

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

BRUCE E. NELSON

A Member of the State Bar

[No. 86-O-17038]

Filed September 25, 1990; as modified, October 25, 1990

SUMMARY

Based on stipulated facts showing that respondent had formed a partnership for the practice of law with a non-lawyer, divided legal fees with the non-lawyer, and used the non-lawyer as a "runner" and "capper," and on findings of other misconduct, a referee of the former, volunteer State Bar Court found respondent culpable of various statute and rule violations, and recommended two years stayed suspension, with one year of actual suspension. (Alexander Anolik, Hearing Referee.)

Both parties requested review. The State Bar examiner contended that additional violations of the Rules of Professional Conduct and State Bar Act should have been found and that the referee should have recommended at least two years of actual suspension. Respondent contended that he was not culpable of certain offenses and that in view of extensive mitigation, no actual suspension was warranted.

On review, the review department adopted most of the referee's culpability findings, and found respondent culpable of an additional charge of failing to pay client trust funds upon demand. It deleted the referee's findings that respondent had violated his oath and duties, except as to one charge where respondent had been found culpable of violating a criminal statute. Because respondent presented evidence of extremely strong mitigation, including remorse, restitution, rehabilitation, and extreme candor and cooperation in the State Bar investigation and proceedings, the review department recommended only a six-month actual suspension, with two years stayed suspension and two years probation.

COUNSEL FOR PARTIES

For Office of Trials: Erica Tabachnick

For Respondent: Philip B. Martin

HEADNOTES

- [1] **221.00 State Bar Act—Section 6106**
 1528 Conviction Matters—Moral Turpitude—Definition
Supreme Court has defined moral turpitude as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, or an act contrary to honesty and good morals.
- [2] **221.00 State Bar Act—Section 6106**
Where respondent's involvement in capping was pervasive, and his law practice was built entirely on illegal payments to third parties for cases, respondent's conduct clearly involved corruption, and thus violated statute precluding acts of moral turpitude, dishonesty or corruption, even though no deceit was involved.
- [3] **243.00 State Bar Act—Sections 6150-6154**
The reason behind the long-standing prohibition in the rules of professional conduct or state law, against capping and improper partnership and fee division activities between lawyers and non-lawyers, is the potential these activities have to adversely affect the independent professional judgment of the lawyer.
- [4] **221.00 State Bar Act—Section 6106**
 420.00 Misappropriation
Absent additional evidence, attorney could not be found culpable of committing act of moral turpitude by misappropriating client trust funds, where evidence showed that attorney had transferred funds to successor counsel, and State Bar had stipulated that successor counsel had actually misappropriated funds.
- [5] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
A request by a client for payment of funds or property held by the attorney is an essential element of the charge of failing to pay client trust funds promptly upon request.
- [6] **106.20 Procedure—Pleadings—Notice of Charges**
 106.40 Procedure—Pleadings—Amendment
 119 Procedure—Other Pretrial Matters
 139 Procedure—Miscellaneous
 151 Evidence—Stipulations
 280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
Where respondent, represented by experienced counsel, stipulated to facts which respondent conceded supported uncharged violation of failing to notify clients of receipt of client funds, and respondent did not object to referee's amendment of notice to show cause to reflect such charge, review department held that any such objection was waived, and found culpability despite omission of charge from notice to show cause.
- [7 a-c] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
To uphold a finding of culpability of withdrawal without taking steps to avoid foreseeable prejudice to the client, it is not necessary that the precise nature of the prejudice to the client be foreseeable. A finding that it was reasonably foreseeable that some prejudice would result to the client is sufficient to support culpability. Where respondent ended his association with running and capping in a hasty manner, and failed to give adequate notice of withdrawal and change of counsel, prejudice to clients was foreseeable even though evidence did not show that successor counsel's subsequent dishonesty was foreseeable.

- [8] **213.10 State Bar Act—Section 6068(a)**
243.00 State Bar Act—Sections 6150-6154
 Finding of culpability of violating attorney's duty to uphold the law was proper, where attorney was found to have violated criminal provision of Business and Professions Code as charged in notice to show cause.
- [9] **243.00 State Bar Act—Sections 6150-6154**
1091 Substantive Issues re Discipline—Proportionality
 Supreme Court attorney disciplinary opinions in which prohibited solicitation or capping activities were a significant or sole part of the lawyer's misconduct have imposed discipline ranging from six months actual suspension for isolated acts to disbarment in a few aggravated cases.
- [10] **801.45 Standards—Deviation From—Not Justified**
802.30 Standards—Purposes of Sanctions
863.30 Standards—Standard 2.6—Suspension
1091 Substantive Issues re Discipline—Proportionality
 Strong mitigating factors in matter involving capping and other misconduct dramatically lessened need for strict discipline imposed by Supreme Court in similar matters, but did not eliminate need for measurable discipline to maintain integrity of and public confidence in legal profession.
- [11] **171 Discipline—Restitution**
 Where evidence showed that another attorney, not respondent, was apparently responsible for certain thefts of trust funds, review department did not recommend requiring restitution as to those matters.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
- 221.19 Section 6106—Other Factual Basis
- 243.01 Sections 6150-6154
- 252.21 Rule 1-310 [former 3-103]
- 252.31 Rule 1-320(A) [former 3-102(A)]
- 275.31 Rule 3-510 [former 5-105]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 252.05 Rule 1-300(A) [former 3-101(A)]
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.54 Misappropriation—Not Proven

