STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANK H. WHITEHEAD, JR.

A Member of the State Bar

[No. 86-O-14767]

Filed February 22, 1991; as modified, March 12, 1991.

SUMMARY

An attorney was found culpable of commingling trust funds with personal funds; failing to supervise his associates; failing to respond to letters from his clients' subsequent attorney; and failing to respond to investigative letters from the State Bar. Numerous other charges were dismissed for lack of evidence. In light of extensive mitigating evidence, the hearing department recommended three months suspension, stayed, with five years probation, and no actual suspension. (Elliot R. Smith, Hearing Referee.)

The State Bar examiner sought review, seeking additional culpability findings and a minimum of one year actual suspension. With minor modifications, the review department adopted all of the essential findings of culpability and non-culpability, but added a finding that the attorney had failed to act competently. In assessing the appropriate degree of discipline, the review department also took into account the extensive mitigation. However, in view of the attorney's culpability on three client matters and his record of prior discipline, the review department held that some actual suspension was warranted. Accordingly, the review department recommended that the attorney be suspended for one year, stayed, with 45 days actual suspension and five years probation on the strict probation conditions recommended by the referee.

COUNSEL FOR PARTIES

For Office of Trials: Teri Katz

For Respondent: Frank H. Whitehead, in pro. per.

HEADNOTES

[1 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record

In all cases brought before it, the review department must independently review the trial record just as the Supreme Court does upon review of the review department recommendation. (Rule 453(a), Trans. Rules Proc. of State Bar.) In doing so, the review department accords great weight to

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

findings of fact made by the hearing department which resolve testimonial issues. However, the review department also has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department; despite a party's initial failure to request review on one count which was addressed in the party's brief, the review department would address the propriety of the findings on that count.

[2] **199 General Issues—Miscellaneous**
802.30 Standards—Purposes of Sanctions
The review department's overriding concern is the same as that of the Supreme Court: the protection of the public, preservation of public confidence in the profession and the maintenance of high professional standards.

[3] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
The rules of ethics regarding the duties of an attorney upon withdrawal apply to attorneys who are discharged as well as those who withdraw.

[4] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Where an attorney had performed some work on a client's case and believed he was entitled to retain the entire advance fee, it was reasonable for him to postpone refunding the fee until a small claims court had determined that a refund was required.

[5] **582.50 Aggravation—Harm to Client—Declined to Find**
Where attorney delayed in pursuing client's appeal, but client ultimately dropped appeal after discharging attorney, there was no basis for determining that client was harmed by attorney's conduct, and in any event, a delay of a few months in prosecuting an appeal does not, standing alone, warrant a finding of significant harm to the client.

[6] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Attorney's failure to apply the diligence necessary to discharge the duties arising from his employment, by failing to pursue his client's appeal in a timely fashion, did not establish reckless disregard or repeated failure to perform legal services competently.

[7 a, b] **148 Evidence—Witnesses**
166 Independent Review of Record
Where hearing referee found respondent's testimony credible and candid, and client's testimony confusing and inconsistent, argument that review department should disbelieve attorney and believe client was unavailing in light of deference review department must give to referee's findings based on credibility of witnesses.

[8 a, b] **165 Adequacy of Hearing Decision**
490.00 Miscellaneous Misconduct
Although hearing referee did not specifically find that client had expressly authorized attorney to endorse settlement check on client's behalf, review department interpreted decision to have resolved this issue on the basis of express rather than implied authorization.

[9 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
Possession of client funds in the form of a cashier's check is no defense to a charge of commingling. However, an attorney who held client funds outside his trust account in the form of cashier's checks, notified his client promptly of the receipt of the funds, forwarded them to the client promptly upon demand, and had adequate funds at all times to pay what he owed the client, did not commit misappropriation, violate obligation to deliver client funds promptly upon demand, or commit any act of moral turpitude or dishonesty.

[10] **213.20 State Bar Act—Section 6068(b)**
An attorney's filing a lawsuit in the wrong court, and not paying sanctions awarded against the attorney in the change of venue order, did not support the contention that the attorney failed to maintain the respect due to the courts, when the attorney had no personal knowledge of the sanctions or the failure to pay them.

[11] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
An attorney's obligation to perform services competently must be construed to have covered the entire period that the attorney represented the clients, even after the clients' case was dismissed.

[12] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where clients hired an attorney to represent them, and were not informed that the attorney had delegated responsibility for the case to an associate, the clients rightly looked to the attorney to pursue their claims diligently. Accordingly, the attorney's failure to supervise the associate's handling of the case amounted to a failure to perform services competently.

[13] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where an attorney acted in good faith, and was kept in the dark by his associate either by design or negligence, his good faith did not relieve the attorney from culpability for failure to perform services competently, based on the attorney's prolonged failure to monitor his associates' handling of the case, after the ethics rule regarding competence was amended to delete the good faith exception.

[14 a, b] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
410.00 Failure to Communicate
Where respondent's failure to respond to letters sent by another attorney whom clients had contacted occurred before enactment of specific statute requiring response to clients' reasonable status inquires, respondent could not be found culpable of violating that statute. Nevertheless, a longstanding common-law duty to communicate with clients was recognized by the Supreme Court prior to the adoption of the specific statute. Thus, for failures to communicate with clients occurring prior to the addition of the new statute, it is not duplicative nor otherwise inappropriate to charge an attorney with violating his general duties as an attorney.

[15 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
Little, if any, purpose is served by duplicative allegations of misconduct; if misconduct violates a specific Rule of Professional Conduct or statute, there is no need for the State Bar to allege the same misconduct as a violation of an attorney's duty to obey the law.

[16] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
213.10 State Bar Act—Section 6068(a)
1099 Substantive Issues re Discipline—Miscellaneous
If violations of the Rules of Professional Conduct were automatically also violations of the statute governing an attorney's duty to obey the law, the statute limiting the discipline for rule violations to a maximum of three years' suspension would be rendered meaningless; such a construction of the statutory scheme would be illogical.

[17] **511 Aggravation—Prior Record—Found**
710.55 Mitigation—No Prior Record—Declined to Find
An attorney's prior private reproval which originated only four years before his current misconduct was not so remote in time to the current proceeding that the imposition of greater discipline in the present case based on the prior discipline would be manifestly unjust, even though the prior private reproval involved misconduct which did not bear any substantive relationship to the subsequent misconduct.

