

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM REAMY KENNON

A Member of the State Bar

[No. 86-O-15958]

Filed December 7, 1990

SUMMARY

Respondent failed to complete work for a client and retained unearned fees of \$2,000. He failed to communicate with and thereafter abandoned a second client. Other charges were dismissed based on the hearing department's credibility findings. The hearing referee recommended a public reproof with conditions. (Elliot R. Smith, Hearing Referee.)

The review department concluded that the record supported the conclusions of culpability, with minor modifications, but that the recommended discipline was insufficient. After considering several Supreme Court decisions involving failure to perform services by attorneys without prior records of discipline, the review department concluded that respondent's misconduct merited a two-year suspension, stayed, a two-year probation period, 30 days actual suspension, and a law office management condition.

COUNSEL FOR PARTIES

For Office of Trials: James R. DiFrank

For Respondent: David A. Clare

HEADNOTES

- [1] **166 Independent Review of Record**
Although the review department conducts independent review, it accords great weight to factual findings of the hearing department which turn on evaluations of credibility.
- [2 a, b] **148 Evidence—Witness**
166 Independent Review of Record
Because the hearing department is in the best position to view witnesses and evaluate their truthfulness, the review department is reluctant to deviate from the hearing department's credibility findings. Reevaluation of witness credibility is limited by the nature of the review process, due to the effect of witness demeanor on credibility findings.

- [3] **148 Evidence—Witnesses**
165 Adequacy of Hearing Decision
 The hearing department may properly give greater credence to a witness’s testimony on some issues than on others.
- [4 a, b] **142 Evidence—Hearsay**
 Where there was no evidence in the record that respondent had knowledge of the contents of a letter from his client, respondent’s failure to answer the letter did not constitute an adoptive admission.
- [5] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
 Preliminary consultations with client created attorney-client relationship, but attorney was not culpable of misconduct for failure to proceed to file suit in absence of clear and convincing evidence that he had agreed to do so.
- [6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
 Where client denied seeing drafts or final copy of trust agreement which contained largely “boiler-plate” language and little if any unique or specially tailored provisions, record supported conclusion that respondent did not earn advanced fees for formation of family trust.
- [7] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
 Attorney’s failure to discuss case with client after assuring her that he would investigate it upon receiving a copy of complaint from her, and his inaction and eventual abandonment of her case, warranted finding of culpability of misconduct even though attorney had obtained extensions of time to answer in effort to protect client’s rights.
- [8] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
 Client’s issuance of check to attorney marked “for filing fees” was insufficient evidence to show clearly and convincingly that attorney was obligated to file suit on behalf of client.
- [9] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4)]
420.00 Misappropriation
 Where hearing department found unpersuasive client’s testimony that he did not consent to respondent’s application of client trust funds to respondent’s outstanding legal fees, State Bar did not demonstrate trust account irregularities or misappropriation by clear and convincing evidence.
- [10] **220.10 State Bar Act—Section 6103, clause 2**
 Section 6103 is not a charging provision, but rather provides that violation of a duty defined elsewhere is grounds for discipline.
- [11] **214.30 State Bar Act—Section 6068(m)**
 Attorney’s failure to communicate with client prior to effective date of section 6068(m) did not violate that statute.

- [12] **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**
Failure of respondent's estranged wife, who worked as his secretary, to deliver telephone messages did not excuse respondent's abandonment of clients.
- [13] **725.32 Mitigation—Disability/Illness—Found but Discounted**
725.33 Mitigation—Disability/Illness—Found but Discounted
760.32 Mitigation—Personal/Financial Problems—Found but Discounted
760.33 Mitigation—Personal/Financial Problems—Found but Discounted
Without evidence that death of respondent's parent resulted in disabling psychological distress, record did not show that attorney's failure to prepare trust documents was affected thereby.
- [14] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
Attorney's abandonment of two clients comprised multiple acts of wrongdoing but did not constitute a pattern of misconduct.
- [15 a, b] **1091 Substantive Issues re Discipline—Proportionality**
1093 Substantive Issues re Discipline—Inadequacy
Recent Supreme Court precedent indicated that attorney with no prior discipline record who abandoned two clients within three years and improperly retained unearned advance fees should receive sanction greater than public reproof; two years stayed suspension, two years probation, and 30 days actual suspension were recommended.
- [16] **172.11 Discipline—Probation Monitor—Appointed**
174 Discipline—Office Management/Trust Account Auditing
Chaotic state of respondent's records and business practices, and lack of written fee agreements and client correspondence, warranted imposition of requirement to submit law office management plan and of State Bar supervision in order to protect the public and prevent any future misconduct.
- [17] **171 Discipline—Restitution**
Requirement that respondent return unearned fees to client was consistent with finding that respondent did little if any of the work he agreed to perform for client.

