

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALVAADER FRAZIER

A Member of the State Bar

[No. 84-O-12333]

Filed October 10, 1991; as modified, January 9, 1992 and February 4, 1992

SUMMARY

Respondent engaged in serious misconduct commencing a year after her admission to practice law, including abandoning several clients; failing promptly to return unearned fees and other funds owed to the clients; misappropriating trust funds belonging to a bankruptcy estate; engaging in acts of deceit and dishonesty, and failing to provide legal services in a competent fashion. The hearing referee recommended disbarment. (Hon. John P. Sparrow (retired), Hearing Referee.)

On respondent's request for review, the review department rejected all except one of respondent's due process challenges to the pretrial proceedings and the hearing, but agreed with respondent's contention that the hearing referee should not have stricken respondent's answer on one count as a sanction for her refusal to testify when called as an adverse witness by the State Bar. On culpability, the review department found that some of the misconduct determined by the hearing referee was not supported by the record, and that there was greater mitigating evidence than the hearing referee had found.

After considering recent Supreme Court decisions involving attorneys whose psychological difficulties contributed to their misconduct, the review department concluded that in light of respondent's misconduct, her emotional difficulties and subsequent rehabilitation, public protection did not require respondent's disbarment. Rather, the appropriate discipline was a five-year suspension, stayed, a five-year probation period, and actual suspension for three years and until she made restitution and demonstrated rehabilitation and fitness to practice.

COUNSEL FOR PARTIES

For Office of Trials: Dominique Snyder

For Respondent: Lawrence A. Grigsby, Arthur R. Block, Michael A. Hardy

HEADNOTES

- [1] **725.11 Mitigation—Disability/Illness—Found**
 801.41 Standards—Deviation From—Justified
 822.39 Standards—Misappropriation—One Year Minimum
 833.90 Standards—Moral Turpitude—Suspension
Where respondent committed serious misconduct shortly after admission to practice, including abandoning several clients and failing to perform legal services competently; four instances of failure to return unearned advance fees promptly; misleading two clients; misappropriating trust funds of a bankruptcy estate; and accepting employment without sufficient time, resources and ability to perform competently; but respondent presented mitigating evidence of emotional and psychological difficulties and rehabilitation, disbarment was not required, and protection of the public and profession was satisfied by five-year stayed suspension, three-year actual suspension, requirements to make restitution and show rehabilitation before returning to practice, and a period of supervised probation.
- [2 a, b] **130 Procedure—Procedure on Review**
 136 Procedure—Rules of Practice
 142 Evidence—Hearsay
 159 Evidence—Miscellaneous
 191 Effect/Relationship of Other Proceedings
Requests to augment the record at the review department level will be granted only if the original record is incomplete or incorrect. (Rule 1304, Provisional Rules of Practice.) Out-of-court evidence offered at the appellate level is ordinarily hearsay, and impossible to evaluate because of the absence of cross-examination to test the credibility of the declarant. The rule is to rely only on evidence which was presented to the trier of fact. The only general exception is to permit documentary evidence of subsequent rehabilitation when it is the only means to meet the heavy burden of demonstrating recovery from substance abuse or mental disorder. Where proffered additional evidence was derived from the record in another proceeding involving respondent, and was not offered to correct any omission in the record, the review department declined to grant respondent's motion to augment the record.
- [3] **110 Procedure—Consolidation/Severance**
 191 Effect/Relationship of Other Proceedings
 2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
 2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues
Disciplinary proceedings and involuntary inactive enrollment proceedings are not related so as to require consolidation, and may be conducted on simultaneous, parallel tracks.
- [4] **146 Evidence—Judicial Notice**
 191 Effect/Relationship of Other Proceedings
 2315.10 Section 6007—Inactive Enrollment After Disbarment—Not Imposed
In reviewing hearing department decision in disciplinary proceeding, review department took judicial notice that in separate involuntary inactive enrollment proceeding, respondent had been found to have rebutted the presumption, arising from hearing department's disbarment recommendation, that respondent's conduct posed a continuing threat of harm to clients and the public. However, the findings in the involuntary inactive enrollment proceeding were not binding in the disciplinary matter, nor did they have any probative value.