[18] **801.41 Standards—Deviation From—Justified**
824.54 Standards—Commingling/Trust Account—Declined to Apply
The Standards for Attorney Sanctions for Professional Misconduct are not to be rigidly applied, and an actual suspension of less than three months for commingling may be appropriate in the circumstances of a particular case.

[19] **173 Discipline—Ethics Exam/Ethics School**
Ordinarily, a requirement that a disciplined attorney take and pass the Professional Responsibility Examination is set forth as a separate requirement and not as a condition of probation.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
213.91 Section 6068(i)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
410.01 Failure to Communicate

Not Found

213.15 Section 6068(a)
213.25 Section 6068(b)
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)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.25 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.54 Misappropriation—Not Proven

Aggravation

Found

521 Multiple Acts
535.10 Pattern

Mitigation

Found

715.10 Good Faith
720.10 Lack of Harm
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution
760.11 Personal/Financial Problems

Standards

805.10 Effect of Prior Discipline
844.13 Failure to Communicate/Perform
863.10 Standard 2.6—Suspension
863.30 Standard 2.6—Suspension

Discipline

1013.06 Stayed Suspension—1 Year
1015.02 Actual Suspension—2 Months
1017.11 Probation—5 Years

Probation Conditions

1023.10 Testing/Treatment—Alcohol
1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1026 Trust Account Auditing

OPINION

PEARLMAN, P.J.:

This case involves seven contested counts. The referee found the respondent culpable of charges in three counts involving two sets of client matters and one count of failing to cooperate with the State Bar. Respondent was found to have commingled trust funds with personal funds in one of the two client matters, and, in the other, was found culpable of failing to supervise his associates in a civil case and failing to respond to letters from the client's subsequent attorney. In the light of extensive mitigating evidence, the referee recommended three months suspension, stayed, with five years probation, on various conditions including trust account reporting, psychiatric counseling and conditions for monitoring potential substance abuse. The examiner requested review challenging the hearing referee's decision regarding culpability on three counts as unsupported by the evidence and seeking the imposition of a minimum of one year actual suspension.

With minor modifications, we adopt the referee's essential findings of culpability as to all counts, except that we add a finding that respondent was culpable of violating former rule 6-101(A)(2) as charged in count five.[1] In assessing the appropriate discipline, we also take into account the extensive mitigation. However, in view of respondent's culpability on three client matters and a prior private reproval, we conclude that some actual suspension is warranted here. We recommend one year stayed suspension conditioned on 45 days actual suspension together with the strict probation conditions recommended by the referee.

PROCEDURAL HISTORY

This proceeding was initiated by a notice to show cause filed on February 27, 1989. As was then customary, all of the counts charged respondent with violating his oath and duties as set forth in Business and Professions Code sections 6068 (a) and 6103. More specifically, count one charged respondent with causing the dismissal of an appeal he was hired to prosecute and alleged failure to perform, failure to return $1,500 in unearned advanced fees and withdrawal from representation of the client (Lillian Collins) without taking reasonable steps to avoid prejudice in violation of rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the Rules of Professional Conduct. Count two charged respondent with misappropriating settlement funds deposited in his personal account without the authorization or knowledge of his client (Octavio Gomez), allegedly in violation of Business and Professions Code section 6106[2] and rules 8-101(A), 8-101(B)(1) and 8-101(B)(4). Counts three and four charged respondent with mishandling two matters for Salvadore Ramirez. In count three respondent was charged with failure to perform services in defense of a lawsuit against Ramirez resulting in a default judgment, and alleged failure to communicate, misrepresentation of activity in the lawsuit and failure to return advanced fees in violation of rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2) and former rule 6-101(2).[3] Count four charged respondent with violating sections 6068 (m) and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) by his alleged failure to set aside the default, to respond to client inquiries or to release Ramirez's file on request.

Count five charged respondent with violating section 6068 (b) and rules 2-111(A)(2), 6-101(A)(2) and former rule 6-101 (2)[4] by filing a lawsuit in the wrong court on behalf of three clients (Leon Gonzales, Candelarra Berrios and Michael Giordani), failure to pay costs ordered upon the defendants' motion for change of venue resulting in the dismissal of the action, and failure to communicate with the clients. Count six charged respondent with further related misconduct harming two of the three clients in count

1. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

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

3. The reference here is to former rule 6-101, which was in effect from January 1, 1975, to October 23, 1983.

4. See footnote 3, *ante*.

five. Respondent was charged with violating section 6106 by allegedly misrepresenting to the clients that he had taken care of a notice of foreclosure on their properties, later failing to communicate and respond to their inquiries, and misrepresenting to their new counsel that he had obtained injunctions blocking the foreclosure when the properties had, in fact, been sold at a trustee's sale two and one-half years earlier. Count seven charged respondent with violating section 6068 (i) by allegedly failing to respond to nine letters of inquiry from a State Bar investigator sent to his record address between January of 1987 and August of 1988.

Respondent's answer to the notice to show cause was filed on March 22, 1989, in pro per. Respondent denied all of the charges in counts one through six and affirmatively alleged facts controverting the allegations against him in each count. As to count seven, he admitted his failure to respond to inquiries except for a letter dated November 29, 1988, which he responded to on December 7, 1988, requesting a conference with the examiner prior to the institution of formal charges. He also included in his answer, in mitigation of his failure to respond to earlier inquiries of the State Bar investigator, that he was under severe emotional and financial stress during the period of time in question (1987-1988) due to his then pending contested marital dissolution proceeding.

A three-day evidentiary hearing was held on August 7-9, 1989. By that time, respondent was represented by counsel. He stipulated to the charging allegations of count seven. Oral and documentary evidence was presented with respect to counts one through six. The decision on culpability was issued on September 11, 1989, finding culpability on three of the six contested counts and on count seven. The hearing to consider aggravating and mitigating factors and to determine discipline was held on September 25, 1989. Respondent presented in mitigation psychiatric testimony, several character witnesses, his own testimony and documentary evidence. The referee also received as evidence in aggravation the record of respondent's prior private reproval for failure to obtain informed, written consent to a potential conflict between two clients he was representing.[5]

The referee issued a lengthy, carefully considered decision on December 12, 1989. He found no clear and convincing evidence of the charges in counts one, three and four. On count two he found respondent culpable of commingling in violation of rule 8-101(A) and of violating sections 6068 (a) and 6103, based thereon. He found no willful misappropriation in violation of section 6106, or misconduct in violation of rule 8-101(B)(1) or 8-101(B)(4).

