

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**JOHN NICHOLAS BACH**

A Member of the State Bar

[No. 88-O-10872]

Filed August 8, 1991

**SUMMARY**

Respondent was found culpable by the hearing department of the former volunteer State Bar Court of two counts of client abandonment. The referee dismissed one client-related count in its entirety. He also found respondent not culpable of failing to cooperate with the State Bar, despite respondent's failure to reply to the investigator's letters, because respondent did participate in the disciplinary proceeding. On the counts where culpability was found, the referee declined to find culpability of prejudicial withdrawal in the absence of an intent to withdraw. The referee recommended that respondent be suspended for five years, stayed, with probation for five years, on conditions including actual suspension for three years and until restitution was made to clients. (Hon. Denver C. Peckinpah (retired), Hearing Referee.)

Respondent requested review, contending that the referee's procedural and evidentiary rulings deprived him of due process and equal protection and that there was insufficient evidence to sustain culpability on the violations found by the referee.

The review department made a number of modifications to the referee's decision. It found respondent culpable of additional misconduct, holding that prejudicial withdrawal may occur even in the absence of an intent to withdraw, and that cooperation in the formal proceeding is not a defense to failure to cooperate in the investigation. However, the referee's recommended discipline was found to be excessive. The review department recommended that respondent be suspended for two years, stayed, with probation for two years and actual suspension for nine months and until restitution was made.

**COUNSEL FOR PARTIES**

For Office of Trials: Gregory B. Sloan

For Respondent: John N. Bach, in pro. per.

## HEADNOTES

- [1 a, b] **135 Procedure—Rules of Procedure**  
**162.20 Proof—Respondent's Burden**  
**166 Independent Review of Record**

Where the testimony of the State Bar's witnesses was in conflict with that of respondent, and the referee resolved those conflicts against respondent, respondent could not show error in the findings merely by repeating his own version of the facts, and respondent's generalized challenge to the complainant's credibility was not sufficient to persuade the review department to reject the referee's findings. In the absence of a strong showing that the referee was mistaken, the review department is required to defer to the referee's determinations as to credibility, and it is reluctant to deviate from the referee's credibility-based findings in the absence of a specific showing that they were in error. (Rule 453, Trans. Rules Proc. of State Bar.)

- [2] **274.00 Rule 3-400 [former 6-102]**

It was not improper for an attorney to request written confirmation from a client that the attorney had been discharged as counsel. Such a letter was not a release from liability of the type prohibited by the Rules of Professional Conduct.

- [3] **139 Procedure—Miscellaneous**  
**191 Effect/Relationship of Other Proceedings**  
**194 Statutes Outside State Bar Act**

Where respondent did not agree in writing that statutory attorney-client fee arbitration would be binding, arbitration award was not binding even though it recited that it was. However, the award became binding when respondent failed to seek a post-arbitration trial within the statutory time limit.

- [4 a-c] **101 Procedure—Jurisdiction**  
**171 Discipline—Restitution**  
**191 Effect/Relationship of Other Proceedings**

The State Bar Court, as an arm of the Supreme Court in attorney disciplinary matters, does not sit as a collection board for clients aggrieved over fee matters, nor is its jurisdiction derivative of fee arbitration proceedings. The administration of attorney discipline, including such remedial orders as restitution, is independent of any remedy that an aggrieved client may pursue. In a disciplinary proceeding to protect the public, the alleged flaws in a fee arbitration proceeding and resulting judgment have little relevance. Accordingly, the State Bar Court has jurisdiction over a disciplinary matter even though there has already been a factually related fee arbitration.

- [5 a, b] **191 Effect/Relationship of Other Proceedings**  
**277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

A finding of failure to return the unearned portion of an advanced fee upon termination of employment was legally independent of the validity of a related fee arbitration award. Where respondent took an advance fee, failed to complete the work, was discharged by the client, agreed to return the unearned portion of the fee, and then failed to do so, respondent was culpable of misconduct notwithstanding alleged defects in a subsequent fee arbitration proceeding.

- [6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

Even if respondent's advanced fee originally was a non-refundable "true retainer," respondent's subsequent oral agreement to refund the unearned balance modified the retainer agreement to make the unearned portion of the fee refundable.

- [7 a, b]    **164      Proof of Intent**  
              **204.20    Culpability—Intent Requirement**  
              **277.20    Rule 3-700(A)(2) [former 2-111(A)(2)]**  
              The rule regarding prejudicial withdrawal from representation applies when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel. Whether or not an attorney’s ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. Where time is of the essence, failure to provide services constitutes an effective withdrawal even if the attorney’s period of inaction is relatively brief.
- [8]            **214.30    State Bar Act—Section 6068(m)**  
              **270.30    Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
              Where client needed immediate action, and respondent recommended that client seek a temporary restraining order, respondent’s failure to bring TRO application to hearing for over two months constituted reckless incompetence, and respondent’s inaccessibility to the client, even though not as severe or protracted as in many disciplinary cases, violated the statutory duty to communicate with clients.
- [9]            **164      Proof of Intent**  
              **204.20    Culpability—Intent Requirement**  
              **277.20    Rule 3-700(A)(2) [former 2-111(A)(2)]**  
              An attorney’s total cessation of services to a client for a period of two years, standing alone, and even though unintentional, was clear and convincing evidence that the attorney effectively withdrew from employment without taking steps to protect the client’s interests.
- [10]          **270.30    Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
              Failure to perform competently, with reckless disregard, was demonstrated by respondent’s failure to take any steps whatsoever to bring a client’s case to trial, or to pursue it at all, prior to the expiration of the five-year statute, causing the client to lose a cause of action irrevocably.
- [11]          **204.90    Culpability—General Substantive Issues**  
              **214.30    State Bar Act—Section 6068(m)**  
              Where respondent failed to inform a client that the five-year statute was about to run on the client’s case, respondent violated the statutory duty to keep clients reasonably informed of significant developments in their cases; the fact that the failure to communicate resulted from the loss of the client’s file did not render respondent any less culpable.
- [12 a, b]    **213.90    State Bar Act—Section 6068(i)**  
              The statute requiring cooperation in State Bar disciplinary proceedings contemplates that attorneys may be found culpable of violating that duty if they fail to cooperate either in the investigation or in the formal proceedings. An attorney may be found culpable of violating the statute by failing to respond to a State Bar investigator’s letter, even if the attorney subsequently appears and fully participates in the formal proceeding.
- [13]          **120      Procedure—Conduct of Trial**  
              **144      Evidence—Self-Incrimination**  
              **193      Constitutional Issues**  
              In a disciplinary action, an attorney does not have a privilege not to be called to testify, but may refuse to answer specific questions on the grounds that answering the question may subject the attorney to criminal prosecution.

