

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**HENRY JAMES KOEHLER, IV**

A Member of the State Bar

[No. 84-O-16139]

Filed July 26, 1990; as modified, August 6, 1991

**SUMMARY**

A hearing judge found that respondent had improperly used his trust account as a personal account; failed to refund unearned cost advances promptly in two instances; failed to perform legal services competently in one matter; and committed an act of moral turpitude by concealing from the California Franchise Tax Board personal funds which he improperly maintained in a client trust account. Respondent was found not culpable on other charges. The hearing judge recommended that respondent be suspended from the practice of law for three years, stayed on conditions of five years probation, six months actual suspension, probation monitoring, trust account auditing, law office management and psychiatric treatment. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent requested review, challenging certain findings and contending that the recommended discipline was excessive. The review department adopted most of the hearing judge's findings, but deleted the finding of culpability regarding concealing funds from the Franchise Tax Board, because respondent had not been properly charged with such conduct. However, it used the same conduct as the basis for a finding in aggravation.

The review department adopted the hearing judge's discipline recommendation with the exception of the psychiatric treatment requirement, based on the court's holding that such a requirement should not be imposed absent expert testimony or other clear evidence of psychiatric problems.

**COUNSEL FOR PARTIES**

For Office of Trials: Teresa Schmid

For Respondent: David A. Clare

**HEADNOTES**

[1] **280.00 Rule 4-100(A) [former 8-101(A)]**

An attorney wilfully violated the rule against commingling by placing his personal funds into his client trust account and issuing checks from that account to pay business expenses, even though at times there were no trust funds in the improperly used client trust account.

- [2 a, b]    **106.20    Procedure—Pleadings—Notice of Charges**  
               **106.40    Procedure—Pleadings—Amendment**  
               **192        Due Process/Procedural Rights**  
               **221.00    State Bar Act—Section 6106**

Respondents have a right to reasonable notice of the charges against them and they may not be disciplined for a violation not alleged either in the original or a properly amended notice to show cause. Where the notice to show cause charged respondent with dishonest acts with regard to non-payment of tax monies withheld from an employee's wages, respondent could not, based on that notice, be held culpable of improperly concealing personal money from the tax authorities by putting it in a client trust account.

- [3]         **162.11    Proof—State Bar's Burden—Clear and Convincing**  
               **165        Adequacy of Hearing Decision**  
               **213.10    State Bar Act—Section 6068(a)**

Where hearing judge accepted respondent's testimony that respondent's prolonged failure to file personal income tax returns resulted from problems with respondent's accountants, and examiner did not object to hearing judge's determination that there was no clear and convincing evidence of misconduct in connection with respondent's failure to file tax returns, review department adopted judge's findings and conclusion of non-culpability.

- [4]         **191        Effect/Relationship of Other Proceedings**  
               **213.10    State Bar Act—Section 6068(a)**

An attorney may be found culpable of professional misconduct, based on charges of failing to obey state law by failing to file tax returns, even if the attorney has not been convicted of a crime based on that conduct.

- [5]         **280.00    Rule 4-100(A) [former 8-101(A)]**  
               **280.50    Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where respondent treated advanced costs as essentially part of a retainer package which could be used to satisfy fees if the retainer fee portion was used up, such treatment was contrary to the requirement that client funds, including advanced costs, be held in trust, and the failure to return the unused portion of such funds promptly when requested violated the rule requiring prompt payment of client funds on demand.

- [6]         **270.30    Rule 3-110(A) [former 6-101(A)(2)/(B)]**

The duty of an attorney to act competently requires the attorney to take timely positive, substantive action on a client's behalf, or, if appropriate, to withdraw from employment; if an impasse develops between the attorney and the client, the attorney cannot simply fail to take action.

- [7 a, b]    **148        Evidence—Witnesses**  
               **165        Adequacy of Hearing Decision**  
               **166        Independent Review of Record**  
               **280.50    Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where there is a conflict in the evidence, the hearing judge is in a particularly appropriate position to resolve it, and the Rules of Procedure require the review department to afford great weight to the hearing judge's findings in such matters, absent a good reason for reaching a different result. Where the hearing judge accepted respondent's client's testimony regarding the timing of a request for a refund of advanced costs, and explained why the client's testimony was given greater weight than respondent's contrary testimony, the review department adopted the hearing judge's findings and conclusions on that issue.

[8 a-c] **204.10 Culpability—Wilfulness Requirement**  
**273.00 Rule 3-300 [former 5-101]**

A transaction whereby a client signs a promissory note secured by the client's property to serve as security for the payment of an attorney's fees is subject to the provisions of the rule regulating business transactions with clients. However, where the failure to comply with the requirements of that rule resulted from the negligence of the attorney's employee, and the evidence clearly and convincingly established that the attorney had taken appropriate actions to guide office personnel as to proper steps to comply with the rule, the attorney was properly found not culpable of violating the rule.

[9] **162.90 Quantum of Proof—Miscellaneous**  
**204.90 Culpability—General Substantive Issues**

While attorneys have a duty to reasonably supervise their staffs, they cannot be held responsible for every event which takes place in their offices.

[10 a-e] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
**280.00 Rule 4-100(A) [former 8-101(A)]**  
**280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**  
**511 Aggravation—Prior Record—Found**  
**802.61 Standards—Appropriate Sanction—Most Severe Applicable**  
**824.10 Standards—Commingling/Trust Account—3 Months Minimum**  
**844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension**

Where respondent repeatedly misused his trust account as a personal account, twice failed to return unearned advanced costs promptly on request, and failed to perform services competently in one matter, the gravest aspect of the misconduct was that relating to respondent's violation of the rule governing trust accounts and client funds, and this misconduct warranted at least a three-month actual suspension. Where such misconduct was aggravated by prior discipline for neglect of four client matters, and aggravating circumstances predominated over mitigating circumstances, it was appropriate to recommend a three-year stayed suspension, six months actual suspension, and five years of monitored probation for the protection of the public.

