STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEPHEN J. HEISER

A Member of the State Bar

[No. 87-O-16747]

Filed April 26, 1990

SUMMARY

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

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

COUNSEL FOR PARTIES

For Office of Trials: Donald Steedman

For Respondent: No appearance (default)

HEADNOTES

[1 a, b] 135 Procedure—Rules of Procedure
166 Independent Review of Record

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

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

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

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

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

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

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

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

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

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

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

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

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

ADDITIONAL ANALYSIS

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

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

Other

1093 Substantive Issues re Discipline—Inadequacy

OPINION

STOVITZ, J.:

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

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

A. FACTS

1. Returned Checks and Use of Trust Accounts

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

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

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

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

2. State Bar Investigation

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

B. STATE BAR FORMAL PROCEEDINGS

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

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

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

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

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

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

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

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

C. STANDARD OF REVIEW

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

D. DISCUSSION

1. Moral Turpitude and Misappropriation

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

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

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

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

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

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

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

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

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

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

2. Misrepresentation and Failure to Cooperate

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

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

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

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

In sum, we find that respondent:

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

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

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

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

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

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

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

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

E. DISCIPLINE

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

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

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

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

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

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

F. RECOMMENDATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We concur:

PEARLMAN, P.J.
NORIAN, J.