- [14]      143      **Evidence—Privileges**  
             144      **Evidence—Self-Incrimination**  
             193      **Constitutional Issues**  
             213.90   **State Bar Act—Section 6068(i)**  
 If an attorney wishes to invoke statutory or constitutional privileges which the attorney contends make a substantive response to a State Bar investigator’s letter unnecessary, the attorney must nevertheless respond to the investigator’s letter, if only to state that the attorney is claiming a privilege; otherwise, the attorney not only violates the statutory duty to cooperate, but also risks waiving the claimed privilege.
- [15 a, b] 101      **Procedure—Jurisdiction**  
             102.20   **Procedure—Improper Prosecutorial Conduct—Delay**  
             105      **Procedure—Service of Process**  
             106.10   **Procedure—Pleadings—Sufficiency**  
             119      **Procedure—Other Pretrial Matters**  
 Respondent’s fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion.
- [16]      105      **Procedure—Service of Process**  
 Personal service is not required in State Bar proceedings, and actual notice is not an element of proper service.
- [17]      102.20   **Procedure—Improper Prosecutorial Conduct—Delay**  
             139      **Procedure—Miscellaneous**  
 There is no statute of limitations in attorney disciplinary proceedings.
- [18]      101      **Procedure—Jurisdiction**  
 State Bar Court jurisdiction was confirmed by evidence establishing the sole requisite fact, i.e., respondent’s membership in the State Bar.
- [19]      103      **Procedure—Disqualification/Bias of Judge**  
 Where record contained numerous evidentiary rulings favorable to respondent, and showed courteous treatment of respondent by the referee; referee’s evenhandedness was also shown by dismissal of two out of four charged counts in their entirety, and referee’s handling of hearing was in accord with proper judicial temperament and demeanor, record did not show evidence of bias or prejudice.
- [20 a, b] 120      **Procedure—Conduct of Trial**  
             139      **Procedure—Miscellaneous**  
             167      **Abuse of Discretion**  
             194      **Statutes Outside State Bar Act**  
 Even if the procedure for a motion for judgment at the close of the moving party’s case, as set forth in Code of Civil Procedure section 631.8, does apply in State Bar proceedings, it was not error for the hearing referee to take respondent’s motion under submission and rule on it after respondent had presented the defense case, and the motion was impliedly ruled on when the referee made initial rulings as to culpability.

- [21]      **135      Procedure—Rules of Procedure**  
            **139      Procedure—Miscellaneous**  
            **194      Statutes Outside State Bar Act**  
In general, State Bar disciplinary proceedings are governed exclusively by the State Bar's rules of procedure, and the provisions of the Code of Civil Procedure do not apply unless expressly incorporated by reference.
- [22]      **102.90   Procedure—Improper Prosecutorial Conduct—Other**  
            **162.20   Quantum of Proof—Miscellaneous**  
            **193      Constitutional Issues**  
It is not clear that the doctrine of selective prosecution applies in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. But even if it does, there are several threshold procedural and evidentiary hurdles to be overcome before a case of selective prosecution can be established, and where respondent did not even attempt to make the requisite showing, respondent's claim of selective prosecution was without merit.
- [23]      **146      Evidence—Judicial Notice**  
            **802.21   Standards—Definitions—Prior Record**  
Review department took judicial notice that respondent's prior discipline became final after subsequent matter was submitted on review.
- [24 a, b] **513.10   Aggravation—Prior Record—Found but Discounted**  
            **805.10   Standards—Effect of Prior Discipline**  
Although respondent's prior misconduct was similar to the misconduct in a second matter, the aggravating force of respondent's prior disciplinary record was somewhat diluted where the misconduct in the second matter occurred before the notice to show cause in the prior matter was served, because it did not reflect a failure on respondent's part to learn from the prior misconduct. Nevertheless, the prior was a factor in aggravation, and it was appropriate for the discipline in the second matter to be greater than in the previous matter.
- [25]      **582.10   Aggravation—Harm to Client—Found**  
Even where respondent's client could not reasonably have expected to receive a substantial award of damages had the client's case settled or gone to trial, where respondent's conduct deprived the client of the ability to receive any damages at all, this harm was significant and was an aggravating factor.
- [26]      **521      Aggravation—Multiple Acts—Found**  
            **535.10   Aggravation—Pattern—Declined to Find**  
While two matters of misconduct might not be considered multiple acts, the addition of a finding of culpability of another count of misconduct made a finding of multiple acts appropriate; however, the three instances of misconduct did not amount to a pattern or practice even when coupled with the additional misconduct involved in respondent's prior disciplinary matter.
- [27]      **591      Aggravation—Indifference—Found**  
            **621      Aggravation—Lack of Remorse—Found**  
Respondent's use of specious and unsupported arguments in an attempt to evade culpability in his disciplinary matter revealed respondent's lack of appreciation both for his misconduct and for his obligations as an attorney, and his persistent lack of insight into the deficiencies of his professional behavior, and constituted an independent aggravating factor.

- [28] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
**795 Mitigation—Other—Declined to Find**  
 An attorney's being busy with other personal and client-related matters at the time of the attorney's misconduct does not constitute mitigation; if the attorney is too busy to handle a matter competently and complete the necessary work within an appropriate time frame, the attorney should not take on the case.
- [29 a, b] **765.31 Mitigation—Pro Bono Work—Found but Discounted**  
 Respondent's having performed a substantial amount of pro bono work for indigents and minorities, at considerable personal sacrifice due to hostility engendered on the part of local press and elected officials, constituted legitimate mitigation. However, where respondent's testimony was the only evidence on the subject, and meaning of "substantial" was not clear from record, respondent's pro bono record could not be given as much weight in mitigation as in some other cases.
- [30] **745.51 Mitigation—Remorse/Restitution—Declined to Find**  
 An offer of restitution made in response to litigation by the client, and long after the initiation of State Bar proceedings, does not constitute proper mitigation.
- [31 a, b] **844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension**  
 Where respondent abandoned two clients; had been previously disciplined for a third abandonment occurring at roughly the same time; failed to return the unearned portion of an advance fee; failed to cooperate with the State Bar; harmed clients; and evidenced a lack of understanding of professional obligations, but had a record of pro bono work and a long discipline-free record prior to the first misconduct, two years stayed suspension, two years probation, and actual suspension for nine months were necessary to ensure the protection of the public and the maintenance of high professional standards.
- [32] **171 Discipline—Restitution**  
**191 Effect/Relationship of Other Proceedings**  
 Where restitution was appropriate, but record reflected that client might have filed Client Security Fund claim, review department recommended that respondent be ordered to pay restitution either to client, or to Client Security Fund if client's claim had been paid.
- [33] **171 Discipline—Restitution**  
 It is inappropriate to use restitution as a means of awarding unliquidated tort damages for malpractice.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

- 213.91 Section 6068(i)
- 214.31 Section 6068(m)
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]

##### Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2

**Mitigation**

**Found but Discounted**

725.32 Disability/Illness

**Discipline**

1013.08 Stayed Suspension—2 Years

1015.05 Actual Suspension—9 Months

1017.08 Probation—2 Years

**Probation Conditions**

1021 Restitution

1030 Standard 1.4(c)(ii)

**Other**

1091 Substantive Issues re Discipline—Proportionality

1092 Substantive Issues re Discipline—Excessiveness

## OPINION

NORIAN, J.

Respondent, John Nicholas Bach, was admitted to the practice of law in California in 1964, and has previously been disciplined for misconduct. In this matter, the notice to show cause charged respondent with four counts of misconduct. The hearing referee, a retired superior court judge, found respondent culpable of two counts of client abandonment (counts two and three), and dismissed the remaining two counts (counts one and four). The referee recommended that respondent be suspended for five years, stayed, with probation for five years, on conditions including actual suspension for three years and until restitution is made to the clients involved in counts two and three.

Respondent requested review, arguing that: (1) the referee's procedural and evidentiary rulings deprived him of due process and equal protection; (2) the evidence was insufficient to sustain a culpability finding on count two; (3) the evidence was insufficient to sustain a culpability finding on count three, and (4) the referee failed to consider mitigating circumstances adequately in recommending discipline. Counsel for the State Bar (the examiner), though he did not request review, asks that the review department reverse the dismissal of count four, and find respondent culpable of failing to cooperate with the State Bar's investigation of his misconduct.<sup>1</sup>

Upon our independent review of the record, we make a number of modifications to the referee's decision as to the facts and findings in aggravation. We also change the recommended discipline. Although we hold respondent culpable of additional misconduct not found by the referee, we find the referee's recommended discipline excessive. We recommend that respondent be suspended for two years, stayed, with probation for two years, on con-

ditions including actual suspension for the first nine months of the probationary period and until restitution is made to respondent's client Dunsmoor or to the Client Security Fund of the State Bar.