Mitigation

Found

- 735.10 Candor—Bar
- 745.10 Remorse/Restitution
- 750.10 Rehabilitation

Standards

- 801.30 Effect as Guidelines
- 802.69 Appropriate Sanction
- 824.10 Commingling/Trust Account Violations
- 833.40 Moral Turpitude—Suspension
- 863.20 Standard 2.6—Suspension

Discipline

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

Probation Conditions

- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Based on requests for review both by the State Bar examiner ("examiner") and Bruce E. Nelson ("respondent")¹, we review a recommendation of a volunteer referee of the former State Bar Court that respondent be suspended from the practice of law in this state for a period of two years, stayed on conditions including a one-year actual suspension.

The referee's findings are based on stipulated facts showing that respondent was culpable of misconduct in 1984 by forming a partnership for the practice of law with a non-lawyer ((former) Rules Prof. Conduct, rule 3-103²), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper" (Bus. & Prof. Code, § 6152).³ In addition, based on all the evidence presented, the referee found respondent culpable of a violation of Business and Professions Code section 6106 (act of moral turpitude, dishonesty or corruption) in one count, and of rule 5-105 (failing to convey to client a written settlement offer [one count]), rule 8-101(B)(1) (failing to notify client of receipt of trust funds [one count]) and rule 2-111(A)(2) (withdrawing from employment without avoiding foreseeable prejudice to client [four counts]).

On this review, the examiner contends that respondent is also culpable of additional violations of the State Bar Act and Rules of Professional Conduct. The examiner urges that we recommend at least a two-year actual suspension. In contrast, respondent urges that he is not culpable of certain offenses urged by the examiner and that in view of extensive mitigation, no actual suspension is warranted.

On our independent review of the record, we have concluded that in addition to his culpability of the offenses to which he stipulated, respondent is

culpable of conduct involving a violation of Business and Professions Code section 6106 in count one, conduct showing a violation of rule 2-111(A)(2) in counts two, four, five, six, and eight, conduct showing a violation of rule 8-101(B)(4) in count six and conduct showing a violation of rule 5-105 in count ten. Because respondent has presented evidence of extremely strong mitigation, we shall recommend a six-month actual suspension as part of a two-year stayed suspension. But for respondent's strong mitigating evidence, we would have recommended considerably greater discipline for what is demonstrably very serious misconduct.

1. THE CHARGES.

On October 24, 1988, the State Bar's Office of Trial Counsel formally charged respondent with professional misconduct in an 11-count notice to show cause ("notice"). Count one charged him with having formed in 1984 a partnership for the practice of law with a non-lawyer (rule 3-103), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper." Counts two, three, four, seven, eight and nine charged respondent, respectively, with similar misconduct as to different clients in 1984: after having undertaken the specific client's personal injury matter, relocating his office and turning the clients' matters over to another lawyer, Samuel Tolbert, without giving the clients due notice to allow them to seek other counsel. In these counts, respondent was charged with violation of his oath and duties as an attorney (Bus. & Prof. Code, §§ 6068 (a) and 6103) and improper withdrawal from employment (rule 2-111(A)(2)). Counts five and six charged respondent, respectively with similar misconduct as in counts two, three, four, seven, eight and nine but as to different clients. In addition, these counts charged respondent with having received trust funds for these clients, forging or causing to be forged the clients' endorsements on trust items to be deposited and failing to deliver to the

1. Respondent was admitted to practice law in California in 1982. He has no prior record of discipline.

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

3. A "runner" or "capper" is "any person . . . acting . . . as an agent for an attorney at law . . . in the solicitation or procurement of business for such attorney . . ." (Bus. & Prof. Code, § 6151 (a); *Goldman v. State Bar* (1977) 20 Cal.3d 130, 134.)

clients the funds they were entitled to receive. In these latter counts, and in addition to the laws and rules charged as to counts two, three, four, seven, eight and nine, respondent was charged with acts of moral turpitude (Bus. & Prof. Code, § 6106) and with failing to promptly pay to the client, upon request, the client's share of trust funds (rule 8-101(B)(4)).