On count five the referee found respondent culpable of violating sections 6068 (a) and 6103, but found insufficient evidence of a violation of section 6068 (b) or rules 2-111(A)(2), 6-101(A)(2) or former rule 6-101(2). On count six the referee found no intentional misrepresentation but only a negligent error of fact in a letter sent by respondent. He determined that respondent was culpable of violating sections 6068 (a) and 6103, but not section 6106. On count seven, pursuant to respondent's stipulation, the referee found that the nine inquiries were properly sent to respondent at his record address and that he failed to respond or otherwise cooperate in violation of sections 6068 (a), 6068 (i) and 6103.

In aggravation, the referee considered the prior private reproval of respondent for failure to obtain informed, written consent of a potential conflict between two clients, but noted that the event occurred 12 years prior to the proceeding before the referee and was so remote in time and minimal in nature that imposition of greater discipline based thereon would be manifestly unjust. (Decision p. 22.) He also found in aggravation that respondent committed multiple acts of wrongdoing (Trans. Rules Proc. of State Bar, div. V, Standards For Attorney Sanctions For Professional Misconduct ["standard(s)"], standard 1.2(b)(ii)), but no demon-

5. Part of the record of the prior reproval was produced on September 25, 1989, and the full record was presented shortly thereafter, as permitted by the referee.

strated "pattern of misconduct." (Decision p. 23.) The referee further found that there was no significant harm to the client proved by clear and convincing evidence and no other aggravating circumstances were found. (Decision p. 23.)

In mitigation, the referee found that respondent acted in good faith; that there was no harm to the client in counts two and six; that respondent had previously suffered from severe depression as a result of problems in his prior marriage; and that respondent had previously been dependent on alcohol, and had since brought his alcohol use under control. The referee further found that respondent demonstrated spontaneous candor and cooperation at the hearing and that the witnesses produced on respondent's behalf permitted the referee to make the finding of an extraordinary demonstration of good character from a wide range of members of the public. Lastly, the referee found respondent to have exhibited extreme remorse. (Decision pp. 25-28.)

FACTS

We adopt the findings of fact of the referee as set forth in his decision except for a few minor modifications set forth below.

A. Count One (Collins).

The client in this matter, Lillian Collins, was involved in an automobile accident sometime prior to July 19, 1984. Collins had been sitting in her parked car with the driver door slightly ajar and a passing car collided with the door causing injuries to the driver of the passing car and Collins. A lawsuit resulted in which Collins was a defendant. The trial resulted in a judgment against Collins. She immediately contacted respondent in July 1984 regarding an appeal of the judgment.[6] Collins was to pay a retainer of $1,500, plus costs. She made an initial payment of $200 and then made payments over the next several months until the $1,500 retainer had been paid in full. Respondent filed a notice of appeal in September 1984. In addition, respondent filed a motion to tax costs in the trial court in which he prevailed on behalf of Collins, saving her approximately $900 in trial costs assessed against her. Respondent ordered the trial transcript and received a request for payment for $1,216. There apparently was some misunderstanding regarding the payment of costs, but eventually Collins forwarded the transcript fee to respondent in April 1985. Respondent did not send the transcript fee to the reporter until November 1985, due partly to respondent's vacation, his own delay in forwarding fees, and the loss of the first check sent to the reporter.

Respondent received the transcript in April 1986 and met with Collins and explained the problems with the case. Respondent did some research and reviewed the transcript but did not file a brief in time and the appeal was dismissed in late August 1986. Respondent then filed a request for reinstatement of the appeal which was granted on October 2, 1986.

Shortly after the August 29 dismissal of the appeal, Collins, who was unable to reach respondent, called the Court of Appeal and was told that the appeal had been dismissed. She immediately sent a mailgram to respondent on September 10, 1986, inquiring about the status of her case. Respondent promptly replied to that inquiry and informed her of his attempts to reinstate the appeal. On October 7, 1986, Collins sent another mailgram to respondent requesting a fee refund, her case file, and the transcript. Respondent immediately replied to that mailgram. The referee found that as of October 7, 1986, Collins had ended the attorney-client relationship with respondent. Collins picked up her file and the transcript from respondent some time prior to December 28, 1986.

In late December 1986, respondent received a letter from the Court of Appeal advising that the appeal would be dismissed unless an opening brief

6. The referee made a finding that respondent discussed with Collins at that time that her opening of the door may have caused a presumption of liability; that she failed to provide medical testimony to support her injury claims; and that she might have a malpractice claim against her prior attorney. (Decision p. 3.) The examiner points out that these matters were actually discussed in a conversation between respondent and Collins in 1986. (R.T. pp. 382-384, 392.) The respondent agrees that this correction should be made and we hereby modify the findings in this regard.

was filed by January 23, 1987. Respondent advised Collins of this fact by letter dated January 5, 1987. Collins did not or could not get another attorney to represent her and no opening brief was filed. The Court of Appeal dismissed the appeal on February 5, 1987.

Collins eventually filed for fee arbitration and was awarded $1,500. The case then went to small claims court where respondent defaulted and Collins was awarded a judgment for $1,500. Respondent paid her the $1,500 when she went to his office a few weeks later.

B. Count Two (Gomez).

Octavio Gomez hired respondent in 1984 to represent him in a civil action as a plaintiff. Respondent was paid $800 in advanced attorneys fees. At trial of the matter in 1986 the defendant offered Gomez $1,000 to settle the case. Gomez rejected that offer, telling the respondent he wanted $2,000. The defendant then made a final offer of $1,750. Respondent discussed the final offer with Gomez and agreed to reimburse $250 of his attorneys fees to Gomez so that Gomez would receive the $2,000 total recovery he sought. Gomez gave respondent authority to settle on those terms and authorized respondent to deposit the $1,750 check when received. When respondent received the settlement check he did not deposit it into his attorney trust account because his wife, in their contested marital dissolution, had secured a levy on respondent's trust account. Instead, respondent deposited the check into his personal checking account at a different bank, which was not subject to the levy.