ADDITIONAL ANALYSIS

Culpability

Found

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

Not Found

- 213.15 Section 6068(a)
- 214.35 Section 6068(m)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 280.05 Rule 4-100(A) [former 8-101(A)]

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

420.54 Misappropriation—Not Proven

Aggravation

Found

582.10 Harm to Client

611 Lack of Candor—Bar

Mitigation

Found

710.10 No Prior Record

Standards

822.51 Misappropriation—Declined to Apply

Discipline

1013.08 Stayed Suspension—2 Years

1015.01 Actual Suspension—1 Month

1017.08 Probation—2 Years

Probation Conditions

1021 Restitution

1022.10 Probation Monitor Appointed

1024 Ethics Exam/School

1025 Office Management

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that respondent William Reamy Kennon be disciplined by a public reproof with conditions, including restitution to one client, passage of the Professional Responsibility Examination, and submission of a law office management plan. The referee found that respondent failed to complete work on creating a family trust and incorporating a Nevada business, and retained \$2,000 in unearned fees advanced by a client, in violation of Business and Professions Code sections 6068 (a), 6068 (m), and 6103,¹ and former rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the Rules of Professional Conduct of the State Bar.² Respondent was also found to have failed to inform a second client that he would not file an answer in defense of a promissory note dispute, nor did he protect her rights when he withdrew from her case, contrary to sections 6068 (a), 6068 (m) and 6103 and rule 2-111(A)(2). The referee dismissed charges in two matters that alleged that respondent failed to file a lawsuit on behalf of each respective client and improperly withdrew from representation to the prejudice of the clients.

Before us are requests for review from both respondent and the examiner, representing the State Bar's Office of Trial Counsel. The examiner seeks review of the dismissal of the two charges and recommends imposition of additional discipline of a three-year suspension, stayed, and a three-year period of probation, including a one-year actual suspension. Respondent challenges the findings of culpability and requests dismissal of all charges. Alternatively, respondent argues that a public reproof with conditions is too harsh for the misconduct found.

We conclude that the record supports the basic findings of fact and, except for some minor amendments, also supports the conclusions of culpability of the hearing referee. We also conclude that a public reproof is insufficient discipline for the misconduct found in this case and will recommend that the respondent be suspended for two years, stayed on conditions including a thirty-day actual suspension.

FACTS

Respondent was admitted to practice law in California on December 20, 1973. He has no prior record of discipline. A two-count notice to show cause charged the respondent with misconduct in four matters concerning two sets of clients. With a few minor changes we shall detail below, we adopt the referee's factual findings noted under the headings "Count One" and "Count Two" at pages two through six and seven through eleven of the decision, respectively. To reflect chronological order, we outline the facts in reverse from the counts in the notice.

A. Ida Vida Matters (Count 2)

1. Garden Grove Lawsuit.

Respondent was involved in two matters concerning Mrs. Ida Vida. The first arose in the spring of 1984, when Mrs. Vida and her son, Michael Vida, met with the respondent regarding a possible lawsuit against the City of Garden Grove seeking civil damages to compensate for harm to Ida Vida's business, the Roundup Saloon, allegedly resulting from harassment and improper closures of the bar by the city.³ Respondent agreed to represent the Vidas for a \$3,500 retainer against services performed. On May 25, 1984, respondent filed a claim against Garden Grove on behalf of the Vidas which was rejected on

1. Unless otherwise stated, references to sections are to the sections of the Business and Professions Code.

2. References to the Rules of Professional Conduct herein are to the rules effective from January 1, 1975, through May 26, 1989.

3. There was a dispute in the testimony as to when the meeting took place. Respondent testified to an initial meeting with Michael Vida and others on January 26, 1983, to discuss the lawsuit against the City of Garden Grove, during which he advised that a \$3,500 retainer would be necessary to undertake the litigation. (1 R.T. pp. 50, 94-96.) He insisted that the only

time he met Ida Vida was on May 3, 1984, when he showed her the claim he later filed with the city (exh. 5) and received \$1,000 in travelers checks from her. (1 R.T. pp. 96-97, 100; exh. 4.) A receipt issued to Michael Vida for \$1,000 in fees to the respondent dated March 20, 1984 (exh. 3) contains the statement "partial retainer on account—\$1,000 due 4/19/84—\$1,500 due 5/19/84." Ida Vida contended that she met with the respondent on March 20th and May 3d and paid him \$1,000 on each occasion. (2 R.T. pp. 255-258.) Michael Vida could not remember his first meeting with respondent but indicated he saw respondent five to ten times after their initial meeting. (2 R.T. pp. 291-292.)

