting or continuing his representation of the client.

[6] **1015.03 Discipline Imposed in Disciplinary Matters Generally–90 days**
Where respondent charged and collected unconscionable fees and improperly entered into a business transaction with a client, where there was aggravation including significant client harm and multiple acts of misconduct, and mitigation for community service and entering into a pretrial stipulation, appropriate discipline recommendation was one year stayed suspension and two years' probation on conditions which included 90 days' actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

221.50 Section 6106
241.01 Section 6147
242.01 Section 6148
273.01 Rule 3–300
290.01 Rule 4–200

Not Found

270.35 Rule 3–110(A)
273.35 Rule 3–310
290.05 Rule 4–200

Aggravation

Found

582.10 Harm to Client

Found but Discounted

523 Multiple Acts of Misconduct

Declined to Find

555 Overreaching
595.90 Indifference

Mitigation

Found

735.10 Candor and cooperation

Found but Discounted

765.31 Substantial pro bono work

Declined to Find

710.53 Prior to commission of misconduct
725.51 Lack of expert testimony

Discipline

1013.06 Stayed suspension–One Year
1017.08 Probation–Two Years

Probation Conditions

1021 Restitution

Other

106.30 Duplicative Charges

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OPINION

EPSTEIN, J.

In this original disciplinary proceeding, respondent David M. Van Sickle requested review of a hearing judge's decision placing him on actual suspension for six months. In a single client matter, the hearing judge found respondent culpable of charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failing to represent the client competently.

On February 8, 2005, we filed our opinion in this case, modifying the hearing judge's culpability, mitigation and aggravation determinations and recommending that respondent be placed on one year's suspension, stayed, and two years' probation on various conditions, including 30 days' actual suspension and restitution in the amount of $8,124.99 plus interest.

The State Bar sought review in the Supreme Court, and by order dated November 30, 2005, the court remanded the matter to us with directions to vacate our recommendation as to discipline. The Supreme Court specifically directed this court to consider the appropriate discipline in light of standards[1] 1.6 and 2.7 and *In re Silverton* (2005) 36 Cal.4th 81, 89–92, stating: "In reconsidering the degree of discipline, the State Bar Court Review Department shall consider the application of the Standards to setting an appropriate degree of discipline in this proceeding, including any ground that may form a basis for an exception to their application."

After considering the briefs on remand and taking into account all relevant factors, including the applicable standards and case law, we have reconsidered our earlier discipline recommendation and now recommend, for the reasons stated herein, that respondent be suspended from the practice of law for a period of one year, stayed, and that he be placed on probation for a period of two years on the condition that he be actually suspended from the practice of law for three months. We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court, as more specifically set forth *post*.[2]

I. STATEMENT OF FACTS

A. Procedural Facts

Respondent was admitted to practice law on December 13, 1993. He has no prior record of discipline.

In a five–count notice of disciplinary charges (NDC) filed on January 2, 2002, involving one client matter, respondent was charged with violating Rules of Professional Conduct, rule 4–200[3] (charging and collecting an unconscionable fee), rule 3–300 (acquiring an interest adverse to a client), rule 3–310(B)(4) (accepting or continuing representation of a client without providing written disclosure to the client that the attorney has a financial interest in the subject of the representation), rule 3–110(A) (intentionally, recklessly, or repeatedly failing to perform legal services competently), and Business and Professions Code section 6106[4] (committing acts involving moral turpitude by engaging in gross overreaching and coercion in representing a client).

1. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

2. Because of the Supreme Court's remand order, and pending our further order, we depublished our earlier opinion in *In the Matter of Van Sickle* (4 Cal. State Bar Ct. Rptr. 756.) For ease of reference, we refer to that opinion as our "2005 opinion." We have construed the Supreme Court's order to mean that we are to vacate our 2005 opinion as to our discussion and recommendation of the degree of discipline. (2005 typed opinion, Sections III(C) and IV, pp. 27-34.) We here re–adopt Sections I through III(A–B) of our 2005 opinion, and, accordingly, we republish pp. 2–26 of our 2005 opinion as to the factual and procedural history, our culpability discussion, and discussion of aggravating and mitigating circumstances. In order to restore the portions of our 2005 opinion which we re–adopt, we set them forth anew below, utilizing the same heading designations as in our 2005 opinion.

3. All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

4. All further statutory references are to the Business and Professions Code unless otherwise indicated.

Prior to the trial, respondent stipulated to many facts and to his culpability for violating rule 3–300. After a two–day trial, the hearing judge found culpability on all counts, with the exception of moral turpitude as alleged in count five of the NDC. The hearing judge recommended respondent be suspended for a period of one year, stayed and that he be placed on probation for a period of three years on the condition of six months' actual suspension. The court further recommended restitution of the excess attorney fees to be paid within the period of his probation. Respondent filed a motion for reconsideration and a motion for a new trial, which were denied on March 18, 2003. Respondent here appeals the determinations of the hearing judge.

B. Background

In August 1994, Ivy Hei was involved in an automobile accident. At the time of the accident, Hei was delivering mail for the United States Postal Service, and her vehicle and two others, a car owned by Sukhbir Beasla and a truck owned by Corea Trucking, were involved in the crash. As a result of the accident, Hei suffered severe injuries and ultimately lost two years of income. Hei was initially represented by Attorney John T. Nagel in a personal injury action to recover damages for her injuries. The contingent fee agreement between Hei and Nagel, dated September 1, 1994, called for Nagel to represent Hei in the personal injury action in exchange for one–third of any recovery.

Nagel filed a lawsuit against Sukhbir Beasla and the driver of that vehicle, Kirpal Kaur Beasla (the Beasla defendants), in December 1994. This lawsuit did not include Corea Trucking or the driver of the truck as defendants. Among other things, Nagel engaged in discovery on Hei's behalf, including preparing answers to form interrogatories. In May 1995, the insurance carrier for the Beasla defendants offered the policy limit of $50,000 in exchange for a release of all claims arising from the accident, including all causes of action against all persons involved. Hei initially agreed to the settlement, and Nagel agreed to reduce his fee to 25 percent of the recovery. However, in June 1995, Hei withdrew her acceptance of the offer. On July 28, 1995, Nagel filed an amended complaint which included as defendants Corea Trucking and the driver of the truck, Shane Nelson Corea (the Corea defendants). On August 10, 1995, Hei substituted herself in propria persona in place of Nagel.[5] Also on August 10, 1995, Nagel filed a lien against any recovery in the case in the amount of $1,289.73 in costs plus one third of any recovery (rather than the 25 percent Nagel had agreed to take if Hei accepted the $50,000 settlement offer). In August 1995, Hei filed a personal injury suit against the Corea defendants which was separate from the personal injury suit previously filed by Nagel.

C. Hei Retains Respondent

From August through early October 1995, Hei saw two to three other attorneys before coming to respondent. She retained him to represent her in three separate matters, all relating to her 1994 accident: 1) personal injury lawsuits against the Beasla and Corea defendants; 2) a workers' compensation claim; and 3) a fee dispute with her first attorney, Nagel.

1. Hei's Personal Injury Case

On October 5, 1995, respondent entered into a written contingent fee agreement with Hei to represent her in the personal injury actions against the Beasla and the Corea defendants in exchange for an attorney fee of 35 percent of any "settlement &/or judgement" plus costs. This written agreement made no mention of Hei's prior representation by Nagel, but according to respondent, Hei agreed to bear the full risk that she would be required to pay Nagel his fees in addition to her obligation to pay respondent's 35 percent contingent fee if he would take her case. However, according to Hei, respondent never explained to her that she was required to assume the risk that she would have to pay *both* Nagel's and respondent's fees.