[11] **801.30 Standards—Effect as Guidelines**

To consider the proper discipline, the review department looks first to the Standards for Attorney Sanctions for Professional Misconduct as guidelines.

[12] **511 Aggravation—Prior Record—Found**  
**802.21 Standards—Definitions—Prior Record**

Where respondent had received a reproof for four separate instances of misconduct which had occurred seven years prior to the instant misconduct, the reproof was not too remote in time and was properly considered an aggravating circumstance.

[13] **106.20 Procedure—Pleadings—Notice of Charges**  
**221.00 State Bar Act—Section 6106**  
**561 Aggravation—Uncharged Violations—Found**

Although it was improper to find respondent culpable of misconduct on the basis of his freely given evidence that he concealed funds from the Franchise Tax Board, because such conduct fell outside the proper scope of the charges, such evidence could be used to form the basis of an aggravating circumstance.

**[14] 172.50 Discipline—Psychological Treatment**

Where no clear or expert evidence was presented that respondent had a specific mental or other problem requiring psychiatric treatment, the review department declined to adopt the hearing judge's recommendation of such treatment as a condition of respondent's disciplinary probation.

**ADDITIONAL ANALYSIS****Culpability****Found**

- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

**Not Found**

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 273.05 Rule 3-300 (former 5-101)
- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

**Mitigation****Found**

- 715.10 Good Faith
- 735.10 Candor—Bar
- 765.10 Pro Bono Work

**Found but Discounted**

- 740.33 Good Character

**Declined to Find**

- 755.59 Prejudicial Delay

**Discipline**

- 1013.09 Stayed Suspension—3 Years
- 1015.04 Actual Suspension—6 Months
- 1017.11 Probation—5 Years

**Probation Conditions**

- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1025 Office Management
- 1026 Trust Account Auditing

**Other**

- 1091 Substantive Issues re Discipline—Proportionality

## OPINION

STOVITZ, J.

We review a recommendation of a hearing judge (“judge”) of the State Bar Court that respondent Henry J. Koehler, IV be suspended from the practice of law for three years and that the execution of suspension be stayed on conditions of a five-year probation, six months actual suspension, probation monitoring, trust account auditing, law office management and psychiatric treatment.

The judge’s recommendation rests on her findings and conclusions that in one matter, respondent improperly used his trust account as a personal account, that in two attorney-client matters, the respondent failed to promptly refund to clients, when requested, unearned cost advances; and, in one of those two matters, respondent failed to perform legal services competently. In another matter, the judge found that respondent committed an act of moral turpitude by concealing from the California Franchise Tax Board (“FTB”) personal funds which he improperly maintained in a client trust account.

The judge found respondent not culpable of several charges in several of the six matters. In aggravation, the judge considered respondent’s 1977 private reproof showing his failure to perform services in four client matters in 1974 and 1975.

Respondent requested our review contending that some of the judge’s findings are unsupported and the recommended discipline is excessive. Upon our independent review of the record, we adopt most of the judge’s findings but delete her conclusion that respondent committed moral turpitude by secreting funds and concealing them from the FTB because respondent was not properly charged with that conduct. Although we delete that conclusion, we find that respondent’s concealment of funds from the FTB is properly considered an aggravating circumstance in addition to his prior discipline and we find

that the record supports additional mitigating circumstances as well. Nevertheless, upon our balance of all relevant factors in this matter we adopt the judge’s suspension recommendation with the exception that we do not find sufficient basis to recommend that respondent be required to seek psychiatric treatment.

### I. RESPONDENT’S BACKGROUND AND PRIOR DISCIPLINE

Respondent was admitted to practice law in Ohio in 1965. After completing a court appointment as trustee of a large business bankruptcy, he spent two years in private practice with an Ohio law firm. During the second of those years, he was also an attorney with the law department of the City of Akron (similar to a city attorney) where he worked in governmental reform cases involving organized crime. (R.T. pp. 554, 764-766; 897-899.)

On January 1, 1967, respondent moved to California. (R.T. p. 899.) After doing non-legal work running a tax preparation service, he was admitted to practice law in California on June 2, 1972.<sup>1</sup> (R.T. p. 900; exh. 28.) In this state, his practice was mostly as a sole practitioner; although in 1972 and in the 1980’s, he took on one or more associate attorneys. (R.T. pp. 554-555, 767, 901.) From 1972 through 1981, respondent’s law practice was general. He did everything from “admiralty to zoning.” (R.T. pp. 556, 767, 901.)

Respondent had no record of discipline in Ohio where he served on a bar disciplinary committee (R.T. pp. 896-897); but in 1977, based on his stipulation, he was privately reproofed in California for four matters of client inattention arising between 1974 and 1975. (Exh. 36.)

In brief, the admitted facts leading to that private reproof show: 1) In a business incorporation matter, respondent willfully failed: to perform needed services to complete the incorporation, to turn over the

---

1. We correct the hearing judge’s finding that respondent was admitted to practice in this state on December 14, 1972. (Decision p. 2, line 9.)

client's papers to new counsel and to return the client's unearned fees. 2) After becoming attorney of record for the wife in a marriage dissolution action, he willfully failed to: perform all the services, communicate with her and advise her of the status of the matter and refund unearned fees. 3) In another marriage dissolution matter in which respondent represented the husband, he willfully failed: to serve the wife with a summons, to complete the services needed, to communicate with the client or to refund unearned fees. 4) After accepting \$100 to prepare wills for a couple, respondent willfully failed to perform the services for nine months (five months after learning of a State Bar complaint in the matter). He stipulated that he violated these Business and Professions Code sections: 6067-6068, 6103, 6106.<sup>2</sup> No Rule of Professional Conduct violations were charged. (Exh. 36.)