- [5] **125 Procedure—Post-Trial Motions**
135 Procedure—Rules of Procedure
161 Duty to Present Evidence
On a motion to present additional evidence, the moving party did not show good cause where the substance of the evidence sought to be admitted was not summarized and there was no claim that the witnesses or affiants were unavailable to present their evidence at the disciplinary hearing or that their evidence related to events or observations which occurred after the disciplinary hearing. (Rules Proc. of State Bar, rule 562.)
- [6 a, b] **113 Procedure—Discovery**
192 Due Process/Procedural Rights
Denial of respondent's motion to compel discovery did not deprive respondent of due process, where the information sought (information concerning the race, practice and gender of members of the State Bar, and statistics allegedly maintained by the Bar) was not gathered or maintained by the State Bar, and the State Bar was under no obligation to survey its membership in order to respond to respondent's discovery request.
- [7] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
103 Procedure—Disqualification/Bias of Judge
Highly generalized claims of bias have been rejected as being overbroad.
- [8] **106.40 Procedure—Pleadings—Amendment**
192 Due Process/Procedural Rights
A notice to show cause may be amended, including amendment to conform to proof, so long as the attorney is given a reasonable opportunity to defend the charge and provided the amendment is not a trap for the unwary attorney. Where respondent was given informal, oral notice of an intended amendment five months prior to its filing, and formal notice one month prior to trial, respondent had adequate time to prepare a defense, and due process was not violated.
- [9] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights
Respondent was not entitled to a three-member hearing panel as a matter of due process. Where it was evident from the pre-trial filings that the case would require more than one day of hearing, the State Bar Court did not have discretion to assign the matter to a three-member panel, under the then-applicable statute. (Bus. & Prof. Code, § 6079 (b).)
- [10] **103 Procedure—Disqualification/Bias of Judge**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
Where a standard for judicial disqualification in the State Bar's Rules of Procedure was drawn from a similar provision in the Code of Civil Procedure, case law under the statute could be looked to in applying the State Bar rule. (Rule 230, Rules Proc. of State Bar.)
- [11] **103 Procedure—Disqualification/Bias of Judge**
112 Procedure—Assistance of Counsel
120 Procedure—Conduct of Trial
The hearing judge is entitled to exert reasonable control over the conduct of the hearing. Such measures as requiring one counsel to question a witness, requesting respondent not to consult with

respondent's attorneys while the judge was speaking to them, and expecting counsel to note objections for the record and then move forward with the case, were reasonable, did not demonstrate bias under the circumstances and did not deprive respondent of the statutory right to legal assistance.

[12] **103 Procedure—Disqualification/Bias of Judge**
 192 Due Process/Procedural Rights

Bias on the part of the hearing referee was not demonstrated when the referee, without the knowledge of the parties, corresponded with an out-of-state trial court judge in an attempt to coordinate conflicting trial schedules. While the better method would have been for the referee to have advised the parties of his intent to contact the trial court judge and to have copied the parties on any correspondence, the referee's conduct was not improper in nature and did not establish an appearance of bias constituting a denial of due process.

[13] **103 Procedure—Disqualification/Bias of Judge**

A State Bar Court referee who referred respondent's out-of-state counsel to the Office of Trial Counsel for investigation for alleged misconduct and possible revocation of their admission to practice *pro hac vice* was not in the same position as a trial court judge ruling on a contempt matter, and the referee's conduct did not demonstrate bias.

[14] **141 Evidence—Relevance**
 162.20 Proof—Respondent's Burden

Testimony concerning a psychological disorder related to respondent's misconduct constitutes at most mitigating evidence, and is not admissible during the culpability phase of the hearing unless the respondent asserts a defense of insanity or claims to be unable to assist in his or her own defense.

[15] **213.10 State Bar Act—Section 6068(a)**
 214.30 State Bar Act—Section 6068(m)

Where an attorney's failure to communicate with a client occurred prior to the effective date of the statute specifically requiring communication with clients, a violation of the underlying duty predating this statute may be charged as a violation of the attorney's oath and duties generally.

[16] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

Where respondent did some work on a lawsuit and provided a contemporaneous accounting of time to the client, the charge that respondent had retained unearned advanced fees was not supported by the record.

[17] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

Advances by the client for expenses incurred during representation are not encompassed by the rule requiring the prompt refund of unearned advanced fees upon request.