5. Hei confirmed in her testimony at trial that she was unhappy with Nagel because he would not proceed with a personal injury case against Corea Trucking, and she felt that he had not performed all of the services he was supposed to perform under her agreement with him.

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5. Hei confirmed in her testimony at trial that she was unhappy with Nagel because he would not proceed with a personal injury case against Corea Trucking, and she felt that he had not performed all of the services he was supposed to perform under her agreement with him.

In December 1995, respondent obtained Hei's personal injury file from Nagel. Also in December 1995, Hei agreed to accept a settlement in the action against the Beasla defendants for the policy limit of $50,000. Unlike the first settlement offer from the insurance carrier for the Beasla defendants, this settlement allowed Hei to proceed with her claims against the Corea defendants. At that time, as Hei informed respondent, Hei had a four–year–old son, Hei's house was going into foreclosure, and Hei's car was going to be repossessed.

In early January 1996, respondent received three checks from the Beasla defendants' insurance carrier totaling $50,000: 1) a check in the amount of $6,327.26 payable jointly to respondent, the United States Department of Labor (USDOL) and Hei; 2) a check in the amount of $12,500 payable to respondent's trust account, Hei and Nagel's law firm; and 3) a check in the amount of $31,172.74, payable to respondent and Hei. Respondent apparently placed the $12,500 claimed by Nagel in respondent's trust account, pending resolution of the fee dispute. Shortly thereafter, respondent provided Hei with the following accounting of his disbursements of the remaining $37,500: 1) a check for $6,327.26 to Hei for payment to the USDOL in satisfaction of its lien, from which the USDOL would return $2,230.29[6] to Hei to be paid to respondent as his 35 percent contingency fee (see discussion below); 2) a distribution to respondent of $1,250 as his fee for assisting Hei to prepare for the fee arbitration against Nagel (see discussion below); 3) a distribution to respondent of $10,910.45 in fees, representing approximately 35 percent of the remaining settlement check for $31,172.74;[7] and 4) a payment to Hei of $19,019.92 as her share of the personal injury settlement. Accordingly, on January 15, 1996, respondent provided Hei with a check for $19,019.92, and he distributed $12,160.45 to himself ($1,250 as his fee for assisting Hei in preparing for the Nagel fee arbitration plus $10,910.45 as his 35 percent contingency fee for the personal injury case). Respondent later collected additional fees of $2,214.54 from the USDOL and $500 from Hei for his appearance at the Nagel fee arbitration.

Sometime during the last six months of 1996, respondent prepared for trial against the Corea defendants. He investigated Hei's allegations that Shane Corea had a bad driving record, consulted traffic and collision experts, prepared accident site schematics, and consulted with Hei's doctors. The trial against the Corea defendants was initially scheduled for December 1996, but it was twice continued and finally held in early March 1997. Respondent represented Hei through this three–day trial. The jury in that case found for the Corea defendants, and therefore neither Hei nor respondent collected additional funds as a result of that case.

2. Hei's Workers' Compensation Claims

As a result of Hei's employment by the United States Postal Service, she received federal workers' compensation medical benefit payments of $6,327.27, which were apparently paid to Hei before she retained respondent to represent her, and for which the USDOL filed a lien against any personal injury recovery obtained by Hei.

On November 21, 1995, respondent entered into a second contingent fee agreement with Hei to represent her in "enforcing a cause of action arising out of work related injury of 8/18/94 accident." This fee agreement provided that respondent would receive 25 percent of any "Benefits, settlement or judgment" relating to Hei's claim for workers' compensation benefits.

Respondent testified that he and Hei initially signed this contingency fee agreement based upon his understanding of the California workers' compensation

6. Respondent was mistaken as to the exact amount of the USDOL fee reimbursement, apparently because of a typographical error in respondent's accounting for the disbursement of the settlement proceeds. Therefore, respondent erroneously set forth the amount of the check payable to the USDOL as $6,372.26 and erroneously set forth the amount of the fee reimbursement as $2,230.29, when the correct amount was $2,214.54.

7. Respondent did not include the $12,500 held in trust for the Nagel fee dispute or the amount of the USDOL medical reimbursement in the gross amount for purposes of computing his 35 percent contingency fee.

rules and before he realized that this was a federal workers' compensation case. Because of this misunderstanding, in December 1995, respondent and Hei also signed a California form entitled Notice of Attorney Representation and Disclosure Statement which stated that the normal range of fees for representation in a workers' compensation matter was between 9 and 12 percent of the benefits obtained.[8] He further testified that when he subsequently discovered that Hei had already filed a federal workers' compensation claim for benefits which had been denied, he realized that Hei was hiring him to file an appeal and a motion for reconsideration of the USDOL's denial of Hei's claim. Respondent accordingly believed that a contingent fee agreement was inappropriate for his contemplated services, and he testified that sometime during early 1996, he and Hei verbally modified the workers' compensation fee agreement to provide (1) for a flat fee in the amount of $2,214.54 for the appeal and rehearing of the denial of her claim and (2) that this fee would be taken from the personal injury settlement funds.

Contrary to respondent's testimony, Hei testified that she never voided or canceled the written agreement which called for a 25 percent contingency fee for respondent's services in the workers' compensation matter. A letter from her to respondent, dated July 31, 1996, corroborated her testimony. Our de novo review confirms that respondent's arrangement with Hei was for a contingency fee of 25 percent in accordance with the terms of the written agreement, and not, as respondent asserted, a flat fee for the preparation of the appeal and motion for reconsideration. Nevertheless, respondent collected from Hei $2,214.54, which equaled 35 percent of the amount distributed to the USDOL.[9]

Hei's appeal and her motion for rehearing were ultimately denied and, she received no workers' compensation benefits other than the medical reimbursement she obtained prior to hiring respondent.

3. Hei's Fee Arbitration with Nagel

Hei did not believe that Nagel was entitled to the $12,500 attorney fee he claimed. She therefore decided to request a fee arbitration. In a letter to respondent dated November 22, 1995, Hei asked respondent to assist her with completing the fee arbitration forms, which respondent did. In January 1996, respondent entered into an oral agreement with Hei for an initial retainer fee of $1,250 plus 25 percent of the recovery to prepare her for the Nagel fee arbitration, which she intended to conduct in propria persona.[10] A hand–written document prepared by respondent that appears to have been signed by Hei on January 12, 1996, confirmed this fee arrangement. Furthermore, respondent again described the fee agreement of $1,250 plus 25 percent for the Nagel arbitration in his disbursement letter, which Hei appears to have signed on January 15, 1996. Nevertheless, Hei testified at trial that she never agreed to pay respondent anything for his assistance in preparing for the fee arbitration.

Hei filed the request for the arbitration with Nagel on March 28, 1996, and the matter was set for July 10, 1996. On the day before the arbitration, Hei wrote to respondent asking him to appear on her behalf at the arbitration and offered to pay him for his time. Respondent entered into a written agreement with Hei, charging $500 for his appearance, which Hei signed the day of the arbitration. Hei agreed to pay respondent $100 every two weeks. The agreement also provided that if Hei were more than three days late on a payment, the entire amount would be due and payable and that Hei granted respondent a lien on her home to secure the fee. Respondent admits that at the time he entered into the agreement to secure his fee with a lien on her home, he did not advise Hei to seek the advice of an independent attorney. (See Rule 3–300.)