Count 10 of the notice charged respondent with having failed to communicate to his client a written settlement offer made on his behalf, with having forged or caused to be forged the client's endorsement on trust items to be deposited and with having misappropriated trust funds. (Bus. & Prof. Code, §§ 6068 (a), 6103, 6106; rules 5-105 and 8-101(B)(4).) Finally, count 11 charged respondent with having settled a case for three joint clients, having disbursed to them their share of settlement funds, having withheld a portion of trust funds to pay a medical lien and having failed to promptly pay the clients' medical expenses. (Bus. & Prof. Code, §§ 6068(a), 6103; rule 8-101(B)(4).)

2. STIPULATED FACTS.

On July 11, 1989, and prior to the date of the State Bar Court trial on the charges, the parties reached a stipulation as to facts. In part, this agreement permitted either party to introduce further admissible evidence on any subject it covered and provided that the stipulated facts would control if additional facts were introduced conflicting with those stipulated facts. The parties also waived any variance between the stipulated facts and the notice. (Stipulation, filed July 11, 1989 ["Stip."], p. 2.)

As noted *ante*, the stipulation admitted as to count one that respondent was culpable of misconduct in 1984 by forming a partnership for the practice of law with one Thomas Carr, a non-lawyer (rule 3-103), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper" (Bus. and Prof. Code, § 6152).⁴ As to counts two, four and eight, the stipulation recited in

essence that the respective clients named in each count retained respondent's law office to represent them in seeking damages for personal injuries. Thereafter, some of the clients received a letter from respondent (while others did not) stating that he was relocating to Northern California and that another lawyer, Samuel Tolbert, would be taking over the handling of their cases. The clients were never consulted about the transfer, but did not object to it, and the other lawyer settled their cases without authority and misappropriated a portion of their settlement proceeds. (Stip. pp. 3-4, 7-8.)

Counts five, six, ten and eleven involved still other personal injury clients for whom respondent's office had negotiated a settlement and had received trust funds. As to the receipt of the funds and their disbursement by respondent's office, the admitted facts differed in the four counts.

As to count five, the stipulation admitted in essence that respondent's non-lawyer partner negotiated a \$6,000 settlement for the client, Ms. Terri Davis, without consulting with her about the settlement; that the funds were placed in respondent's trust account; and that respondent turned over responsibility for Davis' case and the trust account to Tolbert, who assumed the responsibility to disburse the funds. Davis did not receive a letter from respondent stating that he was leaving practice in Los Angeles and that Tolbert would be taking over the handling of her case and the trust funds. Although Davis was never consulted about the transfer, she did not object to it. Tolbert misappropriated her settlement proceeds. Davis hired another attorney who sued respondent. Respondent offered to settle the suit, but Davis rejected the offer and she has not yet received her funds. (Stip. pp. 5-6.)

As to count six, the parties stipulated in essence that Ms. Ollie Mae Warren Taylor received \$2,570 from an insurance company under the medical pay coverage of the policy. The funds were placed in respondent's trust account, but respondent never told

4. The stipulation did not recite the statutes and rules cited above but respondent has never disputed his culpability of their violation based on the admitted facts.

Taylor of the receipt of her funds. She never endorsed the insurance company draft and never received any of its proceeds. These funds were transferred to Tolbert who assumed the responsibility to disburse them but did not do so. Taylor did not learn that respondent was leaving practice in Los Angeles and that Tolbert would be taking over the handling of her case and the trust funds. Although Taylor was never consulted about the transfer, she did not object to it and tried to communicate with Tolbert and Carr. Tolbert misappropriated a portion of Taylor's final settlement of her case. (Stip. pp. 6-7.)

As to count 10, the parties stipulated in essence that in August 1984, Carr negotiated a settlement of \$5,900 for respondent's client Jose Montano. When Carr told Montano of the settlement, he rejected it and respondent instructed Carr to return to the insurer the \$5,900 insurance company draft. Carr did not do so and the draft was still in the file when respondent transferred the case to Tolbert. Tolbert "and/or" Carr deposited the draft and misappropriated the funds. Montano received none of these monies and none of his medical providers were paid for their services. Beginning in January 1985, Montano tried repeatedly but unsuccessfully to reach Carr about his case. In May 1986, respondent first learned there was a problem with Montano's case from the State Bar. In March or April of 1987, after his many unsuccessful efforts to obtain the Montano file from Tolbert, respondent paid Montano the \$5,900 full amount of the insurance draft. (Stip. pp. 8-9.)

As to count 11, the parties agreed that, in September 1984, respondent settled the personal injury case of his clients, the Vasquezes, paid them their share of the settlement funds, but withheld \$4,725 for the liens of a treating chiropractor. These withheld funds were transferred to Tolbert. Tolbert assumed responsibility to disburse them to the doctor but instead misappropriated them. Respondent agreed to pay the doctor the full amount due (\$4,725) but has paid only \$1,700. (Stip. pp. 9-10.)