[18] **221.00 State Bar Act—Section 6106**
 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
 420.00 Misappropriation

An attorney's failure to return unspent costs advanced by the client did not violate the rule requiring prompt payment of client funds upon request, where there was no evidence that the client had requested the return of the funds. Nor did the attorney's inaction alone, in failing to return the funds for several years, support a finding that the attorney had misappropriated the funds or committed acts of moral turpitude.

- [19] **221.00 State Bar Act—Section 6106**
 Providing a trust account check to pay for a personal expense, and then failing to satisfy the underlying obligation when the check was dishonored, constituted an act of moral turpitude.
- [20] **221.00 State Bar Act—Section 6106**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
 Because the retention of unearned advanced fees is a violation of an express duty under the Rules of Professional Conduct, it would be duplicative to find the same conduct to constitute an act of moral turpitude, and such a finding is not supported by the case law.
- [21] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
 Where an attorney representing a bankrupt client had possession of the proceeds of a court-ordered sale of estate assets, did not place the funds in a trust account, did not pay them as directed by the bankruptcy court, and did not otherwise account for the funds, the evidence supported a finding that the attorney misappropriated the funds, violated the rule requiring prompt payment of client funds on request, and committed an act of moral turpitude.
- [22] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
 While failure to keep a promise of future action alone is not ordinarily proof of dishonesty, where respondent promised to deliver client funds into court custody and soon thereafter misappropriated the funds, the review department upheld the hearing department's finding that respondent's actions were intended to mislead the client and therefore constituted deceitful conduct.
- [23] **145 Evidence—Authentication**
162.11 Proof—State Bar's Burden—Clear and Convincing
221.00 State Bar Act—Section 6106
 In an attorney discipline proceeding, all reasonable doubts must be weighed in favor of the attorney. Where the evidence presented by documents raised an inference of irregularity concerning the genuineness of a bankruptcy court order, but there was no evidence from the bankruptcy court concerning its practices nor any evaluation of the genuineness of the purported order itself, there was not clear and convincing evidence that the respondent had fabricated the order.
- [24] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
 Wilfulness, for the purpose of finding a violation of the Rules of Professional Conduct, is defined as having acted or omitted to act purposely to do the act forbidden by the rule or not to do the act required by the rule. Where there was no evidence that respondent was incapable of forming the requisite purpose or intent, the review department upheld a finding that respondent was capable of the wilfulness necessary to commit the charged rule violation (accepting employment without resources to perform competently).
- [25] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
 Where an attorney was willing to accept employment when the attorney knew or should have known that the attorney was not in the position to represent the client competently, the attorney

violated the (former) rule of professional conduct prohibiting knowingly accepting or continuing employment without the resources to perform competently. Respondent's acceptance of employment in four matters and subsequent abandonment of the clients demonstrated a violation of the rule.

[26 a, b] **135 Procedure—Rules of Procedure**
192 Due Process/Procedural Rights

Attorney discipline proceedings are sui generis, neither criminal nor civil, and ordinary criminal procedural safeguards do not apply. The proceedings are conducted pursuant to the Rules of Procedure adopted by the State Bar, which contain procedural safeguards that have been held to be adequate to assure procedural due process.

[27 a, b] **135 Procedure—Rules of Procedure**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act

The rules of evidence in civil cases in courts of record, including applicable sections of the Code of Civil Procedure and judicial decisions as well as the Evidence Code, are followed in State Bar disciplinary proceedings. (Rule 556, Rules Proc. of State Bar.)

[28] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
148 Evidence—Witnesses

Where respondent was not a California resident, and thus not subject to subpoena, respondent's attendance as a witness at the disciplinary hearing could have been required by notice to respondent's counsel.

[29] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act

Evidence Code section 776, providing for calling the opposing party as an adverse witness, does not empower the State Bar to require the respondent's presence at a disciplinary hearing.

[30] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
148 Evidence—Witnesses

The respondent in a disciplinary proceeding has an obligation to be present at the hearing even if not subpoenaed or noticed to appear as a witness.

[31] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
148 Evidence—Witnesses
194 Statutes Outside State Bar Act

In State Bar Court proceedings, the court acts as an administrative arm of the Supreme Court, and State Bar Court judges and referees function as "judicial officers." Therefore, under Code of Civil Procedure section 1990, any person present at a State Bar Court hearing may be compelled to take the witness stand by the judge or referee.