The parties' stipulation in that prior matter took into account mitigating circumstances that, in each of the matters, respondent performed partial but untimely services, he made "fair and reasonable restitution" to each client and at the time of the misconduct, he was operating under an emotional, psychological disability arising from his own traumatic marriage dissolution which overwhelmed him. (*Id.*)

In 1981, largely as a result of his own successful struggle for custody of the son of a former marriage, respondent altered his law practice dramatically from general to highly specialized, representing non-custodial parents in seeking joint or shared custody. (R.T. pp. 556, 903-904.) In 1982, respondent became a State Bar certified specialist in family law and also became very active in a national fathers' rights organization. Although respondent handled the early custody cases himself, by late 1982, others active in the same rights organization urged respondent to delegate his legal work to associates so that respondent could speak publicly and lobby legislatures around the country for change from a system heavily biased in favor of placing custody in one parent

(usually the female) to one which gave the child frequent and continuing custodial contact from both parents. Respondent did so and claimed credit for having brought legislative change to a number of states including California. (R.T. pp. 556-559; 905-907; see also Civ. Code, § 4600.)

## II. THE CHARGES, EVIDENCE AND FINDINGS IN THE PRESENT RECORD

The six counts charged in the first amended notice to show cause which we now review can be divided into two categories: 1) Trust Account Commingling/Tax Problem Matters; and 2) Attorney-Client Matters.

### A. Trust Account Commingling/Tax Problem Matters (Counts One, Two and Six)

#### *1. Commingling Matters—Counts One and Two*

Count one charged respondent with paying his legal secretary's salary in 1985 from his trust account as well as withholding her wages for payroll and unemployment taxes but not paying them. He was charged with violating rule 8-101(A)<sup>3</sup> and sections 6068 (a), 6103 and 6106. Count two charged that between May and December 1985, respondent deposited attorney fees into his client trust account, commingling them with client funds in that account. He was charged with violating rule 8-101(A) and sections 6068 (a) and 6103.

In a written stipulation of facts ("Stipulation"), filed prior to the start of trial, the parties stipulated to facts which established respondent's culpability in this count. Specifically, respondent stipulated that in July 1985, his law office paid his secretary her salary from his client trust account; and, in that same month, respondent kept his business funds in his client trust account. He also deposited his fees into his trust account and issued checks from that account for business purposes. Respondent placed all of his personal funds in his client trust account in about July

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

3. Unless noted otherwise, all references to "rules" are to the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

1985 to avoid a levy on his bank accounts by the FTB. Respondent also stipulated that from about May to December 1985, he deposited his attorney fees into his client trust account. (Stipulation pp. 2-3.)

The judge treated count two as subsumed within count one. In essence, she found that in October 1984, respondent's personal banker told him that a tax levy by the FTB was about to be executed on his bank accounts, he withdrew the funds and put them into a single account at another bank labelled a client trust account into which he deposited all monies, both client and personal funds. During part of 1984, respondent placed his own attorney fees in the account, issued checks from it for business expenses and placed personal funds in it for business expenses. At least once in 1985, respondent paid his secretary's salary from the trust account. (Decision p. 3.) The judge found no clear and convincing evidence that respondent failed to properly pay taxes on withheld wages. (*Id.* at p. 10.) However, the judge did find that respondent committed a dishonest act by concealing his funds from the FTB. (*Id.*) Based on her findings, she concluded that respondent violated section 6106 by concealing monies from the FTB and violated rule 8-101(A) by commingling his own money with that of clients. Following *Baker v. State Bar* (1989) 49 Cal.3d 804, 815, the judge concluded that respondent did not violate sections 6068 (a) or 6103. (Decision pp. 16-17.)

## 2. Count Six—Failure to File Tax Returns.

Count six charged respondent with having violated sections 6068 (a) and 6103 by willfully failing to pay his California personal income tax for the years 1974 through 1981 and 1984 as required by the Revenue and Taxation Code.

The State Bar presented no affirmative case on this count. Most of the evidence came from respondent's own testimony. Respondent freely admitted in his testimony that he did not file his state tax returns for the years 1974 through 1983. (R.T. p. 807.) He blamed this on negligence on his part, on inattention to the problem, combined with a problem of delegation to several different accountants over time, one of whom he was suing for negligence. (*Id.*) He was aware of the problem that he had not filed tax

returns for those years and was aware of dealings he had with the FTB over the years about taxes he owed. In 1985, he resolved his state tax obligations under an "amnesty" program. (See *post.*)

The judge found that respondent did not timely file his personal state tax returns for the charged period but concluded that there was no clear and convincing evidence to establish misconduct in respondent's failure to pay taxes. She dismissed this count and on review the examiner does not dispute the propriety of her action.

## B. Attorney-Client Matters (Counts Three, Four and Five)

### 1. Olson Matter—Count Three

Count three charged respondent with misconduct after he accepted a \$2,500 advance retainer and \$300 in advance costs from client Carl Olson who was seeking child custody. The notice charged violations of sections 6068 (a), 6103, and 6106 and rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2) and 8-101(B)(4).

In brief, Olson, president and CEO of a consulting engineering firm, hired respondent on April 26, 1984. (Exhs. 6, 9 and 10.) He told respondent he needed action quickly as he wished to have a change of custody of his children, who were due to accompany his former wife to Utah. (R.T. pp. 99-101.) According to respondent, Olson's case presented a "double-barreled problem" because Utah was not a signatory to the Uniform Child Custody Jurisdiction Act, was seen as a sanctuary for parents wanting to defeat custody change motions and only six months of Utah residence was needed to shift the custody forum state to Utah. (R.T. pp. 646-649.)