The parties admitted no facts concerning counts three, seven and nine and those counts were dismissed by the referee on motion by the examiner. Also, at the examiner's request, the charge in count one of violation of rule 3-101(A) was dismissed. (R.T. p. 7.)

3. ADDITIONAL EVIDENTIARY FACTS.

Respondent testified at length before the hearing referee. His testimony showed that, while in law school in 1979 or 1980, respondent became a clerk with a three-member Los Angeles law firm (Licker, Rothstein and Delchop) which did plaintiff's personal injury work. After admission to practice in December 1982, he became an associate attorney with that firm and worked there until he decided to start a sole practice in February 1984. (Stip. p.2; R.T. pp. 18-20.)

According to respondent, the Licker firm obtained its cases "almost exclusively" through tow truck drivers, insurance agents and others who worked as runners and cappers. (R.T. p. 21.) Respondent's own reaction was that this practice was improper and he knew as a result of law school that it was illegal (R.T. pp. 22, 72); but initially he thought that it was the law firm's own "business." He learned that most personal injury firms he became acquainted with obtained cases that way. (R.T. pp. 21-22.) Respondent learned from observation that "if you did not pay for cases, you didn't get them" and that \$500 or (sometimes) more was a typical payment to a capper for a good case. (R.T. pp 22-24.) As respondent saw it, capping was not only tolerated, but necessary to acquire personal injury cases in Los Angeles at that time. (R.T. p. 73.) Also, at that time, respondent saw no visible enforcement of the capping laws. (R.T. p. 23.)

While with the Licker firm, respondent met Carr, a law clerk with that firm. Carr asked respondent if he were interested in setting up his own practice. Carr told respondent that he (Carr) knew a lot of insurance agents who could refer cases to respondent and Carr proposed that respondent split profits "50-50." (Stip. p. 2; R.T. p. 29.) Since respondent wanted his own practice, Carr's offer appealed to him and he accepted. (*Id.*)

The parties stipulated that Carr's role in respondent's new practice was to be that of "administrator." His role was to get clients, conduct client interviews, sign letters of representation, get and develop medical information and assist in negotiating settlements. (Stip. pp. 2-3.)

Respondent's own testimony showed that he operated his new practice in two stages. From about February or March to June 1984, respondent continued to work at the Licker firm and at his new practice. He supervised Carr by phone or in person about an hour a day. For purposes of "convenience," he also allowed Carr to be a signatory to respondent's trust account and to make deposits and write trust account checks. (R.T. pp. 30-32, 74-76.) Respondent's testimony on the extent to which he supervised Carr in handling the trust account is unclear at best.⁵

Respondent's testimony also showed that he was allowing Carr to do more than "assist" in various aspects of the practice. Rather, Carr was allowed, on his own, to sign up clients without prior review by respondent and to conclude the settlement with the insurers; but his instructions from respondent were always to advise insurance adjusters that the client had the final word on accepting the settlement. (R.T. pp. 36-37, 75-76.) But as respondent testified: "Well, during the time period that I was still working for Licker . . . , I would talk to [Carr] on a daily basis At lunch, in the evening, [Carr] would basically give me an update as to whether or not we had received any cases, whether or not *he had settled* any cases" (R.T. p. 32, emphasis added.) Elsewhere in his testimony, respondent stated that Carr's negotiation of settlements (subject to client's final approval) was acceptable.⁶ (R.T. pp. 36-37.) It is undisputed that respondent did not keep adequate records of all the clients Carr "took in." (Stip. p. 3.)

In about June 1984, the Licker firm found out about respondent's new practice and it terminated him. (R.T. pp. 74-75.) Respondent moved over full time to his new practice, but respondent did not restrict any of the authority he had given Carr.

In the short term, respondent's sole practice flourished. (R.T. p. 38.) However, some of the cases came to respondent from another capper, Chamino, who had had a falling out with another law firm in which he (Chamino) was the "administrator." (R.T. pp. 39-40.) Chamino treated the cases he had referred as his own. In about July 1984, respondent decided that one of the cases Chamino had referred to him was a "bad liability" and "nominal" damages case. Respondent decided to instruct Carr to notify the clients that he would not handle the case. Respondent became "livid" when Carr told him that Chamino had to approve. (R.T. p. 41.) Since respondent believed that Chamino had a reputation for violence or doing unsavory things if someone opposed him, he decided to get and did get Chamino's approval to decline to handle the case. (R.T. p. 42.)