[32 a, b] 144 Evidence—Self-Incrimination
193 Constitutional Issues

Since attorney discipline matters are not criminal cases for purposes of the Fifth Amendment of the U.S. Constitution, an attorney may be called to the witness stand at the attorney's own hearing, and immunized testimony may be introduced against the attorney. However, the attorney may assert the Fifth Amendment privilege against self-incrimination in response to specific questions, and no adverse inference may be drawn from such invocation. An attorney may not be disciplined solely based on invoking the privilege against self-incrimination.

[33 a, b] 106.50 Procedure—Pleadings—Answer
120 Procedure—Conduct of Trial
144 Evidence—Self-Incrimination
193 Constitutional Issues

Where respondent refused to take the witness stand when ordered to do so by the referee at the disciplinary hearing, and invoked the protection of the Fifth Amendment through counsel and not in response to specific questions, respondent's actions were improper. If appearing under subpoena, respondent's actions could have been certified for contempt before the Superior Court. If culpability had been found on the underlying misconduct charges, respondent's actions could have been considered evidence in aggravation. However, the referee did not have contempt power and lacked the authority to sanction respondent by striking respondent's answer to the notice to show cause and deeming the allegations admitted by default as a matter of law.

[34 a-c] 142 Evidence—Hearsay

The handwritten complaint and accompanying documents of a complaining client, since deceased, were inadmissible as hearsay. The documents did not fit within any of the exceptions to the hearsay rule regarding deceased declarants. The deceased client's letter to respondent could not be admitted as an adoptive admission because there was no admissible evidence of words or other conduct by respondent demonstrating adoption of the statements in the letter. The corroborative evidence exception was also inapplicable because there was no admissible evidence in record which the documents would serve to substantiate.

[35] 162.11 Proof—State Bar's Burden—Clear and Convincing
162.20 Proof—Respondent's Burden
801.90 Standards—General Issues

Circumstances in mitigation and aggravation must be established by clear and convincing evidence.

[36] 515 Aggravation—Prior Record—Declined to Find
802.21 Standards—Definitions—Prior Record

An attorney's administrative suspension for failure to pay bar dues does not constitute prior discipline for purposes of weighing the appropriate discipline in a subsequent disciplinary case, in that the prior suspension is administrative in nature and does not result from a finding of misconduct.

[37] 611 Aggravation—Lack of Candor—Bar—Found

Respondent's failure to maintain a current address with the State Bar's membership records office, which delayed and stymied the investigation of respondent's misconduct, constituted failure to cooperate with the State Bar.

- [38] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
Respondent's failure to obey the hearing referee's order to take the witness stand at the disciplinary hearing was not considered an aggravating factor, where respondent was acting on the advice of counsel and the law was not clear at the time. Nor was the courtroom behavior of respondent's counsel attributable to respondent in assessing respondent's cooperation with the State Bar.
- [39] **541 Aggravation—Bad Faith, Dishonesty—Found**
591 Aggravation—Indifference—Found
601 Aggravation—Lack of Candor—Victim—Found
621 Aggravation—Lack of Remorse—Found
Where respondent failed to make restitution efforts until after disciplinary actions had been instituted; asserted that it was the State Bar's duty to contact her clients when she abandoned her practice; and had committed misconduct involving acts of deceit and bad faith, respondent's conduct evidenced a lack of understanding of her duties and insight into her misconduct.
- [40 a, b] **725.11 Mitigation—Disability/Illness—Found**
Extreme emotional difficulties or stressful family circumstances can be considered as mitigating evidence where it is established by expert testimony that the emotional difficulties were responsible for the attorney's misconduct, and the attorney has demonstrated full recovery and rehabilitation by clear and convincing evidence, such that recurrence of further misconduct is unlikely.
- [41] **725.32 Mitigation—Disability/Illness—Found but Discounted**
Evidence of severe emotional problems does not mitigate misconduct which arose prior to the triggering of the attorney's emotional difficulties.
- [42] **725.11 Mitigation—Disability/Illness—Found**
Acute depression and other psychological problems can explain, but not excuse inattention to the demands of a law practice and the ethical improprieties that result. To the degree that emotional problems underlay respondent's failure to provide competent legal services, to communicate with clients, and to protect clients' rights when ceasing to practice, evidence of respondent's recovery from these problems and the unlikelihood of a recurrence was mitigating.
- [43] **795 Mitigation—Other—Declined to Find**
Where misconduct involves misappropriation, inexperience is irrelevant and has no weight as mitigation.
- [44] **750.59 Mitigation—Rehabilitation—Declined to Find**
The lack of any subsequent misconduct charges against a respondent who had moved to another state was not compelling mitigation, since respondent had not been representing California clients and misconduct allegations arising in another state would not necessarily be reported to discipline authorities in California.
- [45] **765.59 Mitigation—Pro Bono Work—Declined to Find**
Clients of limited or no means are entitled to able, responsive and trustworthy counsel from the attorneys they hire. Improper or unethical conduct is not excused because the attorney represents those of limited means.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation

Found

- 521 Multiple Acts
- 582.10 Harm to Client

Mitigation

Declined to Find

- 710.53 No Prior Record
- 745.51 Remorse/Restitution

Standards

- 801.30 Effect as Guidelines
- 802.30 Purposes of Sanctions

Discipline

- 1013.11 Stayed Suspension—5 Years
- 1015.09 Actual Suspension—3 Years
- 1017.11 Probation—5 Years

Probation Conditions

- 1021 Restitution
- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1025 Office Management
- 1026 Trust Account Auditing
- 1030 Standard 1.4(c)(ii)

Other

- 1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

Respondent Alvaader Frazier was admitted to practice in December 1982. The amended notice to show cause¹ charged respondent with seven counts of misconduct, dating from November 1983 until May 1985. After hearing, the referee concluded that respondent (1) abandoned clients in six matters (rule 2-111(A)(2))²; (2) failed to return unearned fees to one additional client as well as to four of the abandoned clients (rule 2-111(A)(3)); (3) failed to perform legal services competently for seven clients, with no legal work performed for five of the clients (rule 6-101(A)(2)); (4) committed acts of moral turpitude and dishonesty (Bus. & Prof. Code, § 6106)³ by: misappropriating \$6,881.60 in escrow funds by means of a fabricated bankruptcy order, misappropriating unearned client fees totalling \$10,976, giving two checks written on a closed trust account to two different clients, obtaining \$500 from a client under false pretenses, and representing to two different clients that lawsuits had been filed on their behalf when they had not; (5) failed to return advanced costs and other client funds to which three clients were entitled (rule 8-101(B)(4)); (6) failed to deposit client funds in a trust account (rule 8-101(A)), and (7) in all six cases of misconduct, wilfully accepted employment for which she had not the time, skill and resources to perform with competence (rule 6-101(B)(2)).

In mitigation, respondent submitted testimony from her psychotherapist who had treated her for deep depression after respondent had left California and moved to New York. She testified as to respondent's recovery. Respondent also submitted numerous letters attesting to her character and activities on behalf of low income clients and political causes. Proof was adduced that respondent had made

settlements with most complainants, albeit after the institution of bar proceedings against her. The hearing referee concluded that the nature of the misconduct found coupled with aggravating factors, such as respondent's past suspension for non-payment of fees, her failure to cooperate at the hearing, and bad faith toward and harm to her former clients, outweighed the mitigating factors. Under the standards for attorney discipline, the referee concluded that disbarment was warranted.

Respondent filed this request for review. Although respondent's contest is largely a procedural or due process attack on the decision, she also urges lack of a factual basis for disciplinary findings regarding two clients. She also claims her answer to one count of the amended notice to show cause should not have been stricken as a sanction for her refusal to testify in the State Bar hearing.

With the exception of our determination that the referee erred in striking respondent's answer, we have found that none of respondent's procedural claims warrant relief. [1] However, on our independent review of the record, we find fewer acts of misconduct than determined by the referee and greater mitigating evidence than he found in the form of emotional and psychological difficulties suffered by respondent. Nevertheless, we find respondent culpable of serious misconduct, commencing just over one year after her admission, including five instances of abandoning or withdrawing from cases without protecting the clients' causes of action; failing to perform legal services competently and failing to communicate with the clients in those five cases; failing to return promptly unearned fees in four of those cases; making misleading statements to two clients; failing to deposit \$6,881.60 from the bankruptcy estate of a client in her trust account and later misappropriating the trust funds; and accepting legal

1. The examiner originally filed a 13-count notice against respondent. On April 6, 1989, the examiner moved to dismiss six counts of the original notice and amend the notice to add two additional allegations of misconduct to renumbered count three (Mary Peterson). Respondent opposed the amendment to add the additional charges. Leave to amend the notice was granted by order dated April 19, 1989. Respondent's challenge on review to the amendment is discussed *infra*.