Respondent accepted a \$2,500 non-refundable retainer fee per his standard written agreement in such matters and also obtained \$300 in advance costs. (Stipulation p. 3.) Since respondent no longer personally handled cases, he assigned this case to an associate, Schulte, for follow-up work. According to respondent, Olson did not cooperate with Schulte, insisting that respondent personally handle the matter. According to Olson, respondent agreed to handle

the case personally and respondent testified he ultimately agreed to do so about four to five weeks after he accepted the employment and after about nine or ten calls from the Olsons demanding that he take action on the custody case. (R.T. pp. 120, 667-673.) About this same time, Olson discharged respondent since he had not performed any services. He then demanded a full refund. Respondent refused in view of his non-refundable retainer.

In August 1984, Olson was awarded \$2,800 in a non-binding, mandatory fee arbitration in which respondent participated. (Stipulation p. 3; exh. 17.) Fearful that the arbitrator's award would threaten respondent's non-refundable fee agreement which he used in almost every custody case, respondent engaged in extended litigation with Olson's attorney over jurisdictional points. This litigation resulted in court-ordered sanctions of \$6,100 against respondent. (Stipulation pp. 4-5.)

Meanwhile, in May of 1985, respondent had returned to Olson the \$300 in costs. Respondent testified that there was no issue remaining as to the costs. (R.T. pp. 676, 922.) In August 1989, he paid Olson over \$11,000 representing the \$2,500 fee plus all the sanctions and interest. (Stipulation p. 5.)

The judge concluded that respondent willfully violated rule 6-101(A)(2) by failing to perform services for which he was retained. She also found respondent culpable of willfully violating rule 8-101(B)(4) by failing to promptly return to Olson the \$300 he had advanced for costs. Respondent's violation of rule 6-101(A)(2) rested on the judge's findings that respondent failed either to withdraw from employment if he could not perform services promptly as Olson needed or to ensure that services were performed. The judge did not find that respondent violated rule 2-111(A)(2) and 2-111(A)(3) and also concluded that respondent did not violate sections 6068 (a), 6103 or 6106.

## 2. Gordon Matter—Count Four

Count four charged respondent with violations of sections 6068 (a) and 6103 and rules 2-111(A)(3) and 8-101(B)(4) in representing another client, Harry

Gordon, in a marriage dissolution and child custody matter.

In August 1983, Gordon, a high voltage transmission technician employed in Saudi Arabia, was on leave in the United States and represented by counsel in Visalia, California. He was frantic to resolve a divorce action filed against him and to obtain joint custody of his daughter. He learned of respondent through a "Joint Custody Association" as the best counsel there was for his type of case. He hired respondent, paid his \$2,500 non-refundable retainer fee and advanced \$300 in costs. (Stipulation p. 5.) Although Gordon read the non-refundability clause in the retainer agreement, he testified he did not understand it and he was at the time frantic about the custody problem. (R.T. pp. 20-26.) On the Friday respondent was retained, respondent planned to take action immediately by seeking an order to show cause hearing in Visalia that Monday. To that end, he dispatched an associate, who was spending the weekend in Las Vegas, to drive from there to Visalia. When the associate had driven at least half-way, Gordon agreed there would not be enough time to prepare for the hearing. That Monday, respondent and Gordon conferred with Gordon's earlier-hired attorney, Pamela Stone. It was agreed that respondent would do nothing at this time, but Stone would continue to represent him. According to Gordon, respondent agreed to refund his fee by transmitting it to Stone. Respondent disputed this.

Gordon testified that he contacted respondent the following spring (1984), again frantic because Stone had left private practice and his custody situation was still unresolved. Respondent's secretary told Gordon to make an appointment to meet respondent. Gordon spoke to his parents and concluded he had made a mistake by hiring respondent as he could have the same legal services performed in the Visalia area at a more reasonable price. Gordon decided not to have respondent do further work. Instead, he telephoned respondent's office and asked for his money back but received no refund. In January 1985, Gordon wrote to respondent requesting a refund. (R.T. pp. 32-37.) On February 1, 1985, respondent returned the \$300 in costs (Stipulation p. 6) but no part of the \$2,500 fee. According to respondent, he

stood ready to assist Gordon at a later time and did not recall receiving any request for refund until Gordon's January 1985 letter seeking refund of the \$2,500 fee, but not of the costs. Respondent pointed to the non-refundability of the retainer fee and testified he had expended 10.8 hours of time at his hourly rate of \$150 per hour for total fees earned of \$1,620 on Gordon's matter. (R.T. pp. 622-628.)

The judge concluded that respondent willfully violated rule 8-101(B)(4) by failing to promptly return to Gordon the \$300 he had advanced for costs. However, the judge concluded that respondent did not violate sections 6068 and 6103 nor did he refuse to promptly refund unearned fees in violation of rule 2-111(A)(3).

### 3. Fuller Matter—Count Five

Count five charged respondent with violations of sections 6068 (a) and 6103 and the violation of rule 5-101 (entering into an adverse interest or business transaction with a client without complying with all disclosure requirements). Finding that an employee was negligent, the judge dismissed the count and the examiner has not objected.

In April 1985, George Fuller hired respondent to represent him in a child custody matter. He was aware of respondent's fee and wanted to be able to work out an arrangement. After some time had passed and Fuller had received no billings, respondent told him that if he had property, he would have to arrange the fees by signing a note secured by Fuller's property. Fuller felt pressured but understood the consequences of the note. Respondent told Fuller that an associate or one of his employees would draft up the note. Fuller signed the note but testified that no one had given him the disclosures required by rule 5-101. (R.T. pp. 215-216, 262-263, 284-285.)