July 9, 1984, by letter from the Garden Grove city clerk dated July 13, 1984. (Exh. 6.) By that time Ida Vida had returned to her home in Michigan and her son, with her power of attorney, continued as her agent. (2 R.T. pp. 265-266.) Respondent testified that after the claim was rejected, he conducted additional investigation and concluded that the lawsuit would be difficult and time-consuming to litigate; the chances of success were slim; and the financial resources of, and ultimate rewards to, the Vidas were insufficient to make the litigation worthwhile. (1 R.T. pp. 117-120.) He maintained that he advised Michael Vida of his conclusions in late December 1984, just prior to the expiration of the statute of limitations,⁴ and the two of them agreed not to go forward with the litigation. (*Id.*, p. 119; 2 R.T. pp. 361-363.) Michael Vida testified at the hearing that he understood that respondent was going to file the suit prior to the expiration of the statute of limitations. He denied any agreement to forgo litigation. (2 R.T. pp. 301, 318.) Ida Vida wrote to respondent in July 25, 1985, seeking, among other things, information as to the status of her case against the city. (Exh. 8.)

The hearing referee found that the examiner did not present clear and convincing proof that as to the Garden Grove litigation, respondent had violated Business and Professions Code sections 6068 (a), 6068 (m), and 6103, or rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2), 8-101(A) and 8-101(B)(4) and dismissed these charges.

Prior to the disputed meeting in December of 1984, a check dated November 14, 1984, payable to "William Kenton" [sic] for \$112 from Ida Vida was given to respondent. Michael Vida wrote "for filing fees" on the memo portion of the check when he gave the check to respondent. (2 R.T. pp. 297-298.) The Vidas contend that respondent requested the check in late 1984. Respondent denied discussing filing fees after his initial meetings with the Vidas (1 R.T. pp. 122-124), but did deposit the check in his trust account in December 1984. Respondent maintains that Michael Vida agreed in their last meeting to

apply the \$112 to the \$1,500 in fees owed, that respondent would accept the \$2,112 as total payment and no further work would be done. (1 R.T. pp. 135-136; 2 R.T. p. 363.) The respondent thereafter transferred the \$112 to his personal account (1 R.T. p. 136), although his trust records do not indicate a debit of that amount.

The hearing referee found that respondent did earn the fees paid to him and did not find respondent's retention of the \$112 as a fee to be either a misappropriation under section 6106 or a failure to return funds owed to the client under rule 8-101(B)(4).

2. Maag Complaint.

The second alleged misconduct began when, in May 1984, Ida Vida was sued for allegedly failing to make payments on a promissory note held by Jean Garcia Maag. (Exh. 12.) The note was part of the purchase of the Roundup Saloon. Mrs. Vida testified that she called respondent after receiving the complaint and summons in the mail⁵ and he assured her that he would take care of it. (2 R.T. p. 263, 276-277.) She did not have any further contact with him, could not remember if she forwarded the complaint or any other documents to him and admitted that no arrangements had been made to compensate respondent. (*Ibid.*) Mrs. Vida heard nothing further concerning the case until July 1985, when Maag called her to say the case had been resolved against her by default, and judgment had been entered against her on March 26, 1985, for over \$11,000. (2 R.T. pp. 263-264; exh. 8.) Mrs. Vida wrote to respondent on July 25, 1985, seeking his explanation for his failure to represent her in the case. (Exh. 8.) She has since satisfied the Maag judgment. (2 R.T. p. 280.)

Respondent acknowledged that he discussed the case with Ida Vida, requested that she send him the complaint and promised her that he would look into it for her. (2 R.T. pp. 357-358.) Respondent contacted opposing counsel and was granted extensions of time to file an answer. (1 R.T. pp. 61-62; exhs. 8,

4. The Vidas had six months from the date of service of the rejection of their claim to file suit against Garden Grove. (Exh. 6; Gov. Code, § 945.6.)

5. These documents were presumably forwarded to her by her son, who received them at the Roundup Saloon. (2 R.T. p. 318.)

9.) In the interim, he secured additional information from Michael Vida and advised him that there was no viable defense to the action. (1 R.T. pp. 358-361.) Respondent did not contact Ida Vida and did not file an answer to the complaint.