## DISCUSSION

[1a] The testimony of the State Bar's witnesses was in conflict with that of respondent in numerous respects. With regard to counts two and three, the referee resolved those conflicts against respondent. We must give deference to the referee's determinations as to credibility, and we are reluctant to deviate from his credibility-based findings in the absence of a specific showing that they were in error. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 274.) Our review of the record discloses ample evidence to support the referee's factual findings on counts two and three, and we hereby adopt them. The factual statements below are based on these findings, with additional details supplied based on the record.

### A. Count Two (Dunsmoor).

#### *1. Facts.*

Gary Dunsmoor consulted respondent on November 6, 1987, regarding a paternity claim being made against him by Jeannine Griffith on behalf of her 15-year-old son. (Decision p. 3 [finding of fact 6]; R.T. pp. 7-8.) On November 11, 1987, Dunsmoor met with respondent again, this time accompanied by his then-fiancee, Lori Poffenbarger (who shortly thereafter became his wife [R.T. p. 6]). Dunsmoor and Poffenbarger told respondent that Griffith was harassing them with telephone calls, and respondent advised them to obtain a temporary restraining order (TRO) forbidding Griffith from contacting Dunsmoor. (Decision pp. 3-4 [finding of fact 7]; R.T. pp. 10-11, 15-17, 59.) Dunsmoor indicated that the

1. Neither party has requested that we reexamine the referee's decision not to find culpability on count one. Nonetheless, we have independently reviewed the record as to this count. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9. Our

review confirms the facts and reasoning underlying the referee's decision to dismiss this count. We adopt the referee's findings and conclusions as to count one, and affirm the dismissal.

TRO was urgent, because the stress caused by the harassment was aggravating his fiancée's poor state of health. (R.T. pp. 48-49.) Respondent indicated he would have the TRO in place within about a week. (R.T. p. 17.) The next day, Dunsmoor and Poffenbarger gave respondent a signed retainer agreement and a \$3,000 retainer. (Decision p. 4 [finding of fact 8]; exhs. 2, 3, A; R.T. pp. 11, 13-15, 17.)

Due to delay in the preparation of the application for the TRO, and the initial preparation of a version Dunsmoor felt was inaccurate and inflammatory, the final version of the TRO papers was not approved by the client until December 8, 1987, nearly a month after respondent suggested seeking a TRO. (Decision pp. 4-5 [findings of fact 9-13]; R.T. pp. 18-21, 60-61, 65-66.) During that time, Dunsmoor experienced some difficulty in contacting respondent. (Decision pp. 4, 5 [findings of fact 10, 12]; R.T. pp. 18-19, 20, 77-78.)

Both at the time and at the hearing, respondent gave an explanation for his failure to return Dunsmoor's calls during this period which the referee expressly found not to be credible. (Decision p. 4 [finding of fact 10]; see R.T. pp. 17-19, 42-44, 59-60, 542.) On December 7, 1987, in response to Dunsmoor's expression of dissatisfaction with respondent's services, respondent offered to withdraw from the matter and refund the unearned balance of the retainer, but Dunsmoor instructed him to proceed with the TRO. (R.T. pp. 20, 77-78.)

On January 7, 1988, Dunsmoor began a series of attempts to reach respondent to find out what had occurred with regard to the TRO. Respondent did not return Dunsmoor's calls, so on January 15, Dunsmoor went to respondent's office, where he learned that the TRO still had not been obtained. (Decision p. 5 [finding of fact 14]; R.T. pp. 21-22.) Respondent admittedly never obtained a TRO. (R.T. p. 315.)

On January 18, 1988, Dunsmoor spoke with respondent, and told him that he wished to terminate respondent's services and to receive a bill for services to date, and a refund of the unearned balance of the retainer. Respondent agreed, but requested that Dunsmoor first send him a letter confirming that Dunsmoor was releasing respondent from his role as counsel.<sup>2</sup> [2 - see fn. 2] Dunsmoor delivered such a letter to respondent on the following day. At that time, respondent promised to send a bill the next day, after his bookkeeper returned to work. (Decision p. 5 [finding of fact 15]; exh. 4; R.T. pp. 24-26, 84-87.) However, respondent did not instruct his bookkeeper to prepare the bill, never sent Dunsmoor a bill, never refunded any portion of the retainer, and did not return Dunsmoor's repeated telephone calls. (Decision p. 6 [findings of fact 16-18]; R.T. pp. 26-27, 29; see also R.T. pp. 292-297.)

Dunsmoor and his wife thereafter initiated fee arbitration and received an award, characterized by the arbitrators and by the referee as binding, in the amount of \$1,725. (Decision p. 6 [finding of fact 19]; exh. 7; R.T. pp. 31-32, 34.) Respondent participated in the arbitration. (See R.T. pp. 71, 559-560.) As of the date of the hearing in this matter, respondent had not paid any portion of the award, despite Dunsmoor's request that he do so. (Decision p. 6 [finding of fact 19]; exh. 12; R.T. pp. 35-36.) The award was not reduced to judgment, nor did respondent petition to set it aside. (R.T. pp. 89-90, 313.)

## 2. Discussion.

Count two of the notice to show cause charged respondent with violating Business and Professions Code sections 6068 (a), 6068 (m), and 6103, and former Rules of Professional Conduct 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).<sup>3</sup> The referee found culpability only as to section 6068 (m) and rules 2-111(A)(3) and 6-101(A)(2). He properly rejected

2. [2] The release letter that respondent requested and received from Dunsmoor was simply a written confirmation that respondent had been discharged as counsel, and as such was not improper. It was not a release from liability of the type prohibited by rule 3-400 of the Rules of Professional Conduct (former rule 6-102; see fn. 3, *post*).

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

culpability as to sections 6068 (a) and 6103 on the authority of *Baker v. State Bar* (1989) 49 Cal.3d 804, 814-815, and *Sands v. State Bar* (1989) 49 Cal.3d 919, 931. (See *Read v. State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 483, 486-487.)

Respondent contends that the evidence presented in support of the allegations of count two of the notice to show cause was insufficient to support the referee's findings of culpability. Respondent bases this contention primarily on an attack on the credibility of Dunsmoor, claiming that Dunsmoor was a sophisticated witness whose testimony was internally inconsistent. However, respondent failed to provide any specific references to the record regarding the alleged internal inconsistencies in Dunsmoor's testimony. As for Dunsmoor's sophistication, even if true we fail to see how this contention renders his testimony less worthy of belief.

The referee explicitly found Dunsmoor to be a credible witness. In testifying as to the sequence of events in his relationship with respondent, Dunsmoor was aided by contemporaneous notes which refreshed his recollection. [1b] In the absence of a strong showing that the referee was mistaken, we must defer to the referee's determinations as to the credibility of a witness's testimony, because the referee was in the best position to make that determination. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Kennon, supra*, 1 Cal. State Bar Ct. Rptr. at p. 274.) Where the testimony was in conflict, respondent cannot show error in the findings merely by repeating his own version of the facts. (*Read v. State Bar, supra*, 53 Cal.3d at p. 406.) Respondent's generalized challenge to Dunsmoor's credibility is not sufficient to persuade us to reject the referee's findings. (Cf. *Bach v. State Bar* (1991) 52 Cal.3d 1201, 1207.)

Respondent also argues that the allegations in count two are a "deceptive effort and abuse of process to use the State Bar Association [sic] as a collection and enforcement agency regarding an unenforceable arbitration proceeding." (Respondent's opening brief on review, at p. 7.) [3] On the issue of the binding nature of the arbitration award, section 6204 (a)<sup>4</sup> provides that statutory attorney-client fee arbitration is binding only if both parties agree in writing that it shall be binding. Respondent did not so agree. Thus, the arbitration award, contrary to its recital, was not binding at the time it was rendered. However, it *became* binding, under section 6203 (b), when respondent failed to seek a post-arbitration trial under section 6204 within 30 days after service of the award.<sup>5</sup> Thus, the arbitration award was and is binding, and the referee was correct in so characterizing it.