In early September 1984, respondent decided he could not continue to be personally responsible for paying for cases—he could not reconcile running his practice in the way he had been doing. Also, the Chamino incident showed him he did not have control over his own practice. Respondent decided to leave his Los Angeles practice and move to Sacramento where he had lived before going to law school. At that time, respondent had 50 or 60 cases in the

5. "Q. [By the examiner] Did you . . . review with [Carr] on a monthly basis any transactions that went through your trust account?

"A. [Respondent] *No, not on a monthly basis.*

"Q. Did you review with him on any kind of normal basis the trust account transactions?

"A. I would look at them when they came in, *yes. I would.* If I had questions, I would ask him. I didn't have any problems. Never experienced any.

"Q. When they came in, meaning when your bank statement would come in?

"A. Yes." (R.T. p. 77, emphasis added.)

6. Had respondent wanted guidance in this respect, he could have consulted Formal Opinion No. 277, Committee on Legal

Ethics, Los Angeles County Bar Association (June 17, 1963) which held in part that it is ethical to allow a non-lawyer to be delegated the tasks of learning from the insurance company what it will pay, discussing with adjusters the facts of the accident and extent of injuries, so long as the *attorney* reviews the work of the non-lawyer and the *attorney* decides whether the offer extended is in the best interests of the client and the *lawyer* approves or disapproves the settlement. The facts of the Nelson matter show that respondent allowed Carr to conclude those negotiations and to issue checks and releases without exercising his independent judgment as an attorney. Although respondent was not charged with such an offense, his engaging in this conduct shows his awareness of what Carr was doing as early as March 1984, before respondent started full-time work in this practice.

office. None were in litigation. (R.T. pp. 43-47, 49-50.) Respondent considered just severing his ties with Carr and his wife⁷ but feared an emotional response from them. Instead, respondent told Carr that "he should find another attorney." (R.T. pp. 48-50.) At first, Carr was very upset and was astounded that respondent would decide so abruptly to cease practice; but Carr did seek out another attorney, choosing Samuel Tolbert, whose office was adjacent to respondent's. (R.T. pp. 50-52.)

Respondent did not know Tolbert to any significant degree and decided to meet with him for a few hours before agreeing to turn his practice over to him. It was understood that Carr would work for Tolbert and essentially do about the same for Tolbert that Carr did for respondent. (R.T. pp. 52-54.) Respondent met with Tolbert, determining that he appeared competent and had a busy practice. Tolbert agreed to sublease respondent's office and keep the same phone number. Carr was able to remain in the same office.

In early October 1984, respondent drafted a letter to all his clients advising them he had decided to relocate to Northern California and had made arrangements with Tolbert to "take over the handling of [the client's] file." Although Tolbert had only been admitted to practice for 16 months at the time, respondent described him in the letter as "highly experienced and competent" in the field of personal injury. Respondent also wrote his clients that Carr, who had been with respondent throughout and who was intimately familiar with the case, would stay on with Tolbert to serve in the same (undefined) capacity. Respondent assured his clients that the transfer would not affect the progress of their cases. The notice did not invite the clients to choose their own counsel but did invite them to call respondent if they had any questions. The letter stated that respondent would be in the office until the transition was complete. (Stip., attached exh. A.)

It is undisputed that about 75 percent of respondent's clients received the above notice. Re-

spondent had asked Mrs. Carr to prepare the notices and send them out. Respondent gave two reasons why all clients were not notified: some cases were Chamino's, and in other cases, respondent surmised that a "demand" might have been made by Mr. Carr on the defendant's insurer and the Carrs were afraid that they might not be able to keep the case for themselves or Tolbert if the clients were notified of respondent's departure from practice. (R.T. pp. 55-58.)

In addition to respondent's failure to notify all his clients, the transition of respondent's cases to Tolbert was far from smooth in other regards. In late September 1984, the Carrs "cleaned out" all of respondent's files from the office, fearful that respondent would leave the Carrs "high and dry." A few days or a week later, the Carrs returned the files. (R.T. pp. 82-83, 93.) At about the same time, Mr. Carr unilaterally withdrew \$40,000 to \$50,000 from respondent's trust account. (R.T. pp. 83-84.) Carr refused to return the money and, since respondent had continued to let him be a signatory to the trust account, there was nothing he could do about it. He did draft a few one-page documents for Tolbert to sign, acknowledging the transfer of monies and files from respondent to Tolbert. (Stip., attached exh. D; R.T. pp. 84-89.) However, respondent did not itemize the files being transferred and he admitted he did not do so because he did not have a key to the suite at all times; Carr had taken the files for a period of time and respondent did not have complete records of his clients' cases in any event. (R.T. pp. 88-90.)

In 1985, respondent formed an association with a Sacramento attorney with whom he has engaged in a varied litigation practice ever since. He has apparently exercised complete independence of judgment, unfettered by non-lawyers. According to respondent, he has not paid non-lawyers anything for any legal business since leaving his Los Angeles practice. He compared his 1984 Los Angeles practice with his post-1984 Sacramento one as the difference between "night and day." (R.T. pp. 61-66.)