The hearing referee found that respondent's failure to discuss the case with Ida Vida *after* receiving the complaint, failure to keep her apprised of the case generally and eventual abandonment of her case violated sections 6068 (a), 6068 (m), and 6103, as well as rule 2-111(A)(2).

B. Greene Matters (Count 1)

1. Family Trust and Incorporation.

Zane Greene hired respondent in August 1986 for advice on protecting his assets because of his involvement in litigation in Nevada concerning a mobile home park. Respondent advised him to establish a family trust as well as to create a corporation in Nevada that would be registered to do business in California. (1 R.T. pp. 162-163, 165; 2 R.T. pp. 208-209.) Respondent provided Greene with a sample of a family trust agreement (exh. 16) and agreed to do the work involved for \$2,000. Greene paid respondent \$2,000 in cash at a later meeting and respondent gave Greene a receipt.⁶

Respondent used a Nevada corporation processing firm, Laughlin Associates, Inc., to prepare and file the incorporation papers for Greene's corporation, Bulletin's, Inc. The fees for the service were billed directly to Greene's credit card. The articles of incorporation were filed on August 22, 1986, and the corporate kit was mailed to the respondent. Greene was given the corporate package, with the corporate

seal, but later returned it to respondent at his request. (1 R.T. pp. 178-179.)⁷ After September 1986, Greene maintained that he had no further word from respondent, despite his numerous calls in late 1986 to respondent's office. He also never saw or received any documents prepared concerning the family trust. (1 R.T. pp. 164-165.)⁸

In February 1987, Greene sent a letter to respondent requesting a refund of his \$2,000. (Exh. 2.) The letter was returned and, after contacting the State Bar for a more recent address, he re-sent the letter to a Santa Monica address. The letter was not returned by the post office. Respondent denied receiving this letter. (1 R.T. pp. 39-41.) Greene also called the telephone number supplied by the State Bar three times in March and left messages for respondent, none of which were returned. (2 R.T. pp. 241-243.)

The hearing referee found that the only work respondent did on these matters was to arrange for the Nevada corporate processing firm to prepare and file the articles of incorporation in Nevada. The referee found that respondent's failure to complete the work he agreed to do, his abandonment of Greene, his lack of communication with him and failure to refund the advanced, unearned fees upon request in 1987 constituted violations of Business and Professions Code sections 6068 (a), 6068 (m) and 6103, and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2).

2. Allied Fidelity Lawsuit.

At the same initial August 1986 meeting at which Greene hired respondent for the trust and corporate work, he discussed with respondent a possible suit against Greene's former employer, Al-

6. The date the receipt was provided and the amount of the fee charged by the respondent were sharply disputed at the hearing. Respondent maintained that he provided a receipt at the time he accompanied Greene to the bank to withdraw the \$2,000 and that the receipt reflects their agreement that the total fee was to be \$3,500. (Exh. 1.) Greene testified and the hearing referee found that the agreed fee was \$2,000 and Greene received a receipt sometime after the payment was made.

7. Respondent disputes this finding, contending that the certificate of good faith necessary to register the company in California was sent directly to Greene so that he could file it. Respondent admits that he did no further work on the Nevada corporation and testified that he did not retrieve the corporate package from Greene. (1 R.T. p. 157-158.)

8. Respondent proffered two documents at the hearing which purported to be drafts of the trust. (Exhs. A and B.) Respondent did not produce a copy of the final draft and testified that he had no idea if the trust was ever executed. (1 R.T. pp. 30-31.)

lied Fidelity ("Allied"). Greene had been employed by Allied in 1983 after it purchased his insurance company and provided him with stock options. In March 1986, Greene was discharged by Allied and he was contemplating suit against it, the relevant subsidiaries and named Allied executives alleging, among other grounds, breach of contract, securities violations and fraud. (1 R.T. pp. 47-48, 157-158.) Another law firm had earlier represented Greene in connection with all his legal matters, but no actions had been filed as of August 1986. (2 R.T. pp. 204-207.)

Respondent was familiar with Allied in August 1986, having worked on a possible suit against them on behalf of his primary client at that time, a Mr. Parrish. (2 R.T. pp. 321-324.)⁹ Greene testified that respondent agreed to take the case over from the previously retained law firm and proceed with the case on a contingency fee basis, although no written agreement was prepared. Respondent denied that any decision was made for him to prosecute the matter and the costs and complexity of the case were such that both Parrish and respondent were doubtful as to its success. (1 R.T. pp. 158-159; 2 R.T. pp. 326-328.)