8. Respondent testified below that the initial agreement called for a 12 and one half percent contingent fee, but the agreement itself did not reflect that amount.

9. On February 7, 1996, respondent disbursed the check for $6,327.26 to the USDOL, and in March the USDOL sent a check in the amount of $2,214.54 to Hei, who endorsed it and forwarded it to respondent.

10. It appears that in this context, "recovery" meant any amount by which Nagel's claim of $12,500 in fees could be reduced through arbitration.

In July or August 1996, the fee arbitrator issued an award in Nagel's favor in the amount of $12,500. Respondent and the State Bar stipulated that Nagel was paid $12,500 for his representation of Hei in the Beasla litigation.

4. Other Legal Services Provided to Hei

According to respondent's testimony, on July 25 and 31, 1996, Hei also requested additional assistance from respondent regarding seniority and benefit rights with her labor union and advice on injunction laws. The record discloses that respondent provided at least some additional counsel in regard to these issues, as evidenced by Hei's letter to respondent dated July 31, 1996, in which she thanked respondent "for notifying all persons involved . . . concerning my [seniority] and my benefits." The record does not reflect any additional fees were paid by Hei for these services.

In August 1997, respondent and Hei participated in a fee arbitration proceeding regarding respondent's fees charged to Hei.

D. Summary of Disbursement of Funds

In sum, from the $50,000 settlement of Hei's personal injury case against the Beasla defendants, Hei received $19,012.29; the USDOL retained $4,112.72 out of the $6,327.26 in satisfaction of its lien; and the two attorneys together received $26,875.99 or 53.75 percent (respondent's fees were $10,910.45 + $1,250 + $2,214.54 for a total of $14,874.99, and Nagel was paid $12,500). Hei paid respondent an additional $500 for his appearance at the fee arbitration.

II. DISCUSSION

A. Count One: Unconscionable Fees (Rule 4–200)

Rule 4–200(A) provides in relevant part that a member of the State Bar "shall not enter into an agreement for, charge, or collect an . . . unconscionable fee." In count one of the NDC, respondent was charged with violating rule 4–200 in five instances: (1) the 35 percent contingency fee specified in the retainer agreement for the personal injury suit; (2) the 35 percent contingency fee to represent Hei in her workers' compensation suit; (3) the fee of $1,250 to assist Hei in preparing for the Nagel fee arbitration; (4) the additional $500 fee charged and collected to appear at the Nagel fee arbitration; and (5) the imposition of a lien on Hei's home as security for the $500 appearance fee.

For the reasons set forth below, we conclude that respondent is culpable of charging and/or collecting an unconscionable fee in only two of the five instances identified in the NDC: 1) the contingency fee he collected for the personal injury suit; and 2) the contingency fee he collected for Hei's workers' compensation claims.

1. Contingent Fee for Personal Injury Cases

Ordinarily, if an attorney charges a fee that is " 'so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action . . . .' " (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402.) Nevertheless, "a contingent fee ' "may properly provide for a larger compensation than would otherwise be reasonable." ' [Citations.] This is because a contingent fee involves economic considerations separate and apart from the attorney's work on the case." (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287–288.) A contingent fee must take into account both the risk as to the ultimate success of the case and the risk as to the amount recovered. (*Id.* at p. 288.) Furthermore, "the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. [Citation.]" (*Ibid.*)

[1a] We agree with the hearing judge that respondent violated the unconscionable fee prohibitions in rule 4–200 in connection with Hei's personal injury case, but we emphasize that our determination of unconscionability is not based on his written agreement specifying a 35 percent contingency fee, since, as we explain below, we conclude there was no valid or enforceable fee agreement. Rather, our finding of unconscionability is based on the hearing judge's finding that respondent failed to disclose to

Hei that he intended his 35 percent contingency fee to be in addition to the fee earned by Nagel. Respondent thus failed "to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees. [Citations.]" (*Herrscher v. State Bar*, *supra*, 4 Cal.2d at p. 403.) As a consequence, Hei paid respondent far in excess of what she believed she had agreed to pay.

[1b] As previously noted, respondent testified that he intended, in entering the fee agreement with Hei, that she "agreed to take the risk . . . of [paying] Mr. [Nagel's] fees. In fact, she agreed to assume the full risk of paying Mr. [Nagel's] fees in exchange for my taking the case." This was neither Hei's understanding nor her intent. She testified that "[n]othing like that was ever explained to me" in response to the prosecutor's question as to whether respondent ever explained to her that she "would assume the risk that [she] would have to pay out to [respondent] 35–percent of the [Beasla] settlement, and then on top of that pay out [to Nagel] at least 25–percent of the [Beasla] settlement for a total payout of 60–percent of the [settlement proceeds]." This testimonial dichotomy provides the evidentiary basis on which we also conclude that there was no agreement as to fees between Hei and respondent because there was no meeting of the minds. " 'There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and [¶] (a) neither party knows or has reason to know the meaning attached by the other . . . .' [Citations.]" (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 676 (*Merced*).) In *Merced*, the court concluded that the firefighters' employees' association and the county had failed to enter into a contract due to (1) the ambiguity of material contract language, (2) the two differing interpretations each placed on the ambiguous language, and (3) each party's lack of knowledge as to the interpretation placed on the ambiguous language by the other party. (*Id.* at pp. 674–676.)

[1c] In the present case, respondent's written contingent fee agreement with Hei was materially ambiguous. It stated "Attorney shall receive as a fee: [¶] 35% of settlement &/or judgment; *total*." (Emphasis added.) There was no explanation of the term "total" in the contract, and under the circumstances, it would be reasonable for Hei to understand, as she testified, that she agreed to a "total" of 35 percent of any settlement or judgment proceeds to be paid to both respondent and Nagel. Nothing in the record provides us with any basis for concluding that either respondent or Hei had any reason to know that each of them had a different interpretation of the contract language. Respondent testified that he explained his position to Hei, but she testified that respondent never explained that to her. The hearing judge found Hei's testimony to be credible. We give great deference to this credibility determination (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 780), and we adopt it. Thus, as in *Merced*, *supra*, 188 Cal.App.3d at p. 676, we "have no alternative but to declare that the parties failed to reach a meeting of the minds. . . ."

[1d] In the absence of a valid fee agreement, we measure respondent's compensation based on a theory of quantum meruit, rather than the full contract price. (*Spires v. American Bus Lines* (1984) 158 Cal App.3d 211, 216.) Here, as in *Spires*, we have successive attorneys, each of whom was retained for the same matter on a contingency basis and each with a quantum meruit claim.[11] (*Ibid.*) Under such circumstances, where "the contingent fee is insufficient to meet the quantum meruit claims of both discharged and existing counsel, the proper application of the *Fracasse* rule[12] is to use an appropriate pro rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each. Such a formula insures that each attorney is compensated in accordance with work performed, as contemplated by *Fracasse*, while assuring that the client will not be forced to make a double payment of fees." (*Ibid.*) It

11. Under *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790–791, an attorney such as Nagel, who is discharged before the contingency occurs, and who was initially hired pursuant to a contingent fee contract, is entitled to be compensated on a quantum meruit basis for the reasonable value of his or her services, rather than at the contract price.