[4a] Respondent's contention that the State Bar cannot serve as a collection board for arbitration awards, and accordingly has no jurisdiction over this matter, was expressly rejected by the Supreme Court in a decision handed down after respondent had briefed and argued this matter on review. In *Bach v. State Bar, supra*, 52 Cal.3d 1201 (another disciplinary matter involving respondent), in answer to the same argument made by respondent here, the Supreme Court stated that respondent's argument "fundamentally misapprehends the source and objective" of the attorney discipline system. (*Id.* at p. 1206.) The Supreme Court added that "This court does not sit in disciplinary matters as a collection board for clients aggrieved over fee matters; nor is our jurisdiction derivative of fee arbitration proceedings. The administration of attorney discipline, including such remedial orders as restitution, is independent of any remedy that an aggrieved client may pursue. We reject as frivolous petitioner's argument to the contrary." (*Id.* at p. 1207.)

4. Business and Professions Code section 6204 (a) provides that "The parties may agree in writing to be bound by the award of the arbitrators. In the absence of such an agreement, either party shall be entitled to a trial after arbitration. Either party shall be entitled to a trial after arbitration if sought within 30 days, pursuant to subdivisions (b) and (c)."

5. Business and Professions Code section 6203 (b) provides in pertinent part that "Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after mailing of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204."

[4b] The Supreme Court's statements concerning the purpose of its jurisdiction over attorney discipline apply equally to the State Bar Court, which acts as an arm of the Supreme Court in attorney disciplinary matters. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301.) Accordingly, we reject respondent's challenge to the State Bar Court's jurisdiction of this matter.

Respondent makes a related argument in support of his contention that the referee erred in finding respondent culpable of violating rule 2-111(A)(3). Respondent contends that the finding of a violation of rule 2-111(A)(3) was in error because it was necessarily predicated upon the finding that the arbitration award was binding, which was also erroneous. Both of the premises of this argument are incorrect. As already noted, the arbitration award was indeed binding. [5a] But even if it had not been, the finding of a violation of rule 2-111(A)(3) would still stand, because that finding is legally independent of the validity of the arbitration award.

[5b] In the Dunsmoor matter, respondent took an advance fee, failed to complete the work he was hired to do, was discharged by the client, agreed to return the unearned portion of the advance fee, and then failed to do so.<sup>6</sup> [6 - see fn. 6] On essentially identical facts, the Supreme Court held in *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1106-1109, that the attorney's failure to return the unearned portion of the advance fee violated rule 2-111(A)(3) notwithstanding alleged procedural defects in a subsequent arbitration over the fee. [4c] "Because this is a disciplinary proceeding to protect the public, the alleged flaws in the arbitration proceeding and resulting judgment have little relevance." (*Id.* at p. 1109.) Here, as in *Cannon v. State Bar, supra*, respondent's culpability of violating rule 2-111(A)(3)

rests on clear and convincing evidence establishing his failure to return the unearned portion of his advance fee, which is entirely independent of the arbitration award.

Although we adopt the referee's legal conclusions on this count in most respects, our independent review of the record leads us to make one modification therein.<sup>7</sup> The referee rejected culpability as to rule 2-111(A)(2) on the basis of lack of evidence of any intent to withdraw on respondent's part. In so doing, the referee relied on *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979, and *Baker v. State Bar, supra*, 49 Cal.3d at pp. 816-817, fn. 5.

[7a] In our view, these cases do not support the referee's conclusions. *Baker v. State Bar* held that rule 2-111(A)(2) "may reasonably be construed to apply when an attorney ceases to provide services, even *absent* formation of an intent to withdraw as counsel for the client." (*Baker v. State Bar, supra*, 49 Cal.3d at p. 817, fn. 5, emphasis added.) *Guzzetta v. State Bar* held that where, after the alleged withdrawal, the attorney "continued to advise [his client]," recommended action for his client to take, and reviewed papers for his client, the attorney did not violate rule 2-111(A)(2). The reason for this holding, however, was that the attorney had not in fact ceased to provide services, *not* that he had not intended to withdraw. (*Guzzetta v. State Bar, supra*, 43 Cal.3d at p. 979; see also *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 348-349.)

[7b] Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. Here, respondent's failure to provide services spanned a period of only approximately three months. The circumstances, however, were such that time was

6. The referee found, based on clear and convincing evidence and on the referee's determinations as to credibility, that respondent promised Dunsmoor that he would provide an accounting of what was owed, and that he would refund the unearned balance of the substantial advance fee he had received. Thus, we need not address respondent's contention that the advance fee paid by Dunsmoor was a non-refundable "true retainer." [6] Even if the payment originally was a non-refundable retainer, respondent's subsequent oral agreement to refund the unearned balance modified the retainer agree-

ment so as to make the unearned portion of the advance fee refundable.

7. It is the duty of this review department to conduct an independent review of the record. As a result of our independent review, we may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. (Rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Mapps, supra*, 1 Cal. State Bar Ct. Rptr. at p. 9; cf. *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916.)

plainly of the essence to the services requested (a TRO to protect respondent's client from harassment). Under these circumstances, respondent's failure to provide the necessary services constituted an effective withdrawal for purposes of rule 2-111(A)(2), even though his period of inaction was relatively brief. (Cf. *Cannon v. State Bar*, *supra*, 51 Cal.3d at pp. 1106-1108 [attorney effectively withdrew from employment when he had not obtained urgently needed immigration documents three and a half months after the client retained him].) Respondent's failure to take any reasonable steps to avoid foreseeable prejudice to his client prior to his withdrawal was a wilful violation of this rule.

[8] Based on the same facts, we adopt the referee's conclusions that respondent violated rule 6-101(A)(2) and section 6068 (m) as to this count. Given the client's need for immediate action, which respondent apparently recognized when he advised his client to seek a TRO, it was reckless incompetence for him still not to have brought the TRO application to hearing over two months after his client requested that he file it. Similarly, while respondent's inaccessibility to Dunsmoor was not as severe or protracted as in many disciplinary cases, it did constitute a culpable failure to communicate under the particular circumstances of this case, given the need for prompt action and attorney responsiveness in a TRO situation.

## B. Count Three (Sampson).

### 1. Facts.

Christine Sampson hired respondent on January 19, 1983, to represent her in a personal injury case arising out of an accident that had occurred on February 7, 1982. (Decision p. 6 [finding of fact 20];

exh. 39; R.T. pp. 328, 331.) Respondent filed a complaint on February 7, 1983, but failed to propound any discovery or send a demand letter. (Decision pp. 6-7 [findings of fact 21-22]; R.T. pp. 331-334, 355, 360.) He did not file an at-issue memorandum.<sup>8</sup> In December 1984, one of the defendants made a settlement offer under section 998 of the Code of Civil Procedure. (Exh. 45; R.T. p. 409.) Respondent did not respond in writing to this offer, though he testified he made an oral response which the defendant's attorney did not recall. (Decision p. 7 [finding of fact 23]; R.T. pp. 355, 409-410, 422-426, 590-593.)<sup>9</sup>

Respondent made a settlement demand on the same defendant, but not until after the expiration of the statutory five-year time limit to bring the case to trial (February 7, 1988). (R.T. pp. 356-358, 410-411.) The demand was accordingly rejected, and the case was subsequently dismissed due to respondent's failure to bring it to trial within five years. (Decision p. 7 [findings of fact 24-25]; exh. 44; R.T. pp. 336-337, 429-430, 433, 520-521.) Respondent admitted that Sampson's file had been lost when he moved his office in October 1986, and that the case "fell through the cracks" in his office calendar system. (R.T. pp. 331, 356-359, 362-363, 498, 517-519.)