2. Unless noted otherwise, all further references to rules are to the Rules of Professional Conduct effective between January 1, 1975, and May 26, 1989.

3. Unless noted otherwise, all further references to sections or codes are to the Business and Professions Code.

employment in these matters without having sufficient time, resources or ability to perform the necessary work with competence. We find this misconduct to warrant serious discipline, but given respondent's mitigating and rehabilitative evidence, we do not conclude, as did the referee, that disbarment is required. The protection of the public interest and the profession will be served in this matter by a five-year suspension stayed on conditions of three years actual suspension and until restitution and rehabilitation are proven as well as placement on a period of supervised probation on terms outlined at the conclusion of this opinion.

I. PROCEDURAL ISSUES

Since much of respondent's attack on the hearing referee's decision focuses on procedural issues, we discuss them first.

A. Motion to Augment the Record

First we address respondent's request to augment the record before us to include the decision, order, transcript and declarations filed in *In the Matter of Alvaader Frazier*, case number 90-TE-14293, a proceeding to consider enrolling respondent involuntarily as an inactive member of the bar pursuant to section 6007 (c) (hereinafter "6007 proceeding"). That proceeding was started after the filing of the hearing referee's decision which is before us on review. Respondent claims that the 6007 proceeding record bears on the issues of her affirmative defenses and showing of mitigation, is related to the underlying disciplinary action and that for the record to be complete and to serve the interests of justice, all relevant decisions, specifically the 6007 proceeding and its record, should be before us.

In opposing respondent's position, the examiner disputes that the disposition of the 6007 proceeding is in any way related to the underlying disciplinary recommendation. She notes the issues in a proceeding for inactive enrollment are different from a disciplinary case and, later in her argument, that unlike a disciplinary hearing, the formal rules of evidence are not in force. She argues that what respondent is actually seeking is to present additional evidence. As such, under rule 562 of the

Transitional Rules of Procedure of the State Bar, respondent must show, under penalty of perjury, why such evidence was not presented at the time of the hearing. To illustrate, she notes two cases, *Weber v. State Bar* (1988) 47 Cal.3d 492 and *In re Naney* (1990) 51 Cal.3d 186, where motions had been granted to present additional evidence after the hearing decision had been rendered, where the evidence consisted of aggravating circumstances which occurred after the hearing. Finally, the examiner outlines her objections to specific exhibits sought to be admitted by respondent. (OTC brief in opposition, pp. 4-11.)

[2a] Rule 1304 of the Provisional Rules of Practice of the State Bar Court provides that augmentation requests will be granted only if it is found that "the original record is incomplete or incorrect." This follows the Supreme Court policy of only relying on evidence presented to the trier of fact. (*In re Rivas* (1989) 49 Cal.3d 794, 801.) Such out-of-court evidence ordinarily involves hearsay and offers no means to test the credibility of the declarant. (*Ibid.*) "Such evidence is virtually impossible to evaluate in the absence of cross-examination and, to the extent it consists of opinions about the [respondent's] mental attitude, is often based on his own self-serving, out-of-court statements." (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) The only general exception the Supreme Court has recognized to its steadfast rule of refusing to entertain evidence not heard by the State Bar Court is for limited (i.e., documentary) evidence of subsequent rehabilitation when it is the only means to meet a heavy burden to demonstrate recovery from substance addiction or a mental disorder. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.)

[3] Section 6007 proceedings are not proceedings related to disciplinary actions such that consolidation of the cases is mandated. In fact, disciplinary and 6007 proceedings may be conducted on simultaneous, parallel case tracks. (Cf. *Ballard v. State Bar* (1983) 35 Cal.3d 274, 288 [where attorney was competent to assist in his defense, and with both disciplinary and 6007 proceedings filed, the State Bar would have to conduct parallel proceedings].)