12. See "*Fracasse* rule" as discussed in footnote 9, *ante*.

should be noted that the agreed upon contingent fee acts as an upper limit on the amount to be divided on a quantum meruit theory between the discharged and retained attorneys hired on a contingency basis in the same case. (*Cazares v. Saenz, supra*, 208 Cal.App.3d at p. 289.)[13] Using the quantum meruit formula articulated in *Spires* and *Cazares*, we conclude that Nagel and respondent together were entitled to charge Hei a total fee of 35 percent of the gross recovery of $50,000, or $17,500. Since the reasonable value of Nagel's services were determined in arbitration to be 25 percent of the recovery, or $12,500, the reasonable value of respondent's services was the remaining 10 percent of the gross recovery or $5,000. In fact, respondent retained $10,910.45 as his contingency fee for his services related to the personal injury litigation.

[2a] *Fracasse*, *Spires* and *Cazares* are not discipline cases; they involved civil claims for recovery of attorney fees. Accordingly, these cases are not necessarily precedent for concluding that respondent's fee was unconscionable under rule 4–200. But, we look to these cases as benchmarks for determining reasonable compensation using a quantum meruit analysis. In so doing, we conclude that the fee charged by respondent to represent Hei in the personal injury suits was unconscionable since it was more than twice as much as his client agreed to and also double what he was entitled to under a quantum meruit theory.

[2b] Our conclusion is reinforced by the language of the written Attorney Client Retainer Agreement, which respondent prepared. Although void for lack of mutual assent, the agreement nevertheless is strong evidence of respondent's overreaching, since it contains express provisions that are anathema to respondent's fiduciary relationship with his client, and indeed are against the public policy of this state. Specifically, the language of the agreement was intended to prohibit Hei from settling or dismissing her case unless respondent agreed. This has long been held to be an improper intrusion on the unilateral right of clients to control the outcome of their cases. (*Hall v. Orloff* (1920) 49 Cal.App. 745, 750.) The retainer agreement also expressly prohibited Hei from substituting another attorney for respondent without cause unless respondent consented. Such a provision also violates a fundamental public policy of California. "It has long been recognized in this state that the client's power to discharge an attorney, with or without cause, is absolute (Citation)." (*Fracasse v. Brent, supra*, 6 Cal.3d at p.790.)[14] In those cases where discipline has been imposed for excessive fees, "there has usually been present some element of fraud or overreaching on the attorney's part. . . ." (*Herrscher v. State Bar, supra*, 4 Cal.2d at p. 403.)

[2c] Thus, based on the amount charged and collected by respondent for the personal injury lawsuit, as well as the evidence of respondent's overreaching,[15]

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13. We expressly reject the State Bar's reliance on *Cazares v. Saenz, supra*, 208 Cal.App.3d at pp. 287–288 as authority for a *per se* rule of unconscionability under rule 4–200 in every instance where successive attorneys represent a client and the second attorney charges a contingency fee which, when added to the previous fee charged, exceeds 30 to 40 percent. Indeed, in its brief on review, the State Bar concedes – and we agree – that a second contingency fee may be charged pursuant to a fee agreement, *if* the attorney fully discloses the exact nature of his or her fees, i.e., that they are in addition to those charged by the first attorney, and the attorney has obtained the informed consent of the client. Under those circumstances (which were not present in the instant case) it is possible that the range of reasonable fees charged by the initial attorney and the successive attorney in total could exceed 30 to 40 percent, particularly when the case is more difficult than the first attorney initially anticipated, the case has been poorly investigated and/or prepared by the first attorney, trial is imminent, the case presents novel theories that had been unanticipated by the previous attorney, or other circumstances justify an enhanced contingency fee.

14. We are troubled that these two provisions may be incorporated in respondent's standard fee agreement because he used virtually the identical language in his Attorney Client Retainer Agreement in connection with Hei's workers' compensation matter.

15. The fact that the fee agreement contained two provisions that are void for public policy does not in this instance preclude a determination that respondent is entitled to recover his fee on a quantum meruit basis. (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 463.)

we conclude the contingency fee charged and collected by respondent in the personal injury cases was unconscionable in violation of rule 4–200.

2. Contingent Fee for Hei's Workers' Compensation Case

As noted *ante*, respondent and Hei entered into a second written Attorney Client Retainer Agreement pursuant to which respondent would receive "25% of benefits/settlement/judgment" arising from Hei's workers' compensation claim. Respondent testified that the parties orally modified the agreement to provide for a flat fee for the appeal and motion for reconsideration, but Hei testified that she never voided or canceled the written 25 percent contingency fee agreement. We agree with the hearing judge who resolved this conflicting evidence in favor of Hei, particularly in view of respondent's failure to correct her understanding of the 25 percent contingency arrangement which Hei confirmed in a letter of July 31, 1996.

[3] We accordingly find respondent is not entitled to *any* contingent fee for his representation of Hei in her workers' compensation case, since the contingency did not occur, i.e., respondent failed to obtain any employment benefits for her from the USDOL. Hei only received the medical reimbursement she had obtained herself prior to hiring respondent. Further, there was no provision in the agreement that authorized respondent to deduct his fees from Hei's recovery in her personal injury suit, and yet this is precisely what he did.[16] Respondent ultimately charged and collected from her personal injury settlement a fee of $2,215.49 (equaling 35 percent of the $6,327.26 paid to the USDOL). Moreover, like the personal injury contingent fee agreement, the workers' compensation fee agreement contained two provisions void for public policy, a provision prohibiting Hei from settling the case without respondent's consent and a separate provision prohibiting Hei from discharging respondent unless for cause or with respondent's consent. On the basis of the unauthorized $2,215.49 fee collected by respondent in connection with Hei's workers' compensation appeal, together with the evidence of respondent's overreaching, we conclude respondent violated the unconscionability provisions of rule 4–200.

3. The Fees Charged for the Arbitration of Nagel's Fees

[4a] The hearing judge determined that respondent charged and collected an unconscionable fee in charging $1,250 to assist Hei in preparing for the Nagel fee arbitration, plus an additional $500 to appear at the arbitration on her behalf. The hearing judge based this determination on her finding that it was respondent's responsibility, not Hei's, to participate in the arbitration proceedings because the hearing judge concluded that respondent was obliged to divide his contingency fee with Nagel. But, in order to adopt the hearing judge's determination, it would be necessary to find that respondent had a pre–existing duty to negotiate, arbitrate, or litigate Hei's fees with Nagel, which we decline to do. Respondent was not a party to the retainer agreement between Hei and Nagel.

[4b] We believe that it was unwise for respondent to disregard Nagel's claim of attorney fees when respondent was subsequently retained by Hei. (See Fishkin, *Attorney Conduct: Resolving the Division of Fees Between Contingency Fee Attorneys* (Aug./Sept. 2000) 26 San Francisco Att'y 11 ["[T]he fee–splitting argument can easily become a power battle .... There will be righteous disagreements."].) But, we can find no authority to establish that the wiser course of action amounted to a pre–existing duty of respondent to arbitrate Nagel's fee as a necessary party. Since we do not find that respondent was obliged to arbitrate the fee dispute between Hei and Nagel, we find no basis to conclude that the fees charged for respondent's additional services in preparing Hei for the Nagel fee arbitration were unconscionable.

Again we determine the reasonableness of his fees in quantum meruit and not on the basis of the contract price, because the fee agreement for the

16. Respondent unequivocally testified that his fee for representing Hei in her workers' compensation matter was *not* part of the contingency fee he charged for representing Hei in her personal injury matter.