Respondent dictated a letter to Gomez, dated January 5, 1985, enclosing a check for $2,000. Prior to sending the letter respondent had his secretary call Gomez about its contents. The secretary did so and was informed by Gomez that he did not want to accept the settlement. Therefore, the January 5, 1987 letter was not sent to Gomez. Several weeks later respondent received a call from an attorney from the Los Angeles County Bar Association inquiring as to why the $2,000 check had not been sent to Gomez. Respondent explained that he thought Gomez had changed his mind. Soon thereafter respondent received a letter from the attorney confirming Gomez's acceptance of the $2,000 and respondent promptly had a cashiers check for $2,000 prepared and sent to Gomez.

Between the date of deposit of the $1,750 check on December 11, 1986, and respondent's payment to Gomez on February 25, 1987, the balance in the account fell below $1,750. Respondent was not aware of this. Respondent had sufficient funds on his person in the form of cashiers checks to cover the $1,750. He was retaining the checks in his personal possession to avoid attachment by his wife.

C. Count Three (Ramirez I).

Respondent was hired by Salvador Ramirez to defend him in a civil suit. Ramirez essentially disappeared from late 1977 to October 1980. He did not keep in contact with respondent and did not respond to communications from respondent. All letters by respondent to Ramirez were sent to the address given to respondent at the beginning of the matter and respondent was not directed to send the letters to any other address. None of the letters respondent sent to Ramirez ever came back as undeliverable.

After Ramirez failed to appear at a deposition and failed to attend several mandatory settlement conferences, despite written notices from respondent, the plaintiff filed a motion to strike his answer, which was granted on July 15, 1982. A default judgment was entered against Ramirez on February 7, 1984, in the amount of $10,500 plus costs.

D. Count Four (Ramirez II).

The plaintiff in the above lawsuit recorded an abstract of judgment in August 1985. Sometime thereafter Ramirez attempted to refinance real property and learned of the lien. Ramirez then contacted respondent and met with him on December 10, 1986. Respondent was eventually paid $500 as a retainer to investigate the matter.

Respondent performed work on the case including research at the recorder's office and setting the date for a motion to challenge the lien. Respondent

was then informed by Ramirez's son that the case was concluded and he demanded the return of the $500. Despite the fact that respondent had earned at least some of the retainer, he returned the entire $500 along with the file in the case. The actual date of the return of the file and the fee was unclear, however there was no credible evidence that there was any delay in either the return of the file or the fee.

E. Count Five (Gonzalez I).

Some time prior to June 1980, respondent was hired by Leon Gonzalez, Candelarra Berrios and Michael Giordani to prosecute a civil suit against a contractor for construction defects in five rental houses they had purchased in Riverside County, California. Respondent was paid $1,500 in advanced attorneys fees. It was agreed that Giordani would be the main contact person with respondent.

A lawsuit and related lis pendens were prepared by an associate of respondent's and filed in the Los Angeles Superior Court in May 1981.

The three clients apparently ceased making payments on the note held on the houses and foreclosure proceedings were initiated against the properties. Respondent prepared an application for a temporary restraining order (TRO) to stay the foreclosures. A hearing was scheduled for December 4, 1981. Upon arriving at the courthouse prior to the hearing, respondent learned that the defendants had filed a motion for change of venue to Riverside County, which deprived the Los Angeles Superior Court of jurisdiction to rule on the TRO. The motion for change of venue was granted on December 23, 1981. Costs of $319 were assessed against respondent's clients and $750 in sanctions were assessed against respondent. The court order further provided that before the plaintiffs could transfer the case they had to pay both the costs and sanctions. The costs were paid, but the sanctions were not. The defendants subsequently moved for dismissal of the case, which was granted on May 6, 1982, without prejudice. Gonzalez and respondent met in October 1982. Respondent reviewed the file, but the papers relating to the dismissal of the case were not in the file. Respondent did not learn of the failure to pay the sanctions or the dismissal of the case until March 1985.

Respondent had assigned responsibility for the case to an associate in his office who later left respondent's employ. A new associate was hired and the case was assigned to the new associate. The new associate left respondent's employ in February 1984 apparently having done nothing on the matter since the 1982 dismissal without prejudice. Respondent moved his law office to Pasadena in 1984, notifying the courts and his clients in his active files.

Gonzalez called respondent in early 1985 to inquire about the case and indicated he had not been given notice of respondent's change of address. Respondent looked for the file in his active section without success. He finally located the file in the inactive section of his files. The dismissals and related papers had been put back in the file and respondent became aware of what transpired.

Respondent refiled the case in Riverside County in March 1985. However, the statutes of limitation had run on most of the causes of action. A malpractice suit was subsequently filed against respondent by Gonzalez and Barrios, which was settled in 1989.

F. Count Six (Gonzalez II).

In January 1985, Gonzalez authorized attorney George Hecker to contact respondent on Gonzalez's behalf. Hecker wrote to respondent on January 18, 1985, and again on February 4, 1985. Respondent did not reply to these letters.

Gonzalez himself called respondent in late February 1985 and had another attorney, Murray Sturner, also call respondent. Respondent replied by letter indicating that "a copy of the temporary restraining order stopping the foreclosure sale, which was issued by the Los Angeles Superior Court" was enclosed. Respondent testified he meant to say that a lis pendens had been filed in Los Angeles Superior Court and he had attached a copy to the letter. Gonzalez was aware that no TRO had been obtained since the properties had been by that time foreclosed. The referee found that respondent did not intentionally misrepresent the status of the case to Gonzalez.

G. Count Seven (Failure to Cooperate).

The parties stipulated that respondent failed to respond to numerous inquiries from the State Bar investigator between January 1987 and August 1988 and thereby failed to respond or cooperate with the State Bar in the investigation of the matters.

ISSUES ON REVIEW

The examiner has requested review of the referee's decision only with regard to counts one, two, and five. **[1a]** While the examiner's request for review does not request review of count six, her brief indicates she is, in fact, seeking review of count six. Since the review department conducts de novo review of the entire record, we will address the propriety of the findings in count six as well.

The examiner does not contest the referee's conclusion of no culpability in counts three and four. Upon our independent review of the record we agree with the referee's findings on these counts and adopt the conclusion of no culpability.

With respect to count one, the examiner argues that the referee's conclusion that the delays in pursuing the appeal were not all attributable to respondent was in error; that respondent failed to perform the services for which he was hired in that he did not ever prepare an appeal brief in the two years he represented Collins, which resulted in the appeal being dismissed, and the decision should be amended to include violations of rules 2-111(A)(2) and 6-101(A)(2).