The hearing referee concluded that there was not clear and convincing evidence that respondent had agreed to represent Greene in the Allied litigation. Therefore, it dismissed all charges of misconduct relating to the matter.

ISSUES ON REVIEW

1. Culpability.

The determination of culpability turns on the referee's findings of credibility, or lack of credibility, of the witnesses. The referee was explicit in his analysis of the testimony of each witness at the hearing and the crucial impact the credibility findings had on the ultimate findings of fact and conclusions of culpability in the case. [1] Although our

review is independent, we must give great weight to the referee's findings resolving issues pertaining to testimony. (Rule 453, Trans. Rules Proc. of State Bar.) [2a] Because the hearing referee was in the best position to view the witnesses and evaluate the truthfulness of each, we should be reluctant to deviate from his findings. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055-1056.)

Respondent's testimony was often unsupported by documentary evidence.¹⁰ The hearing referee concluded that respondent was not candid at the hearing and, further, considered his lack of credibility to be an aggravating factor under standard 1.2(b)(vi), of the Standards for Attorney Sanctions for Professional Misconduct ("standard(s)") (Rules Proc. of State Bar, div. V). (Decision at p. 14.)

The referee concluded that the complaining witnesses were not uniformly reliable either. Michael Vida was found by the hearing referee to have had many problems remembering specific times, dates, places and related details. His mother, Ida Vida, had some limitations as well, but was credible, in the view of the hearing referee, as to her testimony concerning the Maag litigation. The referee considered Greene to be an excellent witness but a review of his testimony does reveal some inconsistencies concerning dates.

[2b] The reevaluation of a witness's credibility is limited by the nature of the reviewing process. Commenting on the effect of demeanor on credibility findings, a court of appeal noted, "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) A review of the

9. Respondent's connection with Parrish was such that between February 1985 and February 1987, he operated his office in a foyer of Parrish's house. (2 R.T. pp. 211-212, 326-327.)

10. Respondent attributed the lack of some documents in this case to negligence. Portions of files were put in storage and later destroyed when the storage fees were not paid. Respondent has filed suit against the storage company. (Exh. 13.)

April through July 1985,¹² and admittedly did not maintain an adequate trust account balance in the interim. (Exh. 17; 10/18/88 R.T. p. 193-194; 12/20/89 R.T. pp. 19-20, 22-26; exh. G.)¹³ Although respondent did obtain receipts from the brothers for the payments he made to them, he did not provide them with an accounting of the disbursements (including his fee). (10/18/88 R.T. p. 191; exh. G.) The referee found respondent culpable of violating former rules 8-101(A), 8-101(B)(1), 8-101(B)(3) and 8-101(B)(4) of the Rules of Professional Conduct and of violating Business and Professions Code sections 6068 (a), 6103 and 6106.¹⁴ The rule 8-101(A) finding is supported by the fact that respondent admittedly withdrew his share of the settlement in installments over a period of time rather than at the earliest reasonable time after his interest in it became fixed. The other rule violations are also supported by clear and convincing evidence. Respondent did not notify his clients of the receipt of funds in a timely fashion as required by rule 8-101(B)(1); did not render appropriate accounts to his clients as required by rule 8-101(B)(3) and did not promptly deliver the funds when requested to do so as required by rule 8-101(B)(4).

The section 6106 charge was apparently based both on respondent's misappropriation of the Porsch family funds and on respondent's alleged misrepresentation to Porsch that he had not received the funds. Again, we cannot defer to the referee on the misrepresentation issue since he appears to have

assessed Porsch's credibility without taking into account respondent's contrary testimony.¹⁵ We therefore remand for retrial on this point.¹⁶

Count three was based on the following related events. In January 1985, while Porsch and his brothers were waiting for their share of the estate settlement, Porsch requested that respondent advance him \$250 from the settlement to pay a fine in a municipal court matter. Respondent gave Porsch the money in the form of a trust account check made payable to the municipal court. (10/18/88 R.T. pp. 146-148; exh. 13.) The check was drawn on a different trust account than the one into which the settlement check had been deposited and it was returned for insufficient funds. (10/18/88 R.T. p. 148; exh. 14, 16.) Respondent admitted that he did not know whether there was a sufficient balance in the account when he wrote the check. (12/20/89 R.T. pp. 27-28.) Respondent never replaced the invalid \$250 check with other funds, so that although he later paid Porsch \$600, Porsch never received all of his \$850 share of the estate settlement. (10/18/88 R.T. pp. 155-156.)