Nagel arbitration initially was not in writing as required by sections 6147, subdivision (a) and 6148, subdivision (a).[17] Although the arrangement was subsequently confirmed twice by respondent in writing and signed by Hei, neither writing satisfied the relevant statutory requirements for fee agreements set forth in sections 6147, subdivision (a) and 6148, subdivision (a). Under section 6147, subdivision (b) and section 6148, subdivision (c), respondent's failure to comply with those requirements rendered the agreement voidable at Hei's option. In view of Hei's testimony disputing the existence of the agreement, we treat the agreement as void.

Therefore, respondent was entitled to the reasonable value of his services under the theory of quantum meruit. (*Spires v. American Bus Lines*, *supra*, 158 Cal.App.3d at pp. 216–217.) The record establishes that respondent assisted Hei with the arbitration for approximately four months. Respondent and Nagel sent several letters to each other pertaining to the fees Nagel claimed for his services. From these letters, it appears that respondent obtained and reviewed a detailed hourly billing record provided by Nagel in order to determine the reasonableness of Nagel's claimed fee. Respondent made a pre–arbitration settlement offer, which Nagel declined. In addition, respondent assisted Hei with the paperwork required for the arbitration. Although the record does not reflect the amount of time respondent spent on these tasks, we cannot say on this record that compensation in the amount of $1,250 for these services was unreasonable, much less unconscionable, and therefore we find he is entitled to this amount in quantum meruit.

4. The Lien for Respondent's Fee on Hei's Home

The State Bar's final allegation in count one is that respondent charged Hei an unconscionable fee by requiring Hei to grant him a lien on her home as security for the $500 appearance fee in the Nagel fee arbitration matter. However, respondent concedes that he willfully violated rule 3–300 by requiring Hei to grant him a lien on her home as security for the $500 appearance fee without advising her to consult with an independent attorney or giving her an opportunity to do so, and, as we discuss below, we find him culpable as charged in count two. We decline to find additional culpability for charging an unconscionable fee based on the same facts, as such a finding would be duplicative of count two. (Cf. *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536.)

B. Count Two: Acquiring an Adverse Interest (Rule 3–300)

Rule 3–300 provides that "[a] member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

As we previously noted, respondent stipulated that he did not advise Hei in writing that she could seek the advice of an independent lawyer or give her a reasonable opportunity to do so at the time he agreed to appear for her at the Nagel fee arbitration in exchange for a fee of $500 and a lien on Hei's home to secure the $500 fee. Respondent concedes in his opening brief on review that he willfully violated rule 3–300, and we agree. (See *Hawk v. State Bar* (1988) 45 Cal.3d 589 [attorney who secured payment of fee by acquiring note secured by deed of trust in client's real property was required to comply with former rule 5–101 regarding obtaining interest adverse to client].)

17. The agreement for respondent's services in connection with the fee dispute was in the nature of a retainer and contingency fee agreement, and it was foreseeable the fee would exceed $1,000. Hence the applicability of sections 6147 and 6148.

C. Count Three: Failing to Disclose a Financial Interest (Rule 3–310(B)(4))

[5a] The NDC charged respondent in count three with willfully violating rule 3–310(B)(4), which prohibits, inter alia, an attorney from accepting or continuing representation of a client without written disclosure where the attorney has a financial interest in the subject matter of the representation. The State Bar bases this charge on respondent's purported financial interest in the Nagel fee arbitration because, in the State Bar's view, respondent's entitlement to collect his own attorney fee was based on the amount of Nagel's fee awarded in the arbitration. However, as we previously discussed, respondent believed and indeed expressly intended that his 35 percent contingency fee would be independent of the amount of the fees that Hei was obligated to pay Nagel. Our conclusion that respondent was required to share his contingent fee with Nagel based on a quantum meruit analysis does not alter the evidence that respondent believed at the time he was retained by Hei that she had assumed the risk of paying Nagel the additional 25 percent contingency fee.

[5b] "Wilful violation of the Rules of Professional Conduct is established by a demonstration that the attorney ' "acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. [Citations.]" ' [Citations.]" (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952–953.) We do not find clear and convincing evidence that respondent knew he had a financial interest in the Nagel fee arbitration, and therefore he did not wilfully fail to disclose that interest to Hei in writing before accepting or continuing his representation of Hei. (Compare *Beery v. State Bar* (1987) 43 Cal.3d 802, 815 [where, in entering into business transaction with client, attorney concealed material facts from client and carefully presented transaction in most favorable light, attorney "knew what he was doing and intended to commit the acts"].) Under these circumstances, we conclude that respondent is not culpable of willfully violating rule 3–310(B)(4).

D. Count Four: Failure to Perform Competently (Rule 3–110(A))

In count four of the NDC, respondent was charged with intentionally, recklessly or repeatedly failing to perform legal services competently in violation of rule 3–110(A). The NDC in count four incorporates by reference count one and adds the allegations that respondent failed to properly disburse the settlement proceeds to Hei and that he should have been a party to the fee arbitration. We do not believe these additional allegations provide a sufficient basis to impose additional culpability, because the remaining facts alleged in count four are either duplicative of or intrinsic to our culpability determinations in counts one through three. The appropriate resolution of this matter does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) We therefore dismiss count four as duplicative.

E. Count Five: Moral Turpitude (Section 6106)

In count five of the NDC, respondent was charged with committing acts of moral turpitude in violation of section 6106 by gross overreaching in breach of his fiduciary duty to Hei by (1) charging and collecting a 35 percent contingency fee for Hei's personal injury matter in addition to the 25 percent contingency fee Nagel was claiming; (2) requiring Hei, instead of respondent, to pursue the fee arbitration against Nagel; (3) charging Hei a 35 percent contingency fee for the Nagel fee arbitration; (4) collecting $1,250 as a contingency fee for the Nagel fee arbitration before Hei received any award in the Nagel fee arbitration; (5) requiring Hei to give respondent a lien on her home on the day of the Nagel arbitration; and (6) charging Hei another $500 to appear on her behalf at the Nagel fee arbitration. The hearing judge determined, and we agree, that there was insufficient evidence to find that respondent's misconduct rose to the level of acts involving dishonesty, corruption, or moral turpitude.

III. DISCIPLINE

A. Aggravation

We agree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing, but we give this little weight. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).) Respondent charged Hei unconscionable fees in both her personal injury case and her workers' compensation case, and in addition admitted his culpability of entering into an improper business transaction with Hei. These three acts support a finding in aggravation that respondent engaged in multiple acts of misconduct. (See *In the Matter of Malek–Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627 [two violations of failure to supervise resulting in trust fund violations, plus improper threat to bring criminal action constituted multiple acts of wrongdoing in aggravation]; but see *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [one client matter involving misappropriation, failure to promptly pay funds at client's request and failure to inform client of right to seek independent counsel, plus failure to report sanctions in another client matter were not viewed by this court "as strongly presenting aggravation on account of multiple acts of misconduct...."].)

We disagree with the hearing judge's finding of aggravation that respondent's misconduct was surrounded by overreaching (std. 1.2(b)(iii)), as we have already relied on respondent's overreaching as a partial basis for our findings of unconscionable fees. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 176.)