7. Throughout respondent's practice, Carr's wife, Mrs. Vicki Carr, also worked in the office as secretary and receptionist. (R.T. pp. 34-35.)

Respondent expressed remorse and accepted responsibility for what he had done in 1984 and he recognized even by Labor Day of 1984 that it was simply wrong to allow non-lawyers to exert control over his practice as they did. (R.T. p. 71.) It is undisputed that respondent cooperated fully with the State Bar in this proceeding—he did everything asked of him (R.T. pp. 67-69, 97-98)⁸ and he made restitution totalling \$7,600. That sum included the full \$5,900 to Mr. Montana paid before formal charges were filed and \$1,700 to Dr. Noriega. However, the record indicates Dr. Noriega is still owed \$3,025, and two clients, Davis and Taylor, have not been repaid the funds misappropriated after they were transferred to Tolbert, although respondent's offer to Davis was rejected by Davis's new counsel. (R.T. pp. 91-92.)

4. THE APPROPRIATE FINDINGS AND CONCLUSIONS TO ADOPT.

In his decision, the hearing referee adopted findings almost entirely consistent with the stipulated and undisputed facts. Except as shown below, we adopt those findings and conclusions.

As to count one, the general matter in which respondent admitted that he formed a partnership with a non-lawyer (Carr) for the practice of law, used Carr as a runner and capper and shared legal fees with Carr, the referee concluded that respondent violated, respectively, rules 3-103, 3-102(A) and Business and Professions Code section 6152, but did not violate rule 3-101, prohibiting aiding the unauthorized practice of law. Neither party challenges those conclusions on review and we adopt the referee's findings and conclusions in that regard. The only dispute is over the referee's additional conclusion in count one that respondent violated Business and Professions Code section 6106 (prohibiting acts of moral turpitude, dishonesty and corruption). Respondent sharply disputes that conclusion, but the State Bar contends it is warranted. On our indepen-

dent record review (Trans. Rules Proc. of State Bar, rule 453; *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916), we conclude that the activities admitted by respondent in count one did violate section 6106 by constituting an act of moral turpitude.

[1] The Supreme Court has often defined moral turpitude proscribed by section 6106. As the Court stated in *In re Mostman* (1989) 47 Cal.3d 725, 736-737: "One eloquent, oft-cited definition equates moral turpitude with an 'act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citations.]" Another simpler definition was stated in a case in which the attorney was disbarred for solicitation of over 200 potential clients, *Kitsis v. State Bar* (1979) 23 Cal.3d 857, 865: "[A]n act 'contrary to honesty and good morals is conduct involving moral turpitude.' [Citations.]" *Kitsis* deceived one of the cappers that her actions were legal. [2] Respondent's acts here did not involve deceit. Nonetheless, the Court's conclusions that *Kitsis*' activities involved moral turpitude did not rest only on deceit, but were based independently on *Kitsis*' pervasive transgressions. Here, respondent's involvement in capping was similarly pervasive. While we lack any evidence that respondent or Carr solicited any victims in unfortunate situations (such as at the scene of accidents or in hospitals) as did *Kitsis*' cappers, respondent's entire practice for about six months in Los Angeles was founded on his payment of persons for referral of cases. Even if we should decide that no moral turpitude was involved, Business and Professions Code section 6106 also bars an act of "corruption." Respondent's Los Angeles law practice, built entirely on illegal payments to third parties for cases, clearly involved corruption.

[3] Respondent's capping and improper partnership and fee division activities in this case reveal the very reason behind their long-standing prohibi-

8. Respondent testified as to his cooperation with the State Bar. He travelled from Sacramento to Los Angeles on three or four occasions during the State Bar investigation. During one of those trips, he gave a lengthy taped interview to several

State Bar attorneys and investigators. He also wrote detailed letters in response to the bar's investigation of each of the complaints. (R.T. p. 68.)

tion in the rules of professional conduct or state law. These activities adversely affected respondent's independent professional judgment as a lawyer. As noted, respondent was fearful of the actions of one capper who had referred him cases and respondent was wary of the emotional responses of Carr or of Carr's wife. In short, near the end of his Los Angeles practice, respondent realized that he was no longer in charge of it—others, lay persons, were influencing or dominating his decisions.

[4] The examiner contends that we should conclude that respondent misappropriated trust funds in counts five, six and eleven in violation of Business and Professions Code section 6106 and rule 8-101(B)(4). (Examiner's Review Department Brief, filed March 16, 1990, pp. 1-3, 4-7.) As to section 6106, it is undisputed, however, that the parties' stipulation recited that only Tolbert misappropriated any trust funds in those counts. The examiner did not introduce evidence in the form of bank records or other affirmative evidence to show that this respondent committed any act of misappropriation. Considering this lack of proof, the terms of the stipulation and the evidence showing that respondent transferred trust funds to Tolbert for the purpose of handling the matters, we are unable to conclude that the examiner presented enough clear and convincing evidence to find *respondent* culpable of misappropriation of funds.