### 2. Discussion.

Count three of the notice to show cause charged respondent with violating sections 6068 (a), 6068 (m), and 6103, and former rules 2-111(A)(2) and 6-101(A)(2). The referee found culpability only as to section 6068 (m) and rule 6-101(A)(2). The section 6068 (a) and 6103 charges were correctly dismissed on the authority of *Baker v. State Bar*, *supra*, 49 Cal.3d 804 and *Sands v. State Bar*, *supra*, 49 Cal.3d 919.

8. Respondent did attempt to file an at-issue memorandum in municipal court instead of superior court where the case was pending. When this was rejected, he sent another at-issue memorandum to counsel for one of the defendants, along with a stipulation to transfer the action to municipal court. The defendant's counsel refused to sign the stipulation, and respondent made no further effort to file an at-issue memorandum. (R.T. pp. 334, 361-362, 379-381, 414-417; exhs. 42, Q.)

9. The referee's decision recites that respondent testified he made the oral response and that the defendant's attorney testified he could not recall any such response. (Decision p. 7 [finding of fact 23].) The decision does not indicate whether the referee believed respondent's testimony that he did make a response. As shown by the discussion below, even if we accepted respondent's testimony that he did respond orally to the Code of Civil Procedure section 998 offer, this would not affect our determinations as to culpability on this count.

Respondent argues that the evidence offered in support of the allegations contained in count three—in particular, the testimony of Robert Davis, who was defense counsel in Sampson's case—was unsubstantiated and inadequate to support the referee's findings of culpability. Specifically, respondent contends that Davis's testimony was entirely incredible and that his recollection of the events involved was inaccurate. However, even if the challenged portions of Davis's testimony were disbelieved, the facts established by documentary evidence and by respondent's own testimony, as recited above, still would be sufficient to sustain respondent's culpability for violating rule 6-101(A)(2). We therefore reject respondent's contention with regard to this rule.

In this count, the referee again rejected culpability under rule 2-111(A)(2) on the basis of lack of intent to withdraw, based on the same authority cited in connection with the parallel holding in count two. For the reasons stated *ante* in connection with that count, the referee should have sustained the 2-111(A)(2) charge. [9] Respondent's total cessation of services for a period of approximately two years, standing alone, and even though unintentional, is clear and convincing evidence that he effectively withdrew without taking steps to protect his client's interests. (See *Baker v. State Bar*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5.) Thus, we reverse the finding of the referee and hold that respondent's conduct in the Sampson matter was a wilful violation of rule 2-111(A)(2).

[10] The referee's conclusion holding respondent culpable of violating rule 6-101(A)(2) is supported by clear and convincing evidence. Failure to perform competently, with reckless disregard, is demonstrated by respondent's failure to take any steps whatsoever to bring Sampson's case to trial, or to pursue it at all, prior to the expiration of the five-year statute, thereby causing his client to lose her cause of action irrevocably. Respondent admitted that he had lost the file and that the case had been omitted from his calendaring system. Even if respondent did, as he claimed, respond orally to the defendant's Code of Civil Procedure section 998 offer, and even though he undisputedly did make a belated settlement demand after the five-year statute had expired, these activities fall far short of constitut-

ing sufficient prosecution of the case to excuse respondent's total failure to pursue the matter after sometime in early 1986 (or, at the very least, after October 1986 when he admittedly lost the file).

[11] We also concur with the referee's conclusion that the section 6068 (m) charge was sustained by clear and convincing evidence. Section 6068 (m), effective January 1, 1987, requires attorneys to respond to clients' reasonable status inquires and to keep clients reasonably informed of significant developments in their cases. Respondent violated section 6068 (m) by failing to contact Sampson in late 1987 or early 1988 to inform her of an imminent critical development in her matter, i.e., the running of the five-year statute. The fact that this failure to communicate was the result of respondent's loss of Sampson's file does not render him any less culpable. Based on this fact, we adopt the finding of the referee that respondent's conduct in the Sampson matter violated section 6068 (m).

#### C. Count Four (Noncooperation).

##### 1. Facts.

An investigator for the State Bar sent a total of six letters to respondent regarding the client complaints reflected in counts one, two and three of the notice to show cause in this matter. (Exhs. 14-19; decision p. 8 [findings of fact 26-28].) Respondent admitted that he did not respond in writing to any of these letters. (Decision p. 8 [findings of fact 26-28]; R.T. pp. 110-113, 565.) Respondent did not deny receiving the investigator's letters; on the contrary, he testified that he deliberately refrained from responding to them for numerous reasons. These included his belief that section 6068 (i) is unconstitutional; his concern that the State Bar would use against him any information that he provided; and his desire not to provide information until he had an opportunity to confront and cross-examine the complaining witnesses. (Decision pp. 8-9 [finding of fact 29]; R.T. pp. 319-324, 565-567.)

##### 2. Discussion.

Count four of the notice to show cause charged respondent with violating sections 6068 (a), 6068 (i), and 6103. Notwithstanding respondent's admitted

failure to respond to any of the six letters he received from State Bar investigators, the referee dismissed this count in its entirety. The referee's rationale was that respondent ultimately did cooperate with the State Bar by participating fully in the formal disciplinary proceedings after the notice to show cause was filed and served.

[12a] On review, the examiner contends that respondent should have been found culpable of violating section 6068 (i).<sup>10</sup> Section 6068 (i) makes it an attorney's duty "to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney." (Emphasis added.) Thus, the statute contemplates that attorneys may be found culpable of violating their duty to cooperate if they fail to participate either in the investigation or in the formal proceedings. Indeed, the Supreme Court, though without addressing the question expressly, has sustained culpability for failing to cooperate at the investigation stage even where, as here, the respondent subsequently appeared and participated in the formal proceeding. (See, e.g., *Friedman v. State Bar* (1990) 50 Cal.3d 235.)<sup>11</sup>

The statute goes on to provide that the duty to cooperate does not override any constitutional or statutory privileges an attorney may have. Respondent argues that he failed to answer any of the investigator's inquiries precisely because he was relying on his constitutional privileges. Without deciding whether respondent's privilege claims ultimately would have been upheld,<sup>12</sup> [13 - see fn. 12] we may assume for the sake of argument that respondent would not have violated section 6068 (i) if he had replied to the investigator's letters by expressly asserting claims of privilege. However, respondent made no such response; rather, he simply ignored the investigator's letters.

[14] Section 6068 (i) requires attorneys to respond in some fashion to State Bar investigators' letters. If an attorney wishes to invoke statutory or constitutional privileges which the attorney contends make a substantive response unnecessary, the attorney must nevertheless respond to the investigator's letters, if only to state that the attorney is claiming a privilege. If the attorney simply remains silent, the attorney not only violates section 6068 (i), but also risks waiving the very privilege upon which the attorney's silence is predicated. (Cf., e.g., *Inabnit v. Berkson* (1988) 199 Cal.App.3d 1230, 1239 [patient's failure to claim psychotherapist-patient privilege constituted waiver of right to bar disclosure of records of treatment]; *Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708-709, 711-712 [privilege against self-incrimination was waived by failure to make timely objection to discovery request in a civil matter].) [12b] We therefore reverse the finding of the referee on this point, and hold that respondent's failure to respond to the investigator's letters, even by making a claim of privilege, violated section 6068 (i), notwithstanding respondent's full participation in the proceedings after the filing of the notice to show cause.

#### D. Respondent's Other Contentions.

[15a] Respondent complains that his fundamental objections to this proceeding were never ruled on. Respondent's answer to the notice to show cause pleaded that he was never personally served with the notice to show cause; that the statute of limitations had run on the counts in the notice to show cause; that the State Bar did not have jurisdiction over any of the matters alleged in the notice to show cause; and that the counts in the notice to show cause failed to state grounds upon which a disciplinary proceeding could be held.

10. The examiner does not contend that the referee should have sustained the section 6068 (a) and 6103 charges, and we concur with the referee's dismissal thereof.