Based on these facts, the referee found respondent culpable of violating sections 6068 (a), 6103, and 6106, and rule 8-101(A). (Decision, pp. 6, 18-19.)¹⁷ We have determined that the charge of violating section 6106 requires retrial.

Respondent's culpability on the rule 8-101(A) charge is less problematic. Based on respondent's

12. The decision below states that Porsch was paid part of his share in June 1984. This is in error; the payment was made in July 1985, and the payments to the other brothers were made in April through July 1985. (10/18/88 R.T. p. 154; exh. 15; exh. G.)

13. Porsch stated that respondent told him he had used the money to buy a house. (10/18/88 R.T. pp. 151, 183.) Respondent denied this. (12/20/89 R.T. pp. 22-26.) The referee did not definitively resolve this conflict, but appears to have considered it unnecessary to do so because respondent admitted his trust account balance had fallen below the amount of the brothers' share of the settlement. (See decision, p. 5.)

14. Unless otherwise noted, all statutory references hereafter are to the Business and Professions Code, and all references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

15. We decline to adopt the referee's finding that respondent made misrepresentations to Porsch because of the manner in which such finding was made. Porsch testified that respondent told him at that time that respondent had not yet received the settlement funds; respondent denied this. The referee had already indicated that he had accepted Porsch's testimony on this point before respondent testified. (10/18/88 R.T. pp. 140, 143; 12/20/89 R.T. p. 26; decision, p. 4; exh. C (preliminary decision) pp. 3-4.)

16. For the reasons stated *ante*, fn. 11, we reject culpability under sections 6068 (a) and 6103.

17. We do not adopt the section 6068 (a) and 6103 findings. (See *ante*, fn. 11.)

exhibits and the transcripts of the testimony offered in this case does not reveal any substantive basis for this department to overturn the hearing referee's carefully considered determinations of credibility. [3] Moreover, we see no error in the referee's decision giving greater credence to Ida Vida and Greene on certain matters but not others.

In connection with the Allied litigation, the examiner would have us conclude that respondent agreed to go forward with complex, expensive litigation on a contingency fee basis *and* agreed to advance costs as well despite uncontradicted evidence that in accepting work in the same consultation, respondent insisted on payment in cash because of his financial distress. (2 R.T. pp. 210-211.) The notes in exhibit N that the examiner relies upon in his brief to urge such a conclusion were not written contemporaneously with the meeting in 1986, but rather were constructed by respondent to prepare for his testimony at the disciplinary hearing. (2 R.T. pp. 369-370.) [4a] The examiner argues that respondent's failure to answer the letter written by Greene to respondent describing Greene's understanding of the Allied litigation constituted an adoptive admission of respondent's duty to perform services by respondent's failure to answer the correspondence. (Evid. Code, § 1221; 1 Witkin, Cal. Evidence (3d ed. 1986) § 653.) Respondent denied receiving the letter. (1 R.T. pp. 39-41.) The hearing referee therefore was justified in rejecting the adoptive admission argument.¹¹ [4b - see fn. 11] [5] While we modify the decision (page 6, lines 2-4) to find that an attorney-client relationship was created in Greene's preliminary consultations with respondent (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812), we uphold the referee's decision that there was no clear and convincing proof that respondent agreed to go forward and file suit against Allied on behalf of Greene.

[6] The respondent proffered undated drafts of trust documents (exhs. A and B) to support his contention that he completed the work necessary to

form the family trust for Greene, as he was hired to do. He could not remember exactly when the draft trust documents were produced or when they were allegedly shown to Greene. (1 R.T. pp. 142-144, 148-151.) He did not have a copy of the final or executed trust agreement nor did he explain why the copy was missing. The draft trust documents contain largely "boiler-plate" language and have little if any unique or specially tailored provisions. Greene produced at the hearing the sample trust agreement provided to him by respondent at their initial meeting. (2 R.T. pp. 236-237.) He categorically denied ever seeing the drafts (1 R.T. p. 164) or receiving a final trust agreement. (2 R.T. p. 236.) The drafts alone are not persuasive evidence that respondent did earn some of the \$2,000 paid by Greene for the trust work. The referee weighed the drafts and respondent's testimony against that of Greene and concluded that no work had been done to earn the advanced fees. On this record, we agree.

[7] Concerning the Maag lawsuit, Mrs. Vida's testimony is largely corroborated by respondent's own admissions. She spoke to respondent about the case, sent him the complaint at his request and relied on his assurance that he would investigate the matter. In securing additional time from Maag's attorney to file Mrs. Vida's answer to the complaint, respondent did endeavor to protect her interests. However he did not keep her apprised of essential matters in the case and his inaction and abandonment of her case justify the finding of culpability.