According to testimony of respondent and his associates, in 1982 or 1983, respondent devised a package of instructions to comply properly with rule

5-101 if a secured interest was to be taken on a client's property for legal fees. Neither respondent nor his associates could explain why respondent's instructions were not followed in Fuller's case.

From the evidence, the judge concluded that respondent did not willfully violate rule 5-101.

### III. OTHER EVIDENCE IN THE RECORD AND THE HEARING JUDGE'S RECOMMENDATION

As discussed above, the judge found the respondent culpable of some professional misconduct in four of the six counts.<sup>4</sup>

As aggravating circumstances, the judge considered respondent's prior private reproof, that the present record showed multiple acts of misconduct over a three-year period; and, based on the judge's observation of respondent during his testimony, he presented grave concerns that his attitude or his actions were somewhat arrogant and combative, reflecting an egocentric view of the world in which respondent rationalized his own position to the exclusion of objective consideration of needs and rights of others. (Decision p. 19.)

In mitigation, the judge considered only one circumstance, that as to count one, respondent dealt with the FTB in good faith and his failure to pay state taxes resulted from neglect and inattention and was not an intentional evasion.

In addition to the foregoing factors, respondent testified as to the following events. Respondent discontinued use of a trust account in December 1985. He started to advance all costs himself and he testified that if he is required to hold funds by court order, he would arrange for an escrow company to act as stakeholder. (R.T. pp. 638, 912-913, 927.) In 1985, he resolved his tax affairs, taking advantage of an amnesty to pay less than \$2,000 to settle tax lien claims about 60 times that amount. (R.T. pp. 914-915; exh. Z.)

4. Although the judge did not explicitly find respondent culpable in count two, she deemed the activities charged in count

two subsumed in count one and, as noted, respondent stipulated to his culpability of the misconduct charged in count two.

There is no dispute that respondent worked very hard in his practice. He worked and expected associates to work so many long hours, weekends and holidays that his associates generally left after about six months. Respondent had no time for any family life. He seemed almost consumed by the cause of the joint or shared custody movement and he kept active in that movement nationwide, taking very quick trips, often on "red-eye" flights so that he would be able to be in the office as much as possible. Respondent thought it very important to interview personally each client at the outset to insure that no "unacceptable" client's cause (a client too polemic or extreme in custody aims) would jeopardize the joint custody movement. (R.T. pp. 576-578, 815, 818-820.)

Respondent generally kept very good records of client matters and had sought legal advice from his current counsel, David Clare, in setting forth his non-refundable retainer agreement.

Respondent testified as to his civic and community service activities. For 18 years, he served as unpaid trustee of bonds issued by the City of Westminster (Orange County) and since 1980, he had served 12-15 times as judge pro tem in the Orange County courts. (R.T. pp. 909-912.) For the past six years he has coached his son's little league team and has served as a trustee of his son's school. (R.T. p. 903.)

In addition, three character witnesses testified in respondent's favor. Two were clients who had known respondent two and six years, respectively. A third witness was an Illinois attorney who had worked with respondent periodically and was in contact with him yearly. All witnesses praised respondent's moral character and integrity. All seemed generally familiar with the judge's findings of culpability, but that knowledge did not change their opinion of respondent's character. (R.T. pp. 876, 880-881, 890-892, 946-949.)

Finally, respondent cooperated extensively with the State Bar. He gave a two-day interview to a State Bar investigator, reviewing his files in detail with the investigator and he stipulated to many of the facts in these matters including to his culpability in counts one, two and three. (R.T. pp. 762-763, 926-927.)

In reaching her recommendation of discipline, the judge considered the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standards"]) applicable to each matter in which culpability was found, and then noted that the standards are not mandatory and that the Supreme Court has stated that each case must rest on its own facts as to appropriate discipline. (Decision pp. 20-22.) The judge concluded that from weighing and balancing the myriad factors present, significant discipline was called for. The judge concluded that respondent's prior discipline was not sufficient to make him aware of his duties as a lawyer and that respondent for many years had been cavalier in his ethical responsibility to clients and careless in adhering to the proper rules of attorney conduct. The judge noted that the examiner urged two years of actual suspension and that respondent urged that no actual suspension be recommended. The judge concluded that "as is frequently the case, the appropriate level [of discipline] lies in the mid-range." Further, she concluded that strict conditions of probation are warranted, over a long period of time, both to educate and sensitize respondent to his duties and to protect the public. Accordingly, as noted, she recommended a three-year suspension stayed on conditions of a five-year probation with six months actual suspension. (Decision pp. 22-23.)

#### IV. DISCUSSION

##### A. Culpability

We review the appropriate findings and conclusions in the same order in which we discussed the evidence concerning each of the respective counts.

*1. Non Attorney-Client Counts*

[1] With respect to counts one and two, we adopt the judge's findings of fact contained in sections III.B and III.C of her decision. (Decision pp. 2-4.)<sup>5</sup> Respondent's own stipulation established that he failed to operate his trust account properly by placing his personal funds in that account, during at least part of 1984, and issuing checks from that account for business (non-trust) expenses. During 1985, respondent also used his trust account improperly to pay the salary of one of the secretaries in his law office. The judge's findings and associated conclusion that respondent thereby willfully violated rule 8-101(A), which conclusion we also adopt (see decision p. 16, lines 20-24) are grounded beyond dispute in respondent's pretrial stipulation and his own trial testimony. (R.T. pp. 631, 637.) Before us, respondent concedes his improper trust account practices between October 1984 and December 1985. His misuse of his trust account as found by the judge was a clear violation of rule 8-101(A) (e.g., *Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777) even if at times he had no trust funds in this improperly used account. (*Hamilton v. State Bar* (1979) 23 Cal.3d 868, 876.)