11. The examiner cites this review department's opinion in *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73 for the proposition that an attorney may be found culpable of noncooperation based only on the failure to respond to investigators' letters. However, *In the Matter of Peterson, supra*, was a default case, and thus did not involve

the question whether (as the referee found here) such noncooperation may in effect be cured by full participation after the filing of formal charges.

12. [13] See generally, e.g., *Black v. State Bar* (1972) 7 Cal.3d 676, 688 (in a disciplinary action, an attorney does not have a privilege not to be called to testify; an attorney may refuse to answer specific questions on the grounds that answering the question may subject the attorney to criminal prosecution).

[15b] These objections were not properly presented to the State Bar Court at the trial level by motion, but in any event, they are all without merit as a matter of law. [16] Personal service is not required in State Bar proceedings. (See *Middleton v. State Bar* (1990) 51 Cal.3d 548, 558-559 [actual notice is not an element of proper service in disciplinary actions; proper service is completed upon mailing].) [17] There is no statute of limitations in attorney disciplinary proceedings. (See *Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 310-311.) [18] The notice to show cause adequately pleaded State Bar Court jurisdiction, which was confirmed by evidence at the hearing (exh. 20) establishing the sole requisite fact, *i.e.*, respondent's membership in the State Bar. (See *Jacobs v. State Bar* (1977) 20 Cal.3d 191, 196 [State Bar has jurisdiction to conduct attorney discipline hearings to assist Supreme Court].) The notice to show cause adequately pleaded the commission of disciplinary offenses sufficient to justify the initiation of the formal proceedings. (See *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929 [notice to show cause need only fairly apprise attorney of precise nature of charges].)

[19] Respondent also complains that the referee showed impatience with him, and made rulings that were "unclear and caustic." The record has numerous evidentiary rulings favorable to respondent, and shows courteous treatment of respondent by both the referee and the examiners, including a week's continuance of the aggravation/mitigation hearing at respondent's request. (See, *e.g.*, R.T. pp. 6, 19, 25, 34, 93, 118, 386, 552, 557; 9/14/89 R.T. pp. 4-5.) The referee's evenhandedness was also demonstrated by his dismissal of two of the four charged counts in their entirety. The referee's handling of the hearing was in accord with proper judicial temperament and demeanor, and does not show evidence of bias or prejudice. (See *Marquette v. State Bar* (1988) 44 Cal.3d 253, 261.)

[20a] Respondent complains that the referee failed to rule on his motion under Code of Civil

Procedure section 631.8 for judgment at the close of the State Bar's case. [21] In general, State Bar disciplinary proceedings are governed exclusively by the State Bar's rules of procedure, and the provisions of the Code of Civil Procedure do not apply unless expressly incorporated by reference. (See *Younger v. State Bar* (1974) 12 Cal.3d 274, 285-286; *Schullman v. State Bar* (1973) 10 Cal.3d 526, 536, fn. 4, disapproved on another point in *Stitt v. State Bar* (1978) 21 Cal.3d 616, 618.) [20b] We need not determine whether Code of Civil Procedure section 631.8 is an exception to that general rule, because even if there is a right to make such a motion, we reject respondent's contention that the motion was never ruled on. Respondent invited the referee to defer ruling on the motion until after he presented his defense case. (R.T. pp. 449-451.) It was not error for the judge to take the motion under submission and proceed with the hearing. (*People v. Mobil Oil Corp.* (1983) 143 Cal.App.3d 261, 275.) Eventually, the motion was impliedly ruled on—granted in part and denied in part—when the referee made his initial rulings on the record as to culpability. (R.T. pp. 611, 623.)

[22] Respondent's final contention is in the nature of a claim of selective prosecution.<sup>13</sup> It is by no means self-evident that this doctrine applies in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. (See, *e.g.*, *Goldman v. State Bar* (1977) 20 Cal.3d 130, 140.) But even if selective prosecution were a valid defense in State Bar proceedings, respondent's claim could not succeed. The leading case on the defense of selective prosecution in criminal proceedings is *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. (See also 1 Witkin, *California Criminal Law* (2d ed. 1988), Defenses, §§ 381-386, pp. 440-447.) As established in *Murgia v. Municipal Court*, *supra*, there are several threshold procedural and evidentiary hurdles to be overcome before a case of selective prosecution can be established. (See *Murgia v. Municipal Court*, *supra*, 15 Cal.3d at pp. 293-294, fn. 4, 297, 299-300 [claim of selective prosecution must be

13. Respondent also contends that the referee did not consider all relevant mitigating factors. Respondent has not set out any reasons or bases for this claim. In any event, we have indepen-

dently reviewed the record with respect to mitigation, and our conclusions in that regard are set forth later in this opinion.

based on specific allegations of constitutionally impermissible discrimination and must be presented by pretrial motion.] Respondent did not even attempt to make the requisite showing, and his contention is accordingly without merit.

#### E. Aggravation.

The referee found that respondent's prior disciplinary record, which was not yet final at the time of his decision, was a factor in aggravation. (See standard 1.2(b)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V [standard(s) or std.]) [23] We concur, and also take judicial notice that the recommended prior discipline became final after this matter was submitted on review, by virtue of the Supreme Court decision in *Bach v. State Bar*, *supra*, 52 Cal.3d 1201, which was filed on February 26, 1991.

Respondent's prior misconduct involved activities which were quite similar to the misconduct of which he has been found culpable in this matter. In the prior matter, respondent was retained by a client in August 1984, and accepted a non-refundable fee of \$3,000. Thereafter, respondent could not be reached by his client on a number of occasions. Two years later, respondent had taken no action in the case. In August 1986, respondent's client obtained her file from respondent's office and requested that she be refunded any unearned fees. No refund was made. The client subsequently was awarded \$2,000 in a fee arbitration proceeding, which award had not yet been satisfied by respondent as of the date of the disciplinary hearing.

On review, the Supreme Court adopted the former, volunteer review department's discipline recommendation and ordered that respondent be suspended for one year, stayed, with probation for one year on conditions including actual suspension for thirty days and until restitution was made to the client. (*Bach v. State Bar*, *supra*, 52 Cal.3d at p. 1209.)

[24a] Although respondent's prior misconduct was similar, the aggravating force of his prior disciplinary record is somewhat diluted because the misconduct in the present case occurred before the notice to show cause in the prior case was served. As

we have explained previously, "While the first matter was indeed the imposition of prior discipline [citation], it does not carry with it as full a need for severity as if the misconduct in the [prior] matter had occurred after respondent had been disciplined and had failed to heed the import of that discipline." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

[24b] Thus, respondent's misconduct in the present matter, even though it is similar to the misconduct in the prior matter, does not reflect a failure on the part of respondent to learn from his prior misconduct. Nevertheless, the prior should be considered as a factor in aggravation, and the discipline in this matter should be greater than in the previous matter. (Stds. 1.2(b)(i), 1.7(a).)

The referee also found that respondent's misconduct had caused harm to his clients. (Std. 1.2(b)(iv).) With respect to Dunsmoor, the harm was somewhat alleviated by the fact that Dunsmoor apparently was able to obtain at least some relief from Griffith's harassment simply by changing his home telephone to an unlisted number. Nonetheless, the record reflects that respondent's failure to procure the TRO did cause Dunsmoor and Poffenbarger considerable distress. [25] As to Sampson, the record reflects that her injuries were not severe, and that her case on liability was weak, so that she could not reasonably have expected to receive a substantial award of damages had her case settled or gone to trial. Still, respondent's conduct deprived her of the ability to receive any damages at all, and this harm was certainly significant even if the amount of damages would have been relatively modest. Accordingly, we affirm the referee's finding of harm to clients as an aggravating factor.