On the Garden Grove matter, it is evident from the record that respondent had many meetings with Michael Vida, that respondent did do significant work on the case and that by the fall of 1984, the Vidas did not have the resources to proceed with the litigation. The sticking point is the \$112 check for filing fees. [8] The fact that Mrs. Vida sent the check in November 1984 is evidence which supports the examiner's contention that respondent anticipated filing suit shortly. The check was deposited in the

11. [4b] Evidence of the statements in a letter in circumstances where the letter reasonably called for a reply can be admitted as an adoptive admission. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 108-109; *Rose v. Hunter* (1957) 155 Cal.App.2d 319; *Simpson v. Bergmann* (1932) 125 Cal.App. 1, 8-9.)

However, Evidence Code section 1221 requires that the party whose silence is being admitted as an adoptive admission have knowledge of the contents of that which has allegedly been adopted. Respondent testified that he had no knowledge of the contents of Greene's letter.

respondent's trust account. But we conclude that Mrs. Vida's issuance of the check in November 1984 is not sufficient evidence to show clearly and convincingly that respondent was obligated to pursue the Garden Grove matter.

The issue is much closer as to whether respondent was authorized to apply the \$112 to his outstanding fees owed by the Vidas. Accepting the finding that Michael Vida agreed to abandon his mother's suit against Garden Grove, respondent's choice was to return advanced costs to Mrs. Vida or secure permission to retain the advancement as attorneys fees. Respondent's argument that consent was obtained from Michael Vida, his mother's agent, in December 1984 is undermined because respondent's trust account does not reflect a transfer of \$112 out of the account. If there was consent, then the funds were either drawn out in combination with other fees in a timely fashion or they remained mingled with other client monies until May 1985, when the trust balance fell below \$112.¹² Michael Vida disagreed, testifying that he did not consent to applying the \$112 to respondent's outstanding fees. The examiner maintains that no consent was secured and the respondent thereby misappropriated the funds. [9] The hearing panel did not find clear and convincing evidence that there were any trust account irregularities, apparently influenced by Michael Vida's unpersuasive testimony. Given the hearing panel's assessment of Vida's credibility, we agree that the State Bar has not met its burden in this case to show misconduct by clear and convincing evidence.

2. Modification of Culpability Findings.

[10] Section 6103 is not a charging provision, but rather provides that violation of a duty defined elsewhere is grounds for discipline. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617-618; *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561; *Baker v. State Bar* (1989) 49 Cal.3d 804, 814-815.) Therefore, we find no violation of Business and Professions Code section 6103. We also amend the hearing panel's decision to strike the findings on culpability

under section 6068 (a), consistent with our ruling in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, and our readings of *Sugarman v. State Bar, supra*, 51 Cal.3d at p. 617; *Middleton v. State Bar, supra*, 51 Cal.3d at p. 561; *Baker v. State Bar, supra*, 49 Cal.3d at pp. 814-816, and *Sands v. State Bar* (1989) 49 Cal.3d 919, 931.

[11] We also strike the finding that respondent violated Business and Professions Code section 6068 (m) in the Maag lawsuit. Subdivision (m) was not added to section 6068 until January 1, 1987. (Stats. 1986, ch. 475, § 2, pp. 1772-1773.) Respondent's conduct occurred in 1984, before the effective date of that subdivision. However, respondent did fail to return phone calls and correspondence from Greene in the early part of 1987 and thus we affirm the finding of culpability as to that misconduct under section 6068 (m).

3. Discipline.

The examiner argues that the standards call for a minimum one-year actual suspension largely based upon his proposed finding that the respondent misappropriated funds. The examiner also urges imposition of a three-year probationary period to protect the public and assist respondent in his rehabilitation and adoption of a restitution requirement. In contrast, respondent maintains that if any misconduct is ultimately found in this case, it is mitigated by the stressful circumstances of the deterioration of his marriage in 1984 through May 1985, and the death of his mother in September 1986. Respondent's wife was his legal secretary and allegedly did not advise respondent of telephone messages received during the period prior to their separation. Respondent testified that he visited his mother in a nearby hospital once or twice a week during 1986. (3R.T. pp.432-433.)