Conversely, the evidence is cloudy on any impropriety of respondent as to payment of payroll taxes and the judge's findings of respondent's non-culpability in that regard are equally correct.

We also adopt the judge's conclusion (decision p. 17, lines 3-8) that respondent did not willfully violate sections 6068 (a) or 6103. (E.g., *Baker v. State Bar, supra*, 49 Cal.3d at p. 815.)

[2a] Finally, in count one, the judge concluded that respondent committed moral turpitude in violation of section 6106 by intentionally secreting his own funds in a client trust account in order to conceal them from the FTB. (Decision pp. 16-17.) Respondent objects to this conclusion as outside the charges, thus depriving him of fair notice of those charges.

We have concluded that respondent's point is well taken.

[2b] Respondent had a right to reasonable notice of the charges against him (Bus. & Prof. Code, § 6085) and he may not be disciplined for a violation not alleged either in the original or a properly amended notice to show cause. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35, and cases cited.) Nothing in the charges put respondent on notice that concealment from the FTB was the gist of an alleged violation. The record shows that both parties understood the section 6106 charge in count one to accuse respondent of dishonest acts with regard to non-payment of tax monies earlier withheld from an employee's wages. (R.T. pp. 781-785.) The judge found no support for any misconduct with regard to failing to pay over monies withheld from employees for payroll taxes and in view of the parties' understanding that this was the focus of the section 6106 charge, we cannot sustain culpability on a different charge. However, as we shall explain, *post*, under our discussion concerning the appropriate degree of discipline, *Edwards v. State Bar, supra*, 52 Cal.3d at p. 30 permits the use of evidence that respondent concealed funds from the FTB in aggravation.

[3] After an independent review of the record, we have determined to adopt the judge's findings and conclusion as to respondent's non-culpability in count six (failure to pay California personal income taxes for about a 10-year period). We note that the judge correctly found that respondent did not timely file these tax returns for about 10 years and our independent review of respondent's testimony showed that he was aware of his duties to file tax returns. Nevertheless, considering the lack of objection by the examiner, the necessary deference we accord resolution of issues of testimony by the judge (rule 453(a), Trans. Rules Proc. of State Bar) and respondent's testimony that he had a repeated problem with several different accountants with whom he had delegated his tax return preparation over a period of time, we conclude that the judge's

---

5. We regard the judge's reference to findings in section III.A as referring instead to section III.B (See decision p. 4, lines 1-2.)

determination that the evidence fell short of the clear and convincing standard required for culpability on the charge of failing to pay taxes due is adequately grounded.<sup>6</sup> [4 - see fn. 6]

## 2. *The Attorney-Client Counts.*

In count three, the Olson matter, respondent admits his culpability of willfully violating rule 8-101(B)(4) by failing to pay promptly to Olson as requested by him, Olson's \$300 unused advance for costs. Although respondent disputes the conclusion, we find clear and convincing evidence supporting the judge's conclusion that respondent willfully violated rule 6-101(A)(2).

[5] Respondent does not dispute his culpability of the rule 8-101(B)(4) violation and the evidence supporting the judge's conclusion is clear. Respondent never explained satisfactorily why he did not separate from his retainer fee and refund to Olson the unused cost amounts in a timely manner. Respondent's testimony shows that during the time he represented the clients involved in various family law proceedings, he treated costs as essentially part of the retainer "package" which could be used to satisfy fees if the retainer fee portion were used up. As he was preparing to appeal the arbitration award confirmation ruling won by Olson, he realized otherwise. (R.T. pp. 922-923.) Manifestly, respondent's earlier treatment of advance costs was contrary to the explicit terms of rule 8-101(A).

The judge expressly dismissed the charges of violation of oath and duties, committing an act of moral turpitude and violating rules 2-111(A)(2) and

2-111(A)(3), citing to her discussion in subsection IV.C of her decision. Her actions are supported by the record and applicable law.

[6] Respondent disputes strongly the judge's conclusion that he violated rule 6-101(A)(2). He contends that he performed fully the terms of his retainer agreement which allowed him to associate others to represent Olson, that he promptly assigned the case to an associate but that Olson refused to cooperate with respondent's associate. Respondent's argument is not well taken. As soon as respondent was retained, he knew that Olson's child custody matter was time sensitive. He accepted a measurable non-refundable advance retainer fee to make his time available and he did tell Olson that an associate would work on the case. When this was unacceptable to Olson, respondent allowed a four- to five-week impasse with Olson to develop in this time sensitive case. Respondent's own retainer agreement and duties as an attorney to act competently required him either to take timely positive, substantive action on Olson's behalf to perform legal services required by the custody matter; or if appropriate to withdraw from legal employment. (See rule 2-111(A).) Respondent could not simply fail to take action because an impasse had developed with Olson. (See *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1084.)