We agree with the hearing judge's finding in aggravation that respondent's misconduct significantly harmed Hei. (Std. 1.2(b)(iv).) The uncontroverted evidence established that respondent's misconduct deprived Hei of her funds at a time when she was in desperate need.

Finally, we disagree with the hearing judge's determination that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent readily stipulated to the charge of improper business transaction. Moreover, we agree with some of respondent's contentions which he has asserted in his own defense and have declined to adopt the degree of culpability imposed by the hearing judge. We therefore decline to attach aggravating weight to respondent's good faith defense of his actions.

B. Mitigation

The hearing judge found no circumstances in mitigation.

We agree with the hearing judge's determination that respondent is not entitled to mitigation for his absence of any prior record of discipline (std. 1.2(e)(i)) because he had only been admitted to practice law in California slightly more than two years before his misconduct began. (See *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.) We note, however, that since respondent was relatively new to the practice, he may have been inexperienced with the permutations of fee arrangements that comport with the rules of professional conduct.

We also agree with the hearing judge's determination that respondent is entitled to no mitigation for emotional difficulties since there was no expert evidence to establish a causal connection between respondent's anxiety disorder and the misconduct at issue in this case.[18] (Std. 1.2(e)(iv).)

However, we believe there are mitigating factors in this case. We note that respondent entered into a pretrial stipulation as to facts pertaining to various charges of misconduct and as to culpability for the charge of entering into an improper business transaction

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18. From the hearing judge's decision, it appears that the hearing judge admitted and considered the contents of the letter from respondent's psychologist, which respondent attached to his Closing Trial Brief, over the objection of the State Bar in its Closing Reply Trial Brief. We need not and do not address the propriety of the hearing judge's admission of this additional evidence submitted after trial since the evidence did not result in additional mitigation in respondent's favor.

with a client, thus saving State Bar Court time and resources. This conduct is entitled to mitigating weight. (Std. 1.2(e)(v); see *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.)

In addition, respondent testified as to his pro bono and community service, both in California and in Minnesota. Such evidence is entitled to some weight in mitigation, although the weight of the evidence is somewhat limited because respondent's testimony was the only evidence on the subject, and therefore the extent of respondent's service is unclear. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647–648; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 & fn. 22.)

C. Level of Discipline

As we previously noted, the Supreme Court has directed us on remand to reconsider the appropriate degree of discipline in light of the standards, and in so doing, to consider "any ground that may form a basis for an exception to the application [of the standards]." The State Bar correctly notes in its brief on remand that we did not explain in our 2005 opinion why we deviated from standard 2.7, and it urges that we adopt the six months' actual suspension specified by that standard.[19] We are obligated to afford "great weight" to the standards (*In re Silverton, supra,* 36 Cal.4th 81, 89–92), although we believe that the standards do not mandate a specific discipline. Indeed, if the Supreme Court were of the view that the standards provide for mandatory disciplinary outcomes, it would have directed us to simply apply the specific discipline stated in the relevant standards, including standard 2.7, which it obviously did not.

The court's order is consistent with its long–held position that it is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221–222; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550 [the standards are "simply guidelines"]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454 [same]; *Hawk v. State Bar, supra,* 45 Cal.3d at p. 602 [same].) Following the Supreme Court's lead, we recently observed in *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Court Rptr. 920, 940, that "although the Standards were established as guidelines, ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case. [Citations.]"

Utilizing this background as guidance, we proceed to consider the relevant standards, as well as the facts and guiding case law. As a general principle, standard 1.3 provides that the primary purposes of the disciplinary proceedings 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. (See also *In re Morse* (1995) 11 Cal.4th 184, 205.) The other standards applicable to this case are standards 1.6(a), 2.7 and 2.8. Standard 1.6(a) provides that if two or more acts of misconduct are found, the sanction imposed shall be the more severe of the applicable sanctions. We therefore focus on standard 2.7 because standard 2.8 provides that a violation of rule 3–300 [acquiring an adverse interest] shall result in suspension unless the extent of the misconduct and harm to the client are minimal, whereas standard 2.7 is more specific and provides that a violation of rule 4–200 [entering into an agreement for, charging, or collecting an unconscionable fee] "shall result in at least a six–month actual suspension from the practice of law, irrespective of mitigating circumstances."

In view of the flexible nature of the standards, we must address the seemingly mandatory language of standard 2.7. The only Supreme Court case referring to

19. The State Bar also argues in its brief on remand that this court should find that respondent's failure to acknowledge his misconduct constitutes an additional factor in aggravation, justifying a greater degree of discipline. However, in view of the Supreme Court's order of remand directing us only to reconsider the recommendation as to discipline, we do not reconsider our earlier findings of culpability, mitigation, or aggravation.

the application of standard 2.7 cited to us by the State Bar is *Barnum v. State Bar* (1990) 52 Cal.3d 104. In the *Barnum* case, the attorney collected an unconscionable fee, committed acts of moral turpitude, and, additionally, he willfully disobeyed four court orders and failed to cooperate with the State Bar's investigation. (*Id.* at pp. 110–111.) The Supreme Court did not utilize or otherwise engage in an extensive analysis of the application of standard 2.7 in *Barnum*; instead, the court relied upon Barnum's record of three prior disciplines in determining that the review department's disbarment recommendation was warranted. (*Id.* at p. 113.) Because *Barnum* is factually distinguishable, in part due to the absence of a prior record in the instant case, and because the Supreme Court provided no guidance in *Barnum* as to the interpretation or application of the express language of rule 2.7, we do not find that case to be helpful. The few remaining cases discussing standard 2.7 similarly provide little guidance.[20]

For example, in *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, we stated that the attorneys' solicitation violations merited a one–year actual suspension and that "the remainder of respondents' offenses [compensating another for purpose of recommending the attorney's services, committing acts involving moral turpitude, sharing legal fees with nonattorneys, and charging unconscionable fees] . . . deserve an additional six months [of] actual suspension." (*Id.* at p. 654.) Thus, although we noted that standard 2.7 provided for a minimum six–month actual suspension for the unconscionable fee offense alone, we did not apply the standard.

Similarly, in *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, we noted the minimum six–month actual suspension set forth in standard 2.7, but we did not discuss or analyze the impact of that standard on our overall discipline recommendation. There, we recommended a one–year actual suspension for numerous violations in addition to the unconscionable and illegal fee violations, i.e., failure to communicate a written settlement offer, failure to promptly pay out client funds, failure to render an appropriate accounting, and commingling and misappropriating funds. (See also *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896 [analysis confined to whether six months' actual suspension provided by standard 2.7 is additive when further misconduct warrants actual suspension]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [standard 2.7 used as guideline for level of discipline, but case involved an illegal fee rather than an unconscionable fee].)

Because the above cases provide scant assistance as to the proper interpretation of standard 2.7, we look to Supreme Court cases applying standards 2.2(a) and (b), both of which mirror the seemingly mandatory language of standard 2.7 specifying a minimum period of actual suspension "irrespective of mitigating circumstances."[21]

Edwards v. State Bar (1990) 52 Cal.3d 28, involved an attorney who was culpable of commingling funds and wilful misappropriation. The Supreme Court declined to adopt this court's discipline recommendation of two years' actual suspension finding it "excessive." (*Id.* at p. 39.) The *Edwards* decision is most useful to our analysis because there the Supreme Court expressly rejected an inflexible interpretation of the language of standard 2.2(a), which provides: "the discipline shall not be less than a one–year actual suspension, irrespective of mitigating circumstances." (This language mimics the

20. The vast majority of unconscionable fee cases were decided before the standards were implemented. As we discuss *post*, a wide range of discipline was imposed in those cases, from three months' suspension (see, e.g., *Recht v. State Bar* (1933) 218 Cal. 352; *In re Goldstone* (1931) 214 Cal. 490) to disbarment (e.g., *Dixon v. State Bar* (1985) 39 Cal.3d 335; *Tarver v. State Bar* (1984) 37 Cal.3d 122).