[26] The referee also found that respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).) This finding was based on the record of this proceeding which, at the point the referee made his decision, consisted of two matters of misconduct. While these two matters of misconduct may or may not be considered multiple acts, we believe a finding of multiple acts of misconduct is now appropriate given the addition of our finding that respondent was culpable of violating section 6068 (i). Respondent's

three instances of misconduct in this matter do not amount to a pattern or practice (even when coupled with the additional client matter involved in his prior disciplinary matter), but are sufficient to support a finding that respondent engaged in multiple acts of misconduct. (See *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1079-1080.)

[27] Finally, our independent review of the record leads us to add a finding in aggravation. Respondent's use of specious and unsupported arguments in an attempt to evade culpability in this matter reveals a lack of appreciation both for his misconduct and for his obligations as an attorney. In this respect, respondent's contentions here are quite similar to those he raised before the Supreme Court in *Bach v. State Bar*, *supra*, 52 Cal.3d 1201. As a result of respondent's meritless contentions in that matter, the Court found that the case for actual suspension was bolstered. (*Id.* at p. 1209.) These same specious arguments, asserted here on review, similarly show respondent's "persistent lack of insight into the deficiencies of his professional behavior." (*Id.* at p. 1208.) In short, the Supreme Court's conclusions regarding another errant attorney in *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101 apply equally here: "His defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of [his] . . . conduct." (See also *Alberton v. State Bar* (1984) 37 Cal.3d 1, 16; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 432.) Respondent's apparent unwillingness to recognize his professional obligations to his clients and to the State Bar constitutes an independent aggravating factor in this matter. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508; see also std. 1.2(b)(v).)

#### F. Mitigation.

[28] Respondent testified at length about how busy he was with other legal matters, both personal and client-related, at the time he took on the clients involved in this matter. This testimony does not constitute mitigation. (*In re Naney* (1990) 51 Cal.3d 186, 196 [fact that attorney had heavy caseload at time of misconduct is not mitigation]; *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [time constraints of a busy solo practice are not mitigation].) If respondent

was too busy to handle the Dunsmoor and Sampson matters competently and complete the necessary work within an appropriate time frame, he should not have taken on the cases. (See rule 6-101(B)(1).)

Respondent also testified that he was forced to move his office on short notice in October 1986, and that he was out of his office and unable to work for about eight weeks beginning in mid-May 1982 due to a herniated disk. These facts have no bearing on his failure to pursue Dunsmoor's TRO in November and December 1987, or his failure to take any action in Sampson's case from sometime in 1984 until February 1988.

[29a] Respondent did present facts which constitute legitimate mitigation. Respondent testified that he had performed a substantial amount of pro bono work for indigents and minorities, and had taken on those and other unpopular causes at considerable personal sacrifice, because this work engendered hostility towards him in the local press and on the part of local elected officials. (Std. 1.2(e)(vi).) Though respondent's pro bono work was taken into account by the referee, his decision does not adequately indicate the weight that he gave this factor.

In *Gadda v. State Bar* (1990) 50 Cal.3d 344, the Supreme Court concluded that an attorney's pro bono work was deserving of consideration as a mitigating factor. In that case, the attorney was described as "'one of the most active participants' in the immigration court's pro bono program and . . . 'continuously and unselfishly contribute[s] his services to defending the indigent at deportation, exclusion and bond hearings.'" (*Id.* at p. 356.) Conversely, in *Amante v. State Bar* (1990) 50 Cal.3d 247, the Supreme Court held that where an attorney represented one indigent client on a pro bono basis, his conduct did "not demonstrate the kind of 'zeal in undertaking pro bono work'" that would be considered as a mitigating factor. (*Id.* at p. 256.)

[29b] Here, respondent admittedly conducted a "substantial amount" of pro bono work for indigents and minorities. But exactly what was meant by "substantial" is not evident from the record, and respondent's testimony was the only evidence admitted on this subject. We cannot attribute to his

work the weight in mitigation that was afforded the attorney in *Gadda v. State Bar, supra*, 50 Cal.3d 344, but neither does respondent's work deserve to be discounted to the extent done in *Amante v. State Bar, supra*, 50 Cal.3d 247. Thus, respondent's pro bono record puts him in the middle of the range of weight established by *Gadda v. State Bar, supra*, and *Amante v. State Bar, supra*. (See *Rose v. State Bar, supra*, 49 Cal.3d at pp. 665-666, 667.)

Respondent also testified that he had, apparently fairly recently, offered Sampson \$3,500 in settlement of her pending malpractice action against him, but that the offer had been refused. [30] However, an offer of restitution made in response to litigation by the client, and long after the initiation of State Bar proceedings, does not constitute proper mitigation. (See, e.g., *In re Naney, supra*, 51 Cal.3d at p. 196; cf. *Read v. State Bar, supra*, 53 Cal.3d at p. 423 [failure to make restitution until after completion of disciplinary hearing cited as aggravating factor].)

#### RECOMMENDED DISCIPLINE

In making a recommendation as to discipline, our greatest concern is ensuring the protection of the public and the highest professional standards for attorneys. (*King v. State Bar* (1990) 52 Cal.3d 307, 315.) In determining the appropriate discipline, we must also look to the standards and to relevant case law for guidance as to the proportionality of the discipline given the particular facts of this matter. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311 [evaluating proportionality of disciplinary recommendation based on facts of other recent cases].)

Based on his findings, the referee recommended that respondent be suspended for five years, stayed, with probation for five years on the conditions of actual suspension for three years and until respondent made restitution to his clients, and upon completion of the Professional Responsibility Examination. However, beyond reciting the applicable standards indicating the appropriateness of suspension, the hearing referee did not articulate a rationale for his discipline recommendation, nor did he cite any Supreme Court cases to show that his recommendation was proportionate and consistent with precedent.

The referee correctly applied standard 2.4(b), which provides that for offenses involving "culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client." The referee also correctly applied standard 1.7(a). That standard requires that if a member has previously been disciplined, the discipline in the second matter should be of a greater degree than that imposed in the prior matter, unless the prior discipline both was remote in time and was based on misconduct of minimal severity. We agree with the referee's conclusion that neither of the exceptions applies. Accordingly, in this proceeding the standards indicate that respondent should receive discipline greater than the one-year stayed suspension, one-year probation, and thirty days actual suspension recently imposed on him by the Supreme Court.

Aside from indicating this range, however, the standards alone do not provide us with guidance concerning the exact length of stayed suspension, probation, and actual suspension that is appropriate in this case based on its particular facts. The referee's recommended discipline is not inconsistent with the standards, but, as already noted, he neither articulated a rationale nor cited case law to explain the basis for his recommendation.

On review, in supplemental post-argument briefing, the examiner argues that the referee's recommended three-year actual suspension is consistent with *Middleton v. State Bar, supra*, 51 Cal.3d 548. Contrary to the examiner's assertion, *Middleton v. State Bar, supra*, is not factually comparable to this matter. Middleton's misconduct was clearly more severe than respondent's here. Middleton not only abandoned her clients in two matters, but also threatened to sue one set of clients if they persisted in requesting the return of the unearned advance fee they had paid. She also committed a third act of misconduct involving contacting directly an opposing party whom she knew was represented by counsel. Middleton not only refused to cooperate with the State Bar investigation, but also failed to participate in the disciplinary proceeding and made affirmative

misrepresentations to the State Bar. Her misconduct was found to evidence a pattern and to pose a serious threat of reoccurrence in the future. We therefore do not find *Middleton v. State Bar, supra*, sufficiently similar to the case at hand to support the referee's recommendation as to discipline.