To summarize, we adopt all of the findings of fact of the judge in count three (decision pp. 4-5) with the following two changes:

1) The first line of finding D.1 (decision p. 4, line 4) we change to read: "On April 26, 1984, respondent was hired by Carl Olson . . ."; and

---

6. [4] Since the judge's findings and conclusion on count six were favorable to respondent, he has understandably not chosen to brief the matter before us, although our review of the record is independent. Likewise, the examiner does not dispute the judge's findings and conclusion with regard to count six. Although we adopt those findings and conclusions, we do not agree with respondent's position at trial that there could be no basis for culpability on this charge because respondent was not convicted of the crime of willfully failing to file tax returns or pay taxes. We agree with the hearing judge's determination that respondent's position at trial on this issue was not meritorious. (See *In re Rohan* (1978) 21 Cal.3d 195, 201 in which the Court noted that an attorney's conviction of willful failure

to file federal income tax returns could violate section 6068 (a) (duty to support the laws).) This was the identical subdivision of section 6068 of which respondent was charged. Moreover, see our recent decision in *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487, in which we pointed out that an attorney's breach of a duty stated elsewhere in a statute could constitute a violation of section 6068 (a). Recently, the Supreme Court of New Jersey also determined that a member of the bar of that state could be found culpable in an original disciplinary proceeding for willfully failing to file tax returns although not convicted of such a criminal offense. (See *In re Garcia* (1990) 119 N.J. 86 [574 A.2d 394].)

2) In finding D.7 on page 5, line 18 of the decision, we add the word “not” just prior to the word “performing” to remedy what appears to be a typographical error.

From these findings we conclude that respondent willfully violated rule 8-101(B)(4) by failing to return to Olson his unused cost advance as requested by him and failing to return that advance when withdrawing from employment. We also conclude that respondent willfully violated rule 6-101(A)(2).<sup>7</sup>

[7a] In the Gordon matter, respondent disputes the sole basis for the judge’s determination of respondent’s culpability. Before us he advances his version of the evidence that Gordon did not request a refund of the \$300 in advance costs until early 1985 and respondent returned it almost immediately upon Gordon’s request. In this matter, we adopt the judge’s findings and conclusions. The judge received contrary testimony from Gordon that many months before February 1985, he telephoned respondent and requested the return of his funds but did not receive them until February 1985. Since there was a conflict in the evidence, the judge was in a particularly appropriate position to resolve that conflict. (See *Segal v. State Bar*, *supra*, 44 Cal.3d at pp. 1084-1085.) She chose to do so by crediting Gordon’s testimony over that of respondent. As noted, our rules on review require that we give great weight to the judge’s findings in such a matter and we are given no good reason to reach a different result. Coincidentally, respondent returned Gordon’s \$300 in costs simultaneously in time with his return of Olson’s cost advance. Both occurred after respondent was made aware by another attorney that cost advances cannot be considered an undistinguished part of the advance retainer fees.

[7b] Moreover, the judge explained her assessment of the testimony and why she gave greater

weight to Gordon’s testimony than respondent’s. Under the circumstances, we accept and adopt the judge’s findings in the Gordon matter (decision pp. 6-8) as well as her conclusions flowing from that matter on page 18 of her decision. We agree with the judge that the evidence does not show violations of rule 2-111(A)(3) or of section 6068 (a) or 6103.

[8a] With regard to count five, the Fuller matter, in which respondent was charged with failing to disclose to Fuller that which is required by rule 5-101, when receiving from Fuller a security interest in property, we agree with the judge’s findings that clear and convincing evidence was not presented to establish respondent’s culpability.

[8b] At the outset, we observe that the transaction which respondent entered into with Fuller was subject to the provisions of rule 5-101. (*Brockway v. State Bar* (1991) 53 Cal.3d 51, 64.) [9] The Supreme Court has also observed that an attorney cannot be held responsible for every event which takes place in a lawyer’s office although the attorney does have a duty to reasonably supervise his staff. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857.) [8c] In discussing the evidence presented, the judge noted that respondent proved clearly and convincingly that he had taken appropriate actions to guide office personnel as to proper steps to comply with rule 5-101. The judge concluded that the negligence of an employee caused proper procedures not to be followed in Fuller’s case. Given the convincing nature of respondent’s testimony on this point, we agree with the judge and we adopt her findings and conclusion of no culpability—a result undisputed by the examiner.

#### B. Degree of Discipline

[10a] We have concluded that respondent is culpable of violating rule 8-101(A) by repeatedly

---

7. The notice to show cause charged and the stipulation of facts and the hearing judge’s findings recited that respondent had been sanctioned, respectively, by the superior court and the court of appeal for his frivolous attack on Olson’s order confirming an arbitration award in Olson’s favor. Close examination of the charges indicates that they are more in the nature of factual recitals and not of substantive allegations of

misconduct that respondent engaged in frivolous or bad faith actions and section 6068 (c) and (g) violations were not alleged. (Contrast *Sorenson v. State Bar* (1991) 52 Cal.3d 1036.) The judge’s decision does not find unethical respondent’s actions in litigating Olson’s award and the examiner does not seek review in that regard.

misusing his trust account in 1984 and 1985, that he willfully violated rule 8-101(B)(4) in two matters (Olson and Gordon), and that he failed to perform services competently in Olson's time sensitive matter. (Rule 6-101(A)(2).)

[11] To consider the proper discipline we look first to the standards as guidelines. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.)

Standard 2.2(b) provides for at least a three-month actual suspension irrespective of mitigating circumstances for respondent's violations of rule 8-101. Respondent's violation of rule 6-101(A)(2) in the Olson matter warrants either reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client. Respondent's violations of rule 8-101 were repeated and showed either his lack of understanding of the rule or his unwillingness to comply with its dictates. It is difficult to assess how much harm respondent's inaction in the Olson matter caused Olson as Olson apparently let many months go by before authorizing any further legal action to be taken by his new counsel.

[10b] The standards guide that if two or more acts of misconduct are found in a single disciplinary matter each with different sanctions, the sanction imposed shall be the more severe of those applicable. (Std. 1.6.) Clearly, the gravest aspect of respondent's misconduct is his failure to abide by the terms of rule 8-101.