With respect to count two, the examiner argues that the referee erred in finding that respondent had authority to endorse and deposit the $1,750 settlement check; respondent misappropriated the settlement funds when the account balance of his personal checking account fell below $1,750 and therefore is culpable of violating rule 8-101(B)(4).

With respect to counts five and six, the examiner argues that respondent undertook representation of the three clients (Gonzales, Berrios and Giordani), assigned the case to an associate who could not communicate with the Spanish-speaking clients, failed to supervise the associate and failed to communicate with the clients. As a result respondent abandoned his ethical responsibilities to his clients and the decision should be modified to include violations of section 6068 (b) and rules 2-111(A)(2), 6-101(A)(2) and former rule 6-101(2).

With respect to discipline, the examiner assumes that if all of her requested findings are made in counts one, two, five and six the discipline should be increased to a minimum of one year actual suspension and five years probation primarily because respondent engaged in serious misconduct in count two when he misappropriated and commingled funds and endorsed his client's name to the settlement check.

DISCUSSION

[1b] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it this review department must independently review the trial record just as the Supreme Court does upon review of the review department recommendation. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) In doing so, we accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In Re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department also has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Ibid.*) **[2]** Our overriding concern is the same as that of the Supreme Court: the protection of the public, preservation of public confidence in the profession and the maintenance of high professional standards. (See standard 1.3; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

A. Count One.

The essence of this count as charged in the notice was respondent's delay in pursuing the appeal. The examiner has not asserted that the referee's findings with regard to respondent's compliance

with rule 2-111(A)(2) after he was discharged by the client in October 1986, are not supported by the record. Rather, she argues that there was a "de facto withdrawal" prior to his discharge in October. Not only did the referee find that the requirements of rule 2-111(A)(2) were complied with, but that the client discharged respondent. He did not withdraw. **[3]** Nonetheless, rule 2-111 applies to attorneys who are discharged as well as those who withdraw. (See *Academy of California Optometrists, Inc.* v. *Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.) We therefore address the question of respondent's compliance with rule 2-111 upon his discharge.

The referee's findings that respondent complied with rule 2-111(A)(2) are supported by the record. Upon being discharged, respondent immediately advised Collins that she could pick up the file. (State Bar exh. 11.) By letter dated December 24, 1986, the Court of Appeal advised respondent that the appeal would be dismissed unless a brief was filed within 30 days. Respondent copied Collins with this letter on January 5, 1987. Thus, Collins had from early October 1986 to retain new counsel and was advised of the deadline she was facing. Although respondent could have notified Collins of the December 24, 1986 Court of Appeal letter earlier, considering the fact that she was aware of her need to retain new counsel well before December, his two-week delay in doing so did not prejudice his client, as the referee apparently concluded.

[4] The examiner does not challenge the referee's conclusion that respondent returned the disputed fee promptly and therefore did not violate rule 2-111(A)(3). Respondent testified he did some work on the case and felt he was entitled to the entire $1,500 fee. (R.T. p. 370.) The referee concluded that it was therefore reasonable for respondent to postpone the fee refund until the small claims court determined it was required. We see no basis for disturbing that finding.

With respect to rule 6-101(A)(2), the referee concluded that although there were delays in pursuing the appeal, some were not respondent's fault and that although respondent could have been more timely in his research, there was no clear and convincing evidence of misconduct.

The appeal was filed in September 1984. Respondent received the transcript fee from Collins in April 1985. He forwarded that fee to the reporter in November 1985. Respondent received the transcript in April 1986 and was discharged by Collins in October 1986. The referee found that the delay in receiving the transcript was based on a combination of factors not amounting to clear and convincing proof of misconduct. That finding is understandable with regard to respondent's receipt of the transcript fee from Collins for he had no control over that. The referee also found that respondent's seven-month delay in sending the fee to the reporter was due to respondent's vacation, delay in forwarding the check and the loss of the first check respondent sent. These clearly were factors within respondent's control.

Respondent received the transcript in April 1986 and was not discharged until October 1986. His subsequent failure to file appears unjustified since respondent filed a motion to extend time to file the brief in July 1986 (respondent exh. AJ), which was apparently granted. The appeal was not dismissed until August 29, 1986. Thus, respondent had been made aware of the need to file the brief on more than one occasion with ample time to comply and he failed to do so. Nonetheless, respondent was able to get the appeal reinstated prior to his discharge. The client's failure to pursue the appeal thereafter is not attributable to respondent and may have been due to concerns regarding its merit, which respondent had raised.[7] **[5 - see fn. 7] [6]** While it appears that respondent may have failed to apply "diligence necessary to discharge the member's duties arising from the employment or representation" as specified in

7. **[5]** Since the client dropped the appeal there is no basis for determining that she was harmed by respondent's conduct. Even if the client had thereafter pursued the appeal, the delay caused by respondent would probably not be construed as causing significant harm. (*Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1217 [holding that "[a] delay of a few months in prosecuting an appeal, while it may be harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was 'significantly' harmed thereby"].)

rule 6-101(A)(1), the evidence does not rise to the level of proof of "reckless disregard" or "repeated failure" to perform legal services competently and respondent was therefore not culpable of violating rule 6-101(A)(2).

We thus adopt the referee's finding of no culpability in count one.

B. Count Two.

As indicated above, the examiner's assertions with regard to this count are twofold: First, that respondent did not have authority to endorse and deposit the settlement check, and second, that respondent wilfully misappropriated the funds in violation of rule 8-101(B)(4).

Neither side in this matter disputes the fact that Gomez agreed to the settlement. The dispute arises in the context of whether respondent had authority to endorse and deposit the check. Gomez testified that he did not give respondent permission to sign his name to the settlement check nor was he notified by respondent that respondent had received the check. (R.T. p. 99.) The respondent on the other hand testified that he spoke with Gomez at the courthouse (apparently shortly after or at the time of the settlement) and informed Gomez that it would take approximately 30 days for him to receive the draft. Respondent further testified that he informed Gomez that when the check came in he would deposit the money and as soon as it cleared he would send it to Gomez. Gomez seemed agreeable to that. **[7a]** The referee found respondent's testimony credible and candid, while Gomez's testimony was confusing and inconsistent on certain issues. Thus the referee resolved the testimonial conflict in favor of the respondent.