The discussion by the hearing referee of the mitigating and aggravating factors and the applicable standards, at pages 12-15 of the decision, is thorough. Respondent's prior, 11-year, unblemished record was recognized as a mitigating factor. (Deci-

12. There was no charge of commingling in the notice to show cause.

sion at p. 12; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457.) The panel rejected respondent's arguments that the break-up of his marriage in 1985 and his mother's illness and death in September 1986 were causal factors in his misconduct. (Decision at pp. 12-13.) [12] As the referee found, failing to get phone messages from respondent's estranged spouse does not explain or excuse respondent's abandonment of Mrs. Vida or have any connection with his misconduct related to Zane Greene. [13] The death of respondent's parent, without additional evidence as to the psychological distress which may have disabled respondent, was not shown to affect the preparation, or lack thereof, of the Greene family trust documents.

[14] In aggravation, the misconduct was not a single, isolated incident. Rather, there were multiple acts of misconduct, but they cannot be said to constitute a pattern. (Standard 1.2(b)(ii).) The referee did find some harm to Mrs. Vida because of the entry of the default and assessment of attorneys fees, as well as the \$2,000 in unearned fees from Greene retained by the respondent. As noted *ante*, respondent's lack of candor at the hearing was also considered an aggravating circumstance.

[15a] Although we have found no recent published attorney disciplinary opinion of our Supreme Court dealing with the exact misconduct and disciplinary factors we have in this case, we are guided by several recent opinions involving failure to perform services with lack of prior discipline in reaching our conclusion that respondent's abandonment of two clients in less than three years, with \$2,000 in unearned fees retained from one of the clients, merits a greater sanction than a public reproof.

In *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791, the attorney abandoned two clients without completing legal services and retained unearned fees from them. He also completed the work for a third client more than four years after he was hired. The Supreme Court increased the discipline recommended by the State Bar Court from a three-year suspension, stayed, with three years of probation, refunds to the clients involved and no actual suspension, to include sixty days of actual suspension. (*Id.* at pp. 787, 792.)

The aggravating circumstances cited by the Court included the financial harm to the clients from the attorney's refusal to return unearned fees and his indifference to the fee arbitration process. (*Id.* at p. 791.)

Similarly, in another case more serious than the present one but with more mitigating factors, *Gadda v. State Bar* (1990) 50 Cal.3d 344, the attorney had been found culpable of unreasonable client neglect in three immigration matters aggravated by deceit in two of the matters and the publication of a misleading advertisement. The Court considered further aggravating, the attorney's failure to recognize the seriousness of his misconduct but noted in mitigation his very active and generous pro bono immigration legal work. The Supreme Court ordered a two-year suspension stayed on conditions including a six-month actual suspension and until restitution was made.

In a case less serious than the present, involving an attorney's single act of failure to perform requested legal services, coupled with failure in that matter to communicate with the client, but without serious adverse consequences to the client, the Supreme Court imposed a six-month suspension stayed entirely on probation with no actual suspension. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921.)

[15b] Given that respondent's conduct here is less serious than that found in either *Matthew* or *Gadda*, but more serious than found in *Van Sloten*, we propose a two-year suspension, stayed on conditions of a two-year probation period including thirty days of actual suspension. [16] The conditions set forth by the hearing panel are appropriate, considering the chaotic state of the respondent's records and business practices. Correspondence with his clients and written fee agreements appear nonexistent in the matters before us. Submission of a law office management plan and State Bar supervision should, over time, remedy that problem and serve to protect the public. [17] Return of the \$2,000 in fees to Mr. Greene is consistent with our affirmation of the finding that respondent did little if any work in drafting the family trust or incorporating the related Nevada corporation and qualifying it in California.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, William Reamy Kennon, be suspended from the practice of law in the State of California for a period of two years, that execution of the suspension order be stayed, and that respondent be placed on probation for two years under the following conditions:

1. That during the first 30 days of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That within one year from the effective date of the Supreme Court's order in this matter, respondent shall make restitution to Zane Greene, in the amount of \$2,000 plus interest at the rate of 10% per annum from March 1987, until paid in full and furnish satisfactory evidence of restitution to the Probation Department, State Bar Court, Los Angeles;

3. 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;

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

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

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

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

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

6. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

7. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

8. That respondent develop a law office management/organization plan that meets with the approval of his probation monitor within ninety (90) days from the date on which respondent is notified of the assignment of his probation monitor. This plan must include procedures for the adoption of written fee agreements to send periodic status reports to clients, the documentation of telephone messages received and sent, 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.

9. That respondent provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor within one year from the date on which the order of the Supreme Court in this matter becomes effective.

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

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

It is further recommended that respondent be ordered to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners within one (1) year from the effective date of the Supreme Court's order and furnish satisfactory proof of such to the Probation Department of the State Bar Court within said year.

It is further recommended that costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to Business and Professions Code, Section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.