[4] We do take judicial notice of the existence of the 6007 proceeding and the resulting decision therein finding that respondent had rebutted the presumption from the disbarment recommendation that

respondent's conduct posed a continuing substantial threat of harm to the interest of her clients or the public. However, as the Supreme Court noted in *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1119, "Neither the involuntary inactive enrollment order itself nor any of the findings made in those proceedings is binding or has any probative value in the formal disciplinary case." (Footnote omitted.) We recognize that although no involuntary inactive enrollment order was made in this case, the principle nevertheless remains the same. [2b] Here, the proffered evidence is not offered to "correct" any omission in the record developed below. Therefore, we find that respondent has not demonstrated that the record must be augmented to correct or complete the hearing record.

[5] We could also construe respondent's motion as seeking to admit additional evidence under rule 562 of the Rules of Procedure of the State Bar. The rule requires the movant to offer by affidavit or declaration, the substance of the new evidence and demonstrate good cause why the proffered evidence was not previously presented. (Rules Proc. of State Bar, rule 562.)⁴ Respondent does not summarize the substance of the evidence sought to be added from the 6007 proceeding and quotes a mere sentence fragment from the 23-page decision resolving the 6007 proceeding. There is no claim that the witnesses or the affiants were unavailable to present their evidence on rehabilitation at the disciplinary hearing or that the substance of their testimony concerns events or observations which post-date the hearing. Reverend Al Sharpton was the only witness in the 6007 proceeding who did not offer some form of evidence (report or character letter) at the disciplinary hearing. We find that respondent has not demonstrated good cause to admit this additional evidence not submitted to the hearing referee. Accordingly, we deny her request.

B. Due Process Objections

Respondent asserts that on a variety of grounds she was denied a fair hearing in the State Bar Court. Her objections fall into two general categories which

claim that she was denied a fair hearing because of: (1) adverse rulings prior to trial which assertedly curtailed or prevented discovery to support respondent's affirmative defenses, thereby allowing an amendment of the notice to show cause by the examiner, which respondent contended was prejudicial, and which resulted in the denial of respondent's request of a three-referee panel; and (2) the conduct of the hearing by the hearing referee, during which, according to respondent, the referee's bias and prejudice against respondent and her counsel were manifest and his rulings on admissibility of evidence and testimony constituted prejudicial error.

1. Pre-trial rulings

The issues concerning discovery were raised prior to trial and the rulings reviewed by the discovery review referee. (Rules Proc. of State Bar, rule 324.) [6a] Respondent propounded a series of interrogatories concerning the gender, race and practice of members of the State Bar, particularly those members who had been disciplined by the Supreme Court in the recent past, and sought statistical and other information she contended was held by the State Bar. In response, the examiner provided what documents she had in connection with the allegations in the complaint, as well as information from the *California Lawyer* periodical and statistical compilations of cases resolved by the State Bar Court by type of discipline imposed. The examiner did not provide any information concerning the race, gender or practice of members of the California bar, representing that such information was not gathered or maintained by the State Bar's membership records and to secure it would require a survey of the entire membership of the bar, which she was not required to do to satisfy respondent's discovery demand pursuant to Code of Civil Procedure section 2030(f)(2). The hearing referee did not find the State Bar's position to be unreasonable and denied respondent's motion to compel discovery.

[6b] The denial of respondent's motion to compel discovery does not demonstrate a denial of due

4. Since this hearing began prior to the commencement of hearings by the present State Bar Court, the hearing referee

applied the rules of procedure effective prior to September 1, 1989. (Trans. Rules Proc. of State Bar, rule 109.)

process. Had the information sought been maintained by the State Bar, then respondent's motion to compel would have carried more weight. Given that the information sought was not in the possession and control of the State Bar, respondent's restrictions in developing her affirmative defenses on these grounds were limited not by the State Bar but by her own resources. [7] Respondent's claim of bias is highly generalized and such broad claims have been rejected previously. (Cf. *In re Utz* (1989) 48 Cal.3d 468, 477-478.)