The examiner makes two arguments: (1) that we should disbelieve respondent's testimony and believe that of Gomez and (2) that respondent's version is in any event insufficient to support a finding that the respondent was authorized to endorse the settlement check. **[7b]** Both arguments are unavailing in light of the deference we must give to the referee's findings based on the credibility of witnesses. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; cf. *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 144 [deferring to the local committee's finding of no client authority to endorse a settlement check].) **[8a]** While the referee's decision does not specifically mention the endorsement issue, it does expressly find that Gomez authorized respondent to deposit the $1,750 check when received. (Decision p. 9.) Since the examiner raised the identical issue of respondent's lack of express authority in trial briefs below, the referee's finding that the deposit was authorized can only be read as a determination that respondent was authorized by his client to endorse the client's name to the check if necessary in order to deposit it.[8] **[8b]** While the record below appears somewhat equivocal as to whether the authorization was express as required by *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793-794, the referee was in the best position to evaluate the testimony. We interpret the referee's decision in the face of the examiner's arguments to have resolved this issue on the basis of express rather than implied authorization. (See generally 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276-277.)

[9a] The referee properly found that possession of the funds in a cashier's check is no defense to commingling. (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 854.) "'Prior to 1956, [the] practice of holding . . . clients' funds in the form of cashier's checks, or even in cash [citation], was permissible. In 1956, however, rule 9 of the Rules of Professional Conduct was amended to require that all clients' funds be deposited in a designated account, separate from the attorney's personal accounts, . . . unless the client otherwise directs in writing.'" (*Id.* at pp. 854-855, quoting *Black* v. *State Bar* (1962) 57 Cal.2d 219, 227

8. It is clear from the record that respondent deposited the settlement check into his personal bank account at Imperial Savings. A copy of the front of the draft (State Bar exh. 20) and the bank's records (State Bar exh. 21) were introduced. However, a copy of the back of the draft was not. Although the draft was made payable only to Gomez, no testimony was introduced from respondent or any other source that the client's name was actually endorsed on the check. Without the back of the draft, it is only by inference that the record would allow us to determine that respondent in fact endorsed the client's name as opposed to signing his own name as an authorized nonidentical endorsement. (See, e.g., *Campbell* v. *Bank of America* (1987) 190 Cal.App.3d 1420.)

[public reproval of attorney with no prior disciplinary record for violations of former rule 9 by retention of client's funds in the form of cashier's check without client's written permission].) However, a different issue is presented with respect to whether merely holding the funds outside the trust account in the form of cashier's checks constitutes misappropriation in violation of rule 8-101(B)(4).

The examiner relies principally on *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962 in asserting that a misappropriation in violation of rule 8-101(B)(4) occurred based on the referee's finding that on some occasions between the deposit of the check on December 11, 1986, into respondent's personal account and respondent's payment to Gomez in February 1987, the account balance fell below the amount of the settlement check. The examiner contends that it is of no consequence that the referee found that the client had not made a demand for the funds at that time and that the referee further found that respondent had "sufficient funds on his person in the form of cashiers checks to cover the $1,750." (Decision p. 10.)

Rule 8-101(B)(4) states that a member of the State Bar shall: "(4) Promptly pay or deliver to the client as requested by a client, the funds . . . in the possession of the member . . . which the client is entitled to receive." In her brief, the examiner notes that "arguably . . . a client must first make a request for payment or delivery of the funds or property before a violation of the rule can be claimed." She further notes that in every recent California case she reviewed a demand had in fact been made. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962; *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649; *Chang* v. *State Bar* (1989) 49 Cal.3d 114; *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50.)

[9b] In the instant case, there was never any finding of delay in payment after client demand as required for an 8-101(B)(4) violation. To the contrary, the referee found that respondent drafted a transmittal letter by which he would have immediately sent Gomez his check, but refrained from sending it solely because Gomez informed his secretary that he did not want to accept the settlement. (Decision p. 9.) When Gomez reaffirmed his desire to accept the settlement, respondent promptly sent him a cashier's check in the appropriate amount. These facts amply support the referee's finding that respondent did not violate rule 8-101(B)(1) because the client was promptly notified of the receipt of funds, or 8-101(B)(4) because the client's funds remained in his possession and were promptly paid on request.

[9c] The examiner does not argue that respondent's misconduct involves moral turpitude. No dishonesty was involved. We therefore also adopt the referee's finding of no section 6106 violation. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 321; see also *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 144 ["Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him"].)

C. Counts Five and Six.

The examiner argues that the referee ignored the weight of the testimony and documentary evidence on counts five and six and that the legal conclusions the referee reached from his factual findings were also in error. In both counts five and six the referee found respondent's testimony credible and the testimony of the examiner's witnesses not credible, thus believing the respondent on all contested issues.

In count five, the findings of no culpability under section 6068 (b) and rule 2-111(A)(2) appear proper. **[10]** Other than filing the lawsuit in the wrong court and not paying the sanctions, there is no evidence which might be pointed to in support of the argument that respondent failed to maintain the respect due to the courts (section 6068 (b)). The referee specifically found that respondent had no personal knowledge of the sanctions or the failure to pay those sanctions. In addition, there is no evidence respondent withdrew from employment or was discharged by the clients. In fact, respondent refiled the case in Riverside County in March 1985. Neither of the letters that were sent to respondent by the new attorney contacted by the clients indicated that the clients were discharging respondent. Rather, both letters were mere status inquiries. Although respondent did not reply to either of the two letters, he did

respond to the letter of the second attorney contacted by the clients.

The findings of no culpability with regard to the rule 6-101(A)(2) and former rule 6-101 violations are more problematic. The referee concluded that rule 6-101(A)(2) did not apply because that rule did not take effect until October 23, 1983, well after the dismissal of the case. That conclusion is in error. Regardless of when the case was dismissed, the attorney-client relationship extended beyond October 1983 and in fact, respondent filed a new lawsuit on the client's behalf in 1985. The dismissal without prejudice thus did not end the case or respondent's representation of the clients. Had respondent supervised his employees and monitored the case properly he would have learned of the dismissal in a timely fashion (indeed the dismissal might well not have occurred had respondent previously been properly supervising the file and his employee) and could have taken steps to seek earlier reinstatement of the lawsuit.