We also decline to conclude that respondent is culpable of a violation of rule 8-101(B)(4) in those counts. Rule 8-101(B)(4) prohibits an attorney from failing to "promptly pay or deliver to the client as requested by a client" the funds or other property belonging to a client. [5] We hold that a request by a client for payment of funds or property held by the attorney is an essential element of the offense pro-

scribed by rule 8-101(B)(4). The record yields no evidence that the clients requested respondent to pay over their funds in counts five, six and eleven (although clients did make such a request of Tolbert after respondent withdrew from employment). Nor have the parties cited any cases where, in discussing rule 8-101(B)(4), the Supreme Court dispensed with the requirement of client request and we are unaware of any such decisions.

Noting respondent's lack of objection, we adopt the referee's conclusion in count six that respondent wilfully violated rule 8-101(B)(1) (failure to promptly notify client of receipt of funds or property).⁹ [6 - see fn. 9]

We also adopt the referee's conclusions in count 10 that respondent wilfully violated rule 5-105 by failing to promptly communicate to his client Montano, the written settlement offer negotiated by Carr on his behalf.

In the remaining five counts in which culpability was found by the referee regarding specific clients (counts two, four, five, six and eight), we adopt the referee's conclusions that respondent wilfully violated rule 2-111 (A)(2) by withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to his clients. Respondent objects to findings of the referee in each of these five counts. Respondent states that the referee rejected respondent's contention and concluded that it was foreseeable that Tolbert would act dishonestly, settle cases without authority and misappropriate trust funds when respondent knew Tolbert would have the same unethical fee-splitting and capping arrangements with Carr.¹⁰ [7a] We agree with respondent's view that there is not sufficient evidence to support that portion of these findings that it was foreseeable

9. [6] Respondent was not charged in count six with a violation of rule 8-101(B)(1). The stipulation of facts filed July 11, 1989, in which respondent's experienced counsel participated recited facts which would support a rule 8-101(B)(1) violation. (Stip., p. 6, line 28.)

In his trial brief filed on September 18, 1989, the day of the formal hearing before the referee, respondent conceded that those facts show a rule 8-101(B)(1) violation, but noted that the violation "was not charged." Respondent has not objected

to the referee's amendment of the notice to show cause to charge rule 8-101(B)(1) and in the circumstances, we hold that he waived any objection to the amendment. (Cf. *Bowles v. State Bar* (1989) 48 Cal.3d 100, 108-109.)

10. See hearing referee's decision filed December 14, 1989, pp. 7 (count 2, finding 9), 9 (count 4, finding 8), 13 (count 5, finding 11), 16 (count 6, finding 10) and 19-20 (count 8, finding 10).

that Tolbert would act dishonestly. However, our rejection of a portion of these findings does not free respondent from other evidence which clearly shows that he did not act to avoid foreseeable prejudice to his clients.

By his own admission, respondent did not keep accurate records of clients obtained for his law practice by Carr. In the fall of 1984, when respondent decided to quit his Los Angeles practice, he delegated to Carr and his wife the task of notifying clients that respondent was ceasing practice and turning his cases over to Tolbert. When respondent delegated this task to the Carrs, he knew that the Carrs had already acted improperly toward respondent's files and funds and that respondent had not itemized all his client files because he did not have a key to his offices at all times. Throughout his partnership with Carr, respondent delegated to this non-lawyer a broad scope of activities with little evidence of close supervision. [7b] We conclude that the foregoing evidence, coupled with respondent's knowledge that Carr would continue to act in the same capacity for Tolbert as he had done for respondent, made it reasonably foreseeable that some prejudice would result to his clients.

[7c] It is not necessary under rule 2-111(A)(2) that the precise nature of the prejudice be foreseeable. While it was to respondent's credit that he ended his association with running and capping activities, he did so in such a hasty manner that he violated rule 2-111(A)(2) in the above five counts, when he failed to give adequate notice of his withdrawal from employment or opportunity to consult about the change of counsel.

Finally, we adopt the referee's conclusion in counts one, two, four, five, six, eight and ten that respondent did not violate Business and Professions Code section 6103 since that authority does not state an independent duty as a ground of discipline. (See *Baker v. State Bar* (1989) 49 Cal.3d 804, 815; *Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) However, on the authority of *Sands v. State Bar, supra*, we strike from the referee's decision the conclusions in each of those same counts except count one (counts two, four, five, six, eight and ten) that respondent violated Business and Professions Code section 6068 (a). [8] As to count one, we adopt the referee's conclusion

that respondent violated section 6068 (a). We do so on the basis that in count one, respondent was found to have violated a criminal provision under California law, section 6152 (a)(2), as charged in the notice to show cause.