21. Standard 2.2(a) provides in relevant part that wilful misappropriation "shall result in disbarment" unless the amount involved is insignificant, in which case "the discipline shall not be less than a one–year actual suspension, irrespective of mitigating circumstances." Standard 2.2(b) provides in relevant part that commingling of funds or misappropriation not involving a wilful act "shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances."

provisions of standard 2.7.) The court adopted the following approach: "This standard [2.2(a)] correctly recognizes that willful misappropriation is grave misconduct for which disbarment is the usual form of discipline. In requiring that a minimum of one year of actual suspension invariably be imposed, however, the standard is not faithful to the teachings of this court's decisions. [Citation.] The standard's one–year minimum should be regarded as a guideline, not an inflexible mandate." (*Id.* at p. 38.)

Also, in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, the Supreme Court rejected the review department's application of standard 2.2(b) as requiring three months' actual suspension. Even though the Supreme Court adopted the review department's determination that Dudugjian was culpable of willful commingling and failing to promptly pay out client funds, the court concluded that public reproval was the appropriate discipline under the facts of the case. The court focused on Dudugjian's honest belief that the clients had given him permission to retain their settlement funds and rejected the review department's recommendation.

In *Howard v. State Bar, supra,* 51 Cal.3d 215, the Supreme Court imposed a six–month actual suspension instead of the one–year actual suspension recommended by the review department and ostensibly mandated by the language of standard 2.2(a) stating that discipline for misappropriation of entrusted funds "shall not be less than a one–year actual suspension, irrespective of mitigating circumstances." Approximately two years after being admitted to practice law, Howard misappropriated approximately $1,300 from a client's personal injury settlement proceeds and failed to communicate with the client for approximately two months. Although the court acknowledged the mandatory language of standard 2.2(a), it nevertheless determined that a six–month actual suspension was sufficient based upon Howard's evidence presented in mitigation that she had lifelong psychological problems leading to drug and alcohol abuse and that she had been sober for approximately two and one–half years at the time of trial.

In *Brockway v. State Bar* (1991) 53 Cal.3d 51, the Supreme Court imposed a three–month actual suspension notwithstanding the one–year suspension seemingly required by standard 2.2(a). There, the attorney misappropriated $500 of client funds, failed to pay out client funds promptly upon request, and improperly acquired an interest adverse to his client. Although aggravating factors were present, the court focused on mitigating factors and determined that "the minimum one–year period suggested by Standard 2.2(a) would be unduly harsh" under all of the circumstances. (*Id.* at p. 66; see also *Kelly v. State Bar* (1991) 53 Cal.3d 509 [attorney failed to deposit client funds in trust, commingled funds, failed promptly to pay out client funds, and misappropriated $750 in client funds; court refused to apply standard 2.2(a) rigidly and, focusing on circumstances surrounding the misappropriation as well as mitigation evidence, determined that a 120–day actual suspension was appropriate]; *Bates v. State Bar* (1990) 51 Cal.3d 1056 [attorney culpable of misappropriating $1,229.75 and of misrepresenting status of funds; Supreme Court adopted review department recommendation of six–month actual suspension in view of mitigation evidence].)

The foregoing cases make clear that, where appropriate, the Supreme Court will not hesitate to impose a level of discipline lower than that specified by a standard's seemingly mandatory language, even when the standard expressly provides for a minimum discipline "irrespective of mitigating circumstances."

In our consideration of the appropriate level of discipline, we look to other cases involving unconscionable fees. A survey of the unconscionability cases reveals that *Recht v. State Bar, supra,* 218 Cal. at page 352, and *In re Goldstone, supra,* 214 Cal. 490, are at the lenient end of the disciplinary spectrum since both impose three months' actual suspension. In *Recht v. State Bar, supra,* 218 Cal. 352, an attorney who was found culpable of charging exorbitant and unconscionable fees to two clients and making misrepresentations to induce them to employ him was actually suspended for three months. (*Id.* at p. 353.) The attorney represented an investment trust and thereby obtained confidential information which he used to his own advantage in soliciting employment from two investors in the trust. He did not reveal his professional relationship to the trust at the time the investors engaged his services and further made express false representations about the circumstances

of his representation of their interests in the trust. The court also found that Recht attempted to shift blame to a third party and noted that Recht had made no restitution to his clients and had made no attempt to do so until after the local administration committee suggested to Recht that their recommendation might be affected by restitution. (*Id.* at p. 354.)

The conduct in *Recht v. State Bar, supra,* 218 Cal. 352, was more serious than in this matter because it involved intentional misrepresentations, which the court found violated "the very fundamentals of common honesty and fair dealing" (*Id.* at pp. 354–355). However, in ordering that Recht be actually suspended from the practice of law for a period of three months rather than imposing a more serious discipline, the court seemingly gave significant weight to Recht's youth and inexperience. (*Id.* at 355.)

In *Goldstone v. State Bar, supra,* 214 Cal. 490, a three–month suspension was imposed where an attorney was found culpable of one count of charging an unconscionable fee. The court found that in charging the fee, Goldstone performed no service of value, which the court viewed as "a species of dishonesty which no court should condone." (*Id.* at p. 497.) In the instant case, respondent performed the agreed–upon work in Hei's personal injury and workers' compensation cases. Respondent's transgressions were confined to one client, but he charged an unconscionable fee in two instances.

The remaining cases, and certainly the more current ones, have imposed actual discipline from six months to disbarment. The State Bar urges a minimum of six months' actual suspension as appropriate in this matter, but, in every case, except arguably *Bushman v. State Bar* (1974) 11 Cal.3d 558,[22] there has been additional, serious misconduct associated with the charging of an unconscionable fee. (See, e.g. *Barnum v. State Bar, supra,* 52 Cal.3d 104 [disbarment for charging unconscionable fees plus violation of four court orders and extensive history of prior discipline]; *In the Matter of Scapa and Brown, supra,* 2 Cal. State Bar Ct. Rptr. 635 [one–year actual suspension for charging unconscionable fee plus numerous solicitation violations, acts of moral turpitude, and splitting legal fees with non–attorneys]; *In the Matter of Yagman, supra,* 3 Cal. State Bar Ct. Rptr. 788 [one–year actual suspension for unconscionable fee of $378,175, plus, inter alia, acts of moral turpitude in misleading the court, commingling funds, misappropriation, failing to communicate a settlement offer, and failing to account and a prior discipline for charging unconscionable fee].)

In our most recent case of *In the Matter of Wells, supra,* 4 Cal. State Bar Ct. Rptr. 896, we recommended six months' actual suspension[23] where an attorney, in addition to charging unconscionable and illegal fees to two clients, was culpable of engaging in the unlawful practice of law in another state, committing acts of overreaching with her clients, giving false information to officials in California and South Carolina investigating her law practice, and failing to return unearned fees or maintain a trust account. In aggravation, Wells was previously disciplined and she demonstrated indifference. In mitigation, Wells entered into an extensive stipulation of facts as to her culpability, suffered from extreme emotional distress, and presented eight character witnesses, including a retired superior court judge and three attorneys. Respondent's misconduct did not involve such wide–ranging misconduct and his actions were confined to one client. Whereas respondent had no prior record and indeed had only been practicing law for two years at the time he was retained by Hei, Wells had practiced in California since 1984 and had a prior discipline record. In our view, the misconduct in the *Wells* case clearly warranted greater discipline than in the instant case.