[11] We conclude that respondent's obligation to perform services competently must be construed to cover the entire period that he represented these clients, which would include a significant period of time after October 1983. **[12]** Given this conclusion, we next address the issue whether respondent's failure to supervise his associates' handling of the case on and after October 23, 1983, amounts to a failure to perform services competently in violation of rule 6-101(A)(2). We conclude that it did. The clients hired respondent to represent them in this legal matter. They were not informed that respondent had delegated the responsibilities to an associate. Thus, the clients rightly looked to respondent to pursue their legal claims diligently. *Moore* v. *State Bar* (1964) 62 Cal.2d 74, 81 is similar. There an attorney was disciplined for delegation of responsibility for handling a case to an associate without the client's knowledge and his subsequent failure to supervise the associate in the handling of the case. The associate abandoned the case which went to a default judgment against the client. The associate later disappeared. Unbeknownst to Moore, the associate turned out to have been under suspension by the Supreme Court throughout the entire period of time in question. The Supreme Court held Moore culpably negligent in failing to supervise the handling of the case more closely, stating, "An attorney who accepts employment necessarily accepts the responsibilities of his trust." (*Ibid.*)

Respondent herein had earlier failed to accept the responsibility for the trust placed in him by the clients when he failed to supervise his first associate who misfiled the case in the wrong venue, resulting in both a wasted effort to obtain a restraining order in the wrong court and sanctions. Thereafter, in 1982 he met with one of the clients to discuss the case without obtaining accurate information as to its current status. The clients were Spanish-speaking and neither associate was able to communicate with the clients in Spanish. (III R.T. p. 548.) Respondent testified that he expected that if it were necessary to talk to the clients, the associate would talk to him and he would communicate with the clients. (*Id.*)

[13] The referee noted that former rule 6-101, in effect from 1975 to October 1983, made an exception for good faith behavior and concluded that respondent had the requisite good faith. He therefore found that no violation of former rule 6-101 occurred in respondent's conduct during the time period covered by former rule 6-101. The referee's conclusion that respondent acted in good faith is based on his finding that respondent was kept in the dark by the associates either by design or negligence. (Decision p. 18.) We have insufficient basis for disturbing the referee's finding which rests on respondent's credibility as found by the referee. (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055.) However, the finding of good faith conduct prior to October 1983 does not relieve respondent from culpability under rule 6-101(A)(2) for his conduct after October 1983. During this period respondent again delegated the case without his client's knowledge to a new associate and again failed to monitor the case while the associate was assigned to it and after the associate left his employ in February of 1984. Respondent did not become aware of its 1982 dismissal without prejudice and subsequent inactive status until the client called him in 1985. This new period of prolonged neglect was simply inexcusable. We conclude based thereon that respondent is culpable of violating rule 6-101(A)(2) by repeatedly failing to perform services competently. (Cf. *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857-859; *Sanchez* v. *State Bar* (1976)

18 Cal.3d 280, 285 [interpreting gross carelessness and negligence in supervision as violation of the attorney's oath].)

In count six, respondent was found culpable of violating section 6068 (a) and 6103 for failing to respond to two letters sent to him by another attorney the clients contacted. **[14a]** The facts of this count preceded the enactment of Business and Professions Code section 6068 (m) and therefore could not have been charged as a violation thereof. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.)

Prior to 1989, the broad duty of section 6068 (a) to support the Constitution and laws of the State of California and the oath and duty provisions of section 6103 were routinely charged as statutes violated by respondents for alleged acts of misconduct, including failure to communicate. In 1989, the Supreme Court held that section 6103 defines no duties. (*Baker* v. *State Bar, supra*, 49 Cal.3d at p. 815.) We therefore reject culpability under section 6103 on all counts in which respondent was found culpable of statutory or rule violations (count two, five, six and seven).

The Supreme Court in *Baker* also disapproved of the blanket routine charge of a section 6068 (a) violation without specification of the basis therefor and refused to consider it applicable to the rule violations charged in that case. (See also *Sands* v. *State Bar, supra*, 49 Cal.3d at p. 931.) Since *Baker* was decided, the Court has sometimes permitted similar charges to stand in cases where the issue of the continued viability of section 6068 (a) and 6103 charges in matters covered by other statutes or rules was apparently not contested and where the outcome remained unaffected by the additional charges. (See, e.g., *Phillips* v. *State Bar* (1989) 49 Cal.3d 944; *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071.) **[15a]** However, more recently, in *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, the Court noted that "little, if any, purpose is served by duplicative allegations of misconduct" and explained that if "misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103." (*Id.* at p. 1060.)

[15b] The same analysis applies to statutory violations. Thus, there is no independent basis for finding respondent culpable of violating section 6068 (a) in count seven. Culpability of a section 6068 (i) violation for failure to cooperate is the basis for imposing discipline. For the same reason, we also reject section 6068 (a) as a separate basis for culpability in counts two and five. The proved charges of rule 8-101(A) and 6-101(A)(2) violations are the bases for imposing discipline. **[16]** We also note that if rule violations were automatically also violations of section 6068(a), the result would be that the limitation on the State Bar Board of Governors' authority to impose a maximum three-year suspension for any rule violations (Bus. & Prof. Code, § 6077) would be rendered meaningless. In such event, all rule violations could result in disbarment by virtue of constituting section 6068 (a) violations as well. We decline to place such illogical construction on the statutory scheme.

This leaves the issue of respondent's culpability of a section 6068 (a) violation in count six for failure to communicate. **[14b]** Since *Baker*, the Supreme Court has reaffirmed that "[f]ailure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline. [Citations.]" (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 903-904; see also *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1125; *Harris* v. *State Bar* (1990) 51 Cal.3d. 1082, 1088.) This reflects a longstanding common law duty recognized by Supreme Court cases prior to the adoption of Business and Professions Code section 6068 (m). (See, e.g., *Mepham* v. *State Bar* (1986) 42 Cal.3d 943, 949-950 [failure to communicate with clients periodically, standing alone, warrants discipline].) The Supreme Court has very recently affirmed the propriety of predicating findings of culpability for pre-1987 failure to communicate on a charge of a section 6068 (a) violation. (See *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 287-288.) For conduct occurring prior to the addition of section 6068 (m) it clearly is not duplicative nor otherwise inappropriate to charge a section 6068 (a) violation for failure to communicate. We therefore adopt the referee's conclusion that respondent violated section 6068 (a) by the misconduct charged in count six.

DISCIPLINE

The referee, based on his culpability findings and based on findings of extensive mitigating circumstances, recommended that respondent be suspended for three months, stayed, and placed on probation for five years. The examiner argues that the recommended level of discipline is insufficient and should be increased to a minimum of one year actual suspension and five years probation on the ground that respondent should be found to have engaged in serious misconduct, i.e., misappropriation of commingled funds and unauthorized endorsement of his client's name to a check. As indicated above, we have found no basis for disturbing the referee's findings in this regard.