Our review of recent Supreme Court cases involving misconduct comparable to that of which respondent has been found culpable leads us to conclude that the referee's recommendation was excessive. In *King v. State Bar, supra*, 52 Cal.3d 307, the attorney had abandoned two clients, had failed to forward their files promptly to successor counsel, and had given false assurances to one of the clients regarding the status of his case. In one of the matters, the abandonment resulted in a considerable judgment against King for malpractice. King's conduct in the disciplinary proceeding indicated a failure to accept responsibility for his actions and to appreciate the severity of his misconduct. (*Id.* at pp. 311, 314-315.) However, King presented substantial evidence in mitigation, including a lengthy period of misconduct-free practice, depression, a marital dissolution, financial problems, and the fact that he had permitted the injured client to obtain a default judgment against him on the malpractice claim. In the King matter the Supreme Court adopted the former review department's recommended discipline of four years stayed suspension, four years probation, and three months actual suspension. While the facts in *King v. State Bar, supra*, are not entirely identical to those of this matter, there is some similarity.

In *Lister v. State Bar* (1990) 51 Cal.3d 1117, the Supreme Court considered together two matters in which the former review department had recommended a total of one year of actual suspension (two consecutive six-month terms), together with three years stayed suspension and three years probation. The Supreme Court reduced the length of Lister's actual suspension from one year to nine months, concluding that the former review department's recommendation was excessive, and that nine months actual suspension would be "adequate to protect the public and . . . more proportionate to the misconduct." (*Id.* at p. 1129.)

The facts in *Lister v. State Bar, supra*, 51 Cal.3d 1117 are more similar to the facts of this matter than

the facts in *King v. State Bar, supra*, 52 Cal.3d 307. Lister abandoned three clients after a period of trouble-free practice comparable in length to that of respondent in this matter, except for a 1978 private reproof which the Supreme Court dismissed as minor in nature and remote in time. (*Lister v. State Bar, supra*, 51 Cal.3d at pp. 1128-1129.) The abandonments were accompanied by a failure to return the client's file and cooperate with successor counsel in one matter; by incompetent tax advice in the second matter; and by failure to communicate and to return an unearned advance fee in the third. Only one of the clients was harmed. Lister, like respondent, failed to cooperate with the State Bar's investigation and was found culpable of violating section 6068 (i), but did participate fully in the State Bar proceedings after the filing of the notice to show cause.

In *Conroy v. State Bar, supra*, 53 Cal.3d 495, the attorney was charged with one count of misconduct. He was found culpable of violating rule 2-111(A)(2) by withdrawing as counsel without cooperating with his successor; violating section 6068 (m) by failing to respond to reasonable status inquiries of his client; violating section 6106 by making misrepresentations to the client about the status of his case; and violating rule 6-101(A)(2) by prolonged inaction in a case in reckless disregard of his obligation to perform diligently. Aggravating factors included a prior private reproof; failure to take and pass the Professional Responsibility Examination ("PRE") before the deadline imposed by the conditions of the private reproof; and failure to cooperate with the State Bar. There was no mitigation.

Citing Conroy's second prior disciplinary proceeding (*Conroy v. State Bar* (1990) 51 Cal.3d 799 [failure to timely take and pass PRE]), his repeated failure to participate in State Bar proceedings, and his misrepresentations to his client, the Supreme Court concluded that Conroy should receive a lengthier actual suspension than six months. The Supreme Court ordered a five-year stayed suspension, five years probation, and a one-year actual suspension. (*Id.* at p. 508.)

Unlike Conroy, respondent here has not been found culpable of any act of moral turpitude in violation of section 6106, and respondent participated both in this proceeding and in his prior

disciplinary proceeding. Thus, the more severe discipline imposed by the Supreme Court in *Conroy v. State Bar, supra*, 53 Cal.3d 495 would not be appropriate here, and *Conroy v. State Bar, supra*, demonstrates the excessive nature of the greater discipline recommended by the referee in this matter.

Nonetheless, *Conroy v. State Bar, supra*, 53 Cal.3d 495 strongly supports the imposition of a substantial period of actual suspension. Moreover, while respondent here has participated in this State Bar Court proceeding, he has, in so doing, evidenced the same "persistent lack of insight into the deficiencies of his professional behavior" which the Supreme Court found so troubling in his previous disciplinary matter. (*Bach v. State Bar, supra*, 52 Cal.3d at p. 1208.)

[31a] In this case, respondent abandoned two clients and has been previously disciplined (including 30 days actual suspension) for a third abandonment occurring at roughly the same time. Respondent also failed to return the unearned portion of Dunsmoor's advance fee, and failed to cooperate with the State Bar investigation. In aggravation, respondent committed multiple acts of misconduct, caused harm to his clients, and evidenced a lack of understanding of his professional obligations and a desire to avoid responsibility for his actions. His prior disciplinary record must also be considered as aggravation. The mitigation in this matter is that respondent engaged in some pro bono work, and practiced without discipline for some 20 years prior to his first misconduct (the misconduct involved in his prior matter), which was roughly contemporaneous with the misconduct involved in the present matter. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259 [16 years of practice prior to first misconduct still considered mitigating notwithstanding prior record of discipline, because all incidents of client misconduct occurred within fairly narrow time frame].)

[31b] We conclude that, on balance, respondent's misconduct was somewhat more serious than that found in *King v. State Bar, supra*, 53 Cal.3d 495, and more comparable to that found in *Lister v. State Bar,*

*supra*, 51 Cal.3d 1117. Especially in view of respondent's demonstrated lack of understanding of his professional obligations, we find that two years stayed suspension, two years probation, and actual suspension for nine months are necessary to ensure the protection of the public and the maintenance of high professional standards by members of the legal profession.

[32] We further conclude, as did the referee, that it is appropriate to recommend that respondent be ordered to pay restitution to Dunsmoor in the amount of the arbitration award. We note, however, that the record reflects that Dunsmoor may have made a Client Security Fund claim. (R.T. p. 89.) Accordingly, we recommend that respondent be ordered to pay restitution either to Dunsmoor, if Dunsmoor's Client Security Fund claim has not yet been paid, or in the alternative, to the State Bar's Client Security Fund, if Dunsmoor's claim has been paid.

We disagree with the referee's recommendation that restitution be made to respondent's other client, Sampson. As of the date of the hearing, Sampson had a malpractice action pending, and the amount of damages (if any) caused to her by respondent's misconduct had not been determined. The referee based the amount of restitution on the amount of the defendant's Code of Civil Procedure section 998 offer. [33] It is inappropriate to use restitution as a means of awarding unliquidated tort damages for malpractice. (See *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044 [Supreme Court does not approve imposition of restitution in attorney discipline matters as compensation to victim of wrongdoing].) That is what malpractice actions are for, and Sampson has filed one.

In summary, we recommend that respondent be suspended for two years, stayed, with probation for two years, on the condition that he be actually suspended for nine months and until restitution is made in the Dunsmoor matter (either to Dunsmoor or to the State Bar's Client Security Fund, as appropriate), and on the conditions numbered two through eight recommended by the referee. (Decision pp. 15-17.)<sup>14</sup> We further recommend that this discipline be con-

14. We modify the probation condition numbered eight in the referee's recommendation, in accordance with our other rec-

ommendations, so that it refers to a two-year rather than a five-year period of stayed suspension.

secutive to that imposed in *Bach v. State Bar, supra*, 52 Cal.3d 1201.

Because we recommend actual suspension in excess of three months, we adopt the referee's recommendation that respondent be ordered to comply with rule 955, California Rules of Court. We also recommend that respondent be ordered to comply with standard 1.4(c)(ii) if, by reason of his failure to pay restitution, his actual suspension lasts for more than two years under our recommended discipline, or if the Supreme Court orders that respondent be actually suspended for two years or more. We do not adopt the referee's recommendation that respondent be required to take or pass any professional responsibility examination, because he has recently been ordered to do so by the Supreme Court in his prior matter. (*Bach v. State Bar, supra*, 52 Cal.3d at p. 1209.)

We concur:

PEARLMAN, P.J.  
STOVITZ, J.