[10c] Frequently our Supreme Court has described the important function of rule 8-101 in serving to protect client's funds and property from the more severe consequences which could accidentally or intentionally result if trust property is attached, lost or misappropriated. (See *Arm v. State Bar, supra* 50 Cal.3d at pp. 776-777, and cases cited.) Considering respondent's disregard of his duties, we believe that it is appropriate in this case to follow standard 2.2(b) and recommend at least a three-month actual suspension irrespective of mitigating circumstances.

We must also consider the balance of aggravating and mitigating circumstances to determine whether a longer suspension is appropriate.

[12] We agree with the judge that respondent's prior private reproof is an aggravating circumstance. Although the reproof was imposed fourteen years ago, it was imposed but seven years prior to his commission of misconduct in the present matter. Resting on four separate instances of misconduct, respondent's prior record manifestly showed his failure to abide by his duties of proper client representation in 1974 and 1975. Under the circumstances, that reproof was not too remote in time and was properly considered to be an aggravating circumstance. (Compare *Grim v. State Bar* (1991) 53 Cal.3d 21, 32; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 266.)

[13] We also consider an aggravating circumstance the evidence freely given by respondent that he was seeking to conceal funds from the FTB. Although we determined that such matter was outside the proper scope of charges and could not form the basis of culpability (see *ante*), such evidence can form the basis of an aggravating circumstance. (See *Edwards v. State Bar, supra*, 52 Cal.3d at p. 35.)

As the only mitigating circumstance, the judge found that with regard to respondent's payment of taxes, he was acting in good faith. We agree with respondent that additional mitigating circumstances have been established. In particular respondent's candor and cooperation with the State Bar and his performance of a variety of pro bono and community services deserve recognition. (See *Porter v. State Bar* (1990) 52 Cal.3d 518, 529; *In re Larkin* (1989) 48 Cal.3d 236, 243, 244.) We also consider respondent's favorable character evidence but we note that it was not extensive.

Citing delay in initiating formal proceedings in this case, respondent urges it as a mitigating circumstance. We disagree. We see no evidence of any delay which could be considered mitigating. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 774.)

While we find no recent decision of the Supreme Court presenting very similar factors to the present, recent cases less serious than the present show that the discipline we recommend here is fairly proportional. In *Sternlieb v. State Bar* (1990) 52 Cal.3d 317,

the Court suspended the attorney for one year, stayed on conditions including a 30-day actual suspension. Sternlieb, who had been admitted for nine years prior to her misconduct had no prior record of discipline and was found culpable of misappropriation involving only a violation of rule 8-101. Extremely favorable character testimony was presented including from judges and opposing counsel in the case underlying her misconduct.

In our decision of *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, we recommended a five-year suspension stayed on conditions including a 45-day suspension. We found the attorney culpable of commingling of trust and personal funds in one count, repeated failure to perform services competently in another count, failure to communicate with his client in a third count and failure to cooperate with the State Bar in a fourth count. Whitehead had a prior private reproof but presented extensive mitigation which had led the hearing referee to recommend no actual suspension.

The only Supreme Court case cited by respondent is the seven-year-old case of *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327. By a five-to-two vote the Supreme Court publicly reproofed Fitzsimmons for violating the predecessor to rule 8-101 in failing to keep proper records of trust funds in one matter and for failing to obtain written direction from his client in handling trust funds. He had been publicly reproofed seven years earlier for violating a court order in one matter directing he repay funds he had taken without court approval. The two dissenting justices would have imposed the 60-day actual suspension and three-year stayed suspension recommended by the State Bar.

[10d] We believe that actual suspension and extended terms of monitored probation are needed for adequate public protection in light of respondent's earlier discipline in four client matters followed by his violation of more serious provisions of rule 8-101 in three additional matters.

[10e] Balancing all relevant factors, we believe that aggravating circumstances predominate over mitigating circumstances and we therefore determine that the judge's disciplinary recommendation

of three years suspension, stayed, on conditions of a five-year probation with six months actual suspension is well grounded in the standards, proportional to recent decisions and fairly reflective of the balance of mitigating and aggravating circumstances present in this record. With the exception of the requirement that respondent seek psychiatric treatment, we adopt the judge's disciplinary recommendation.

[14] The judge apparently deemed psychiatric treatment an appropriate condition of probation because of the troublesome attitude which respondent displayed to her at the hearing concerning his justification for his actions. Since respondent's attitude was undoubtedly mirrored in his demeanor at the hearing which the judge was in the better position to assess than are we with only a cold record to review, we are reluctant to disagree with her. Nevertheless, to support a condition of psychiatric treatment in a criminal case, expert or other clear evidence of psychiatric problems is required. (See *In re Bushman* (1970) 1 Cal.3d 767, 777, disapproved on other grounds, *People v. Lent* (1975) 15 Cal.3d 481, 486.) While this proceeding is not a criminal one, we believe the foregoing safeguard is appropriate in disciplinary proceedings. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 228-230.) Here, no clear or expert evidence was presented that respondent had a specific mental or other problem requiring psychiatric treatment and we therefore modify the judge's recommendation to eliminate such treatment requirement.

## V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court of California that respondent be suspended from the practice of law in this state for a period of three (3) years, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the following conditions:

- 1) That for the first six (6) months of the period of probation, respondent be suspended from the practice of law in this state; and
- 2) That respondent comply with conditions 2 through 4 and 6 through 12 of the conditions of

probation recommended by the judge in her decision on pages 23-28.

We also recommend that the Supreme Court order that respondent take and pass the California Professional Responsibility Examination within one (1) year from the effective date of the Supreme Court's order.

Finally, we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and that he comply with subparts (a) and (c) of that rule within 30 and 40 days, respectively, from the effective date of the Supreme Court's order.

We concur:

PEARLMAN, P.J.  
NORIAN, J.