5. DEGREE OF DISCIPLINE.

Consulting the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standards") as guidelines (see, e.g., *Arm v. State Bar* (1990) 50 Cal.3d 763, 774), we note that a range of discipline from suspension to disbarment is provided for either of respondent's offenses of moral turpitude (standard 2.3) or capping activities violating Business and Professions Code section 6152 (standard 2.6). (See also standard 1.6 for guidance in selecting the appropriate sanction.) Standard 2.3 guides the choice between disbarment and suspension as depending upon the "extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Standard 2.6 guides the choice between disbarment and suspension as depending upon somewhat similar criteria: the gravity of offense or harm to the victim with "due regard to the purposes of imposing discipline" prescribed in standard 1.3 (protection of the public, courts and legal profession, maintenance of high professional standards and preservation of public confidence in the profession). Here, there was no demonstrable evidence of harm caused to clients by respondent's capping activities. However, the potential for such harm was great, for respondent acknowledged that these activities challenged his independent professional judgement as a lawyer. Further, respondent's capping activities, while limited to about a six-month period, were not isolated activities. Rather, it appears that his entire law practice during that period was derived from paying non-lawyers for referral of cases. Whether or not respondent saw capping of cases as acceptable by local professional culture standards, he knew prior to his State Bar membership that that activity was illegal. Instead of using his legal knowledge to prevent himself and his employee Carr from running afoul of possible legal problems, he exposed himself and Carr to potential arrest and prosecution for the crime of capping.

[9] When we examine Supreme Court attorney disciplinary opinions in the past 20 years in which prohibited solicitation or capping activities were a significant or sole part of the lawyer's misconduct, they have imposed discipline ranging from a minimum of six months actual suspension for isolated acts of solicitation via cappers, to disbarment imposed in a few aggravated cases. (*Kitsis v. State Bar, supra*, 23 Cal.3d at p. 866, and cases cited; see also *In re Gross* (1983) 33 Cal.3d 561 [three-year actual suspension, false medical reports involved]; *In re Arnoff* (1978) 22 Cal.3d 740 [two-year actual suspension; false medical reports also involved]; *Goldman v. State Bar, supra*, 20 Cal.3d 130 [one-year actual suspension].)

After weighing the foregoing factors, and before reaching mitigating or aggravating circumstances, we would conclude that the appropriate sanction is a suspension from practice with a significant period of actual suspension. In that regard, we note that respondent's violation of rule 8-101(B)(1), by itself, would call for a minimum of a three-month actual suspension. (Standard 2.2(b).)

The record contains evidence of substantial, impressive mitigation in the form of respondent's voluntary and decisive withdrawal from any further improper activities (standard 1.2(e)(vii)), his unquestioned and thorough cooperation with the State Bar (standard 1.2(e)(v)) and the passage of about five years between the end of respondent's misconduct and the evidentiary hearings with no dispute as to his rehabilitation. (Standard 1.2(e)(viii).) [10] We conclude that these strong mitigating factors lessen dramatically the need for the type of strict discipline imposed by our Supreme Court in similar matters, but do not eliminate the need for measurable discipline to assure maintenance of the integrity of the legal profession and the preservation of public confidence in that profession. Accordingly, we recommend that respondent be suspended from practice for two years, stayed, on condition of a six-month actual suspension. We also recommend that respondent be

required to comply with rule 955, California Rules of Court and pass the Professional Responsibility Examination within one year of the effective date of the Supreme Court's order. [11] Because we have concluded that a member of the State Bar other than respondent appears to have been responsible for the theft of funds from clients Davis and Taylor and Dr. Noriega, we do not recommend respondent make restitution relative to these matters.¹¹ However, we do recommend compliance with other, standard probationary duties to insure that respondent's continued rehabilitation is formally supervised.

6. FORMAL RECOMMENDATION.

For the reasons stated above, we recommend that respondent, Bruce E. Nelson, be suspended from the practice of law in the State of California for a period of two (2) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for said period of two (2) years upon the following conditions:

1. That during the first six (6) months of said period of probation, he shall be suspended from the practice of law in the State of California;

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

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

11. We note, for the benefit of those clients, that the State Bar Client Security Fund may be able to consider any losses not yet reimbursed if caused by the dishonest conduct of any

active member of the State Bar and if the losses meet applicable rules of the fund. (Bus. & Prof. Code, § 6140.5.)

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

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

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

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

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

6. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, his or her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing

another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

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

8. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

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

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

We concur:

PEARLMAN, P.J.
NORIAN, J.