The State Bar cites *Finch v. State Bar* (1981) 28 Cal.3d 659, 664–665, wherein the Supreme Court

22. In *Bushman v. State Bar, supra,* 11 Cal.3d 558, the court imposed a one–year suspension where the attorney was culpable of charging an unconscionable fee and soliciting professional employment by advertising in violation of the Rules of Professional Conduct then in effect. Three of the four clients in the matter were on welfare, and one was a minor.

23. By Supreme Court order dated June 14, 2006, in case no. S140918, the court ordered the imposition of the recommended discipline.

imposed six months' actual suspension as the result of the collection of an unconscionable fee. But Finch admitted to many other acts of misconduct including that he: (1) misappropriated client funds in two matters, in the total amount of $5,750; (2) forged a client's signature on a settlement check; (3) failed to perform services in three matters; (4) failed to return unearned fees promptly; (5) failed to forward client files and documents to subsequent counsel; and (6) withdrew from representing a client without taking reasonable steps to avoid foreseeable prejudice to the client. The court there considered in mitigation that Finch was a rehabilitated alcoholic, that he believed he had his client's authority to sign the client's name on the settlement check and that he acknowledged his wrongdoing. (*Id.* at pp. 665–666.) However, the court discounted the lack of a prior disciplinary record because the misconduct commenced less than three years after Finch's admission (*id.* at p. 666, fn. 3), and it also discounted the restitution paid to clients because it was made under pressure. (*Id.* at p. 666.)

The totality of the circumstances is far more serious in *Finch v. State Bar, supra,* 28 Cal.3d 659, as that case involved misappropriation, failure to perform and forgery. In contrast to respondent's misconduct, which involved one client and in part was due to his inexperience, the Supreme Court characterized the misconduct in *Finch* as "habitual," warranting a "severe" discipline of six months. (*Id.* at p. 665.)

We find that the more lenient, older cases of *Recht v. State Bar, supra,* 218 Cal. 352, where the court seemingly gave significant weight to the attorney's youth and inexperience and *In re Goldstone, supra,* 214 Cal. 490, which involved misconduct most commensurate with the present case, are most relevant to our discipline analysis. But, in view of the paucity of *recent* unconscionable fee cases having misconduct similar to the instant case, we again turn our attention to the six–month minimum actual suspension proposed by standard 2.7, mindful that it must be given "great weight." (*In re Silverton, supra,* 36 Cal.4th at p. 92.) In so doing, we have taken great care to consider the unique factors of this case that we conclude justify a departure and support our conclusion that three months' actual suspension is appropriate under the circumstances.

We found in this case that respondent is culpable of charging an unconscionable fee on two occasions and entering into a business transaction with his client without securing a waiver. Our finding of unconscionability is based on our determination that the fees charged by respondent should be measured in quantum meruit since there was no meeting of the minds between respondent and his client as to the amount to be paid. The unconscionable fee violations thus are the result of respondent's erroneous conclusion that his client agreed to pay his contingency fees in addition to the fee she was obligated to pay her prior counsel. Moreover, respondent was relatively new to the practice when he accepted Hei as a client, and the fact that he charged the unconscionable fees was in large measure due to his inexperience rather than to any intent to injure his client or acquire an advantage.

The fact that respondent may have intended no harm in charging the fees does not shield him from culpability (see *Edwards v. State Bar, supra,* 52 Cal.3d at p. 38; see also *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309); but we may nevertheless consider this in determining the appropriate level of discipline. (E.g., *Kelly v. State Bar, supra,* 53 Cal.3d 509, 519–520.) Furthermore, respondent did in fact perform substantial work for Hei in both cases, as he took the Corea defendants to trial in Hei's personal injury case and filed an appeal and a rehearing motion in Hei's workers' compensation case. Additionally, we have found but one aggravating circumstance of consequence – harm to his client – as well as evidence of off–setting mitigation as the result of respondent's partial stipulation as to culpability before trial and his pro bono and community activities.

[6] The hearing judge recommended that respondent receive a one–year stayed suspension, a three–year probationary period, and six months' actual suspension based on her assessment that respondent was culpable of four counts of misconduct, as well as four factors in aggravation and no mitigation. We have found much less culpability and less aggravation than the hearing judge, and, in

addition, we have found evidence in mitigation, where the hearing judge found none. We thus conclude, in view of the unique circumstances of this case, the guiding standards and the relevant case law, that a one–year stayed suspension and a two–year period of probation with a period of three months' actual suspension on the conditions set forth below is sufficient to serve the goals of these disciplinary proceedings.

D. Restitution

In view of our determination that respondent collected unconscionable fees with regard to Hei's personal injury and workers' compensation cases, we also recommend that respondent should be required to pay restitution of any amounts in excess of reasonable compensation for these cases. As we earlier concluded, respondent was entitled, based on quantum meruit, to retain only 10 percent of the total $50,000 settlement proceeds or $5,000 for Hei's personal injury case. He also was entitled, on a quantum meruit basis, to retain $1,250 for his preparation for the Nagel fee arbitration and $500 for his appearance at that arbitration, for a total of $6,750 in fees. Because respondent received a total of $14,874.99 in fees, he must make restitution in the amount of $8,124.99 plus interest. Respondent must therefore refund to Hei $5,910.45 plus interest from the date of payment of the attorney fee by Hei to disgorge the unconscionable fees he charged in the personal injury lawsuit, and $2,214.54 plus interest to the United States Department of Labor from the date of the attorney fee it paid in connection with his representation of Hei in the workers' compensation case.

IV. RECOMMENDATION

We recommend that respondent David M. Van Sickle be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first three months of probation.

2. During the period of his probation, respondent must make restitution to Ivy Hei in the amount of $5,910.45 plus simple interest thereon at the rate of 10 percent per annum from the date of respondent's receipt of attorney fees in the *Hei v. Beasla* suit (January 15, 1996) until paid (or to the Client Security Fund to the extent of any payment from the fund to Hei, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof of such restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

3. During the period of his probation, respondent must make restitution to the United States Department of Labor (USDOL) in the amount of $2,214.54 plus simple interest thereon at the rate of 10 percent per annum from the date of respondent's receipt of payment from the USDOL of attorney fees arising from Hei's workers' compensation matter until paid (or to the Client Security Fund to the extent of any payment from the fund to the USDOL, plus interest and costs, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof of such restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). Within the first 90 days after the effective date of the Supreme Court order in this matter, the Office of Probation must determine the date respondent received payment from the USDOL. Respondent must fully cooperate with and assist the Office of Probation in making this determination, which is subject to de novo review by the State Bar Court on motion of respondent or the State Bar.

4. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current

office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

5. Respondent must report, in writing, to the State Bar's Office of Probation 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 his 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that 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 the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

7. 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 such completion to the State Bar's Office of Probation 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. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for one year will be satisfied, and the suspension will be terminated.

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 one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

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 that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

We concur:
STOVITZ, P. J.
WATAI, J.