The referee's findings with regard to mitigation are also supported by the record. Substantial mitigation exists in this case including respondent's emotional difficulties because of problems with his marriage and a suicidal wife. (Decision pp. 23-28.) The referee did take the standards into account and concluded that no actual suspension was warranted under the facts of the case because of the extensive mitigating circumstances.

[17] Respondent has a prior private reproval which originated in 1977. The referee concluded that the prior discipline was so remote in time to the current proceeding and involved an offense so minimal in severity that the imposition of greater discipline would be manifestly unjust. However, the prior discipline was only four years before the misconduct in count five (December 1981). While the private reproval involved a conflict of interest problem which the referee correctly found does not bear any substantive relationship to the misconduct which occurred in the present case, nevertheless, the fact that the misconduct in the present case arose only four years after the misconduct in the prior is of concern to us. Respondent, by the prior discipline, should have been more attentive to his ethical responsibilities.

Nevertheless, the referee specifically found that respondent posed no present threat to the public and a period of actual suspension would merely serve as unnecessary punishment. (Decision p. 29.) He further found that "a period of actual suspension would, however, harm respondent's current clients, many of whom are Spanish-speaking and have limited access to legal representation." (Decision p. 30.)

We must undertake our own independent assessment of appropriate discipline based on our own findings regarding culpability. As indicated above, we modify the referee's conclusions of law to include additional culpability in count five for failure to perform services competently. With due regard for the potential impact on respondent's current clients, we nonetheless conclude that respondent's misconduct warrants some period of actual suspension.

Respondent has been found culpable of commingling in violation of rule 8-101(A) pursuant to count two, repeated failure to perform services competently in violation of rule 6-101(A)(2) in count five, failure to communicate in violation of section 6068 (a) in count six and failure to cooperate in violation of section 6068 (i) in count seven. With respect to count two, the standards provide that commingling not resulting in willful misappropriation "shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances." (Standard 2.2(b).) With respect to counts five and six, standard 2.4(b) provides that culpability of willful failure to perform services or communication "shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client."

The standards thus permit a broad range of discipline for the offenses committed by respondent in counts five and six depending on the circumstances. In *Moore* v. *State Bar*, *supra*, 62 Cal.2d at p. 81, the Supreme Court adopted a recommendation of three months actual suspension of an attorney who turned a case over to an associate to handle without notifying the client, failed to supervise the associate and failed to make restitution to the client. In *Sanchez* v. *State Bar*, *supra*, 18 Cal.3d at p. 285, the Supreme Court also ordered three months suspension of an attorney for two counts in which he was charged and found culpable of gross negligence in failing to supervise employees and to establish an internal calendaring system resulting in the dismissal of two clients' cases. On the other hand, in *Vaughn* v. *State*

Bar, *supra*, 6 Cal.3d at pp. 858-859, the Supreme Court ordered public reproval of an attorney with no prior discipline for commingling[9] in violation of former rule 9 and negligent failure to supervise his office which wrongfully garnished the wages of a defendant to pay attorneys' fees already paid to his office. The discipline called for by standard 2.4(b) is thus in accord with the case law providing for a range of discipline for offenses of the type committed in counts five and six.

Violation of section 6068 (i) is covered by standard 2.6 which provides that violations governed thereby "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." Respondent's initial failure to cooperate followed by full cooperation at the hearing does not constitute a grave offense and does not appear to have materially impeded the proceeding below. The referee's recommendation of stayed suspension on this count in light of its lack of gravity and the extensive mitigation is consistent with the standards. His recommendation is also consistent with standard 1.7(a) which provides that greater discipline shall be imposed when the respondent has a prior record of discipline, here, a private reproval.

The referee's recommendation of no actual suspension is, of course, inconsistent with the three months minimum suspension for commingling called for by standard 2.2(a). **[18]** However, the standards are not to be rigidly applied (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222), and the Supreme Court has recently ordered a one-month actual suspension for an attorney who violated rule 8-101(A) who likewise produced extensive evidence in mitigation and demonstrated that she was no current threat to the public. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 333.) We conclude that in light of the circumstances presented on this record the referee appropriately exercised his judgment in declining to recommend a three-month suspension here. The question remains as to the propriety of no actual suspension in light of the misconduct of which respondent was found culpable and in light of his prior reproval.

The reason the standards call for the general imposition of a three-month minimum for commingling stems from the inherent danger posed by such violation. As the Supreme Court explained in *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 144, in similarly increasing the recommended discipline from public reproval to actual suspension for commingling and other misconduct: "Rule 9 [the predecessor of rule 8-101] . . . was "adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money.'" (*Id.*, quoting *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916-917; *Peck* v. *State Bar* (1932) 217 Cal. 47, 51.) Here, the actual danger proved minimal and occurred under extenuating circumstances. Nonetheless, as in *Silver*, commingling was not respondent's only violation of his professional responsibilities. Most troublesome from the standpoint of protection of the public and the integrity of the bar is respondent's prolonged abnegation of responsibility and inattention to the matters which are the subject of counts five and six which resulted in substantial harm to his clients. The referee's recommendation is lighter than in *Moore* and *Sanchez* which involved similar prolonged inattention to client matters with similarly drastic consequences to the clients' lawsuits.

We appreciate the referee's finding that respondent poses no current threat to the public and that he serves current clients with limited access to other counsel, but "maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession" are of equal concern. (Standard 1.3; see *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.)

Weighing all of these factors, we modify the recommendation of the referee below to provide for one year suspension, stayed on condition of 45 days

9. The Supreme Court also held that the record supported the board's finding that Vaughn appropriated client funds for his own use, but for purposes of discipline it determined that even if no misappropriation occurred, the recommended discipline was fully justified by the undisputed commingling. (*Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at pp. 858-859.)

actual suspension. We retain the referee's recommendation of five years probation with the stringent conditions set forth in the referee's decision and make one minor modification. **[19]** The referee included a requirement that respondent take and pass the Professional Responsibility Examination as a condition of probation. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891.) Ordinarily, that requirement is set forth as a separate requirement and not as a condition of probation and we make it so in this case.

We concur:

NORIAN, J.
STOVITZ, J.