Respondent objected at the hearing, and at the time of a proposed amendment to the notice to show cause, to the added charges of misconduct related to a check issued against insufficient funds (hereafter, "NSF check") and alleged solicitation of one Mary Peterson by respondent. The motion to amend the notice was filed on April 6, 1989, and granted on April 19, 1989. Respondent alleged unfair surprise in that she did not have enough time to prepare a defense to the added charges, resulting in a violation of due process. The examiner averred in her supporting declaration to her motion to file the amended notice that she had advised counsel for respondent of the additional charges in December 1988 during the exchange of informal discovery. Both the hearing referee and the discovery review referee concluded that there was sufficient advance warning to respondent of the additional misconduct allegations to enable her to adequately prepare to meet the additional charges. We agree.

[8] A notice to show cause may be amended, including amending to conform to proof at the hearing, so long as the attorney is given a reasonable opportunity to defend the charge (*Rose v. State Bar* (1989) 49 Cal.3d 646, 654, citing *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420) and providing that the amendment is not a trap for the unwary respondent who has already introduced evidence to defend a different theory of charges. (*In re Ruffalo* (1968) 390 U.S. 544, 550-551.) Considering the informal

notice to respondent almost five months before the amendment was filed and the one-month formal notice given prior to trial, respondent was accorded adequate time to prepare her defense. (See *Marquette v. State Bar* (1988) 44 Cal.3d 253, 264-265 [new allegations arose in testimony on first day of hearing; notice was amended a week later; and attorney given one week to file answer and a continuance of more than one month to prepare defense; no due process violation found].) Therefore, we do not find a due process violation regarding the additional allegations in the amended notice to show cause.

[9] Respondent is not entitled to a three-member panel as a matter of due process. (*In re Utz, supra*, 48 Cal.3d 468, 477-478; *In re Demergian* (1989) 48 Cal.3d 284, 292-293.) It was evident from the pre-trial proceedings that the hearing would take more than one day of trial and the request for a three-member panel was denied on that basis. (Order denying three-member panel dated March 30, 1989.) Given the estimated length of the hearing, the State Bar Court had no discretion to assign the matter to a three-member panel. (Bus. & Prof. Code, § 6079 (b); *In re Demergian, supra*, 48 Cal.3d at p. 293.) In any event, this review panel of three judges has conducted an independent examination of the record. (Rule 453, Rules Proc. of State Bar.)

2. Conduct of the hearing

[10] Respondent filed numerous motions to disqualify the hearing referee based upon her assertion under rule 230, Rules of Procedure of the State Bar, that a reasonable person might question the impartiality of the hearing referee because of his personal bias or prejudice concerning respondent and her counsel.⁵ This disqualification standard is drawn from Code of Civil Procedure section 170.1, subdivision (a)(6)(C) and we agree with the (then) State Bar Court Assistant Presiding Referee's approach in looking to case law interpreting this portion of section 170.1 to resolve the issue in his decision

5. The pertinent portion of rule 230 reads as follows: "A referee shall be disqualified if: . . . (3) a person aware of the facts might reasonably entertain a doubt that the referee is biased or prejudiced against the examiner, respondent or

respondent's attorney, provided, however, that such a challenge must be supported by a verified showing of the facts supporting this inference." (Rule 230, Rules Proc. of State Bar.)

dismissing respondent's motion. The applicable standard articulated in *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104, looks to "whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality." The Assistant Presiding Referee concluded that there was no doubt as to the hearing referee's impartiality at that stage in the proceedings and that his rulings were within the limits of his discretion. Our review of the record affords no basis to differ with that assessment.

[11] The assigned hearing judge or referee is entitled to exert reasonable control over the conduct of proceedings. (See *Dixon v. State Bar* (1982) 32 Cal.3d 728, 736.) Requiring one counsel to question a witness from beginning to end, asking that respondent not speak to her attorneys while the hearing referee is addressing counsel and expecting that counsel will note their objections for the record and move forward with the hearing are not unreasonable standards for courtroom behavior, do not deprive respondent of the statutory recognition of legal assistance during her disciplinary hearing (see Bus. & Prof. Code, § 6085 (b)) and do not, without more, constitute bias on the referee's part.

We reject as without merit two additional claims by respondent of bias allegedly committed by the hearing referee. [12] In attempting to complete the mitigation portion of the hearing after a number of continuances to accommodate the litigation schedules of respondent and her counsel, the hearing referee wrote to a New York judge who was presiding over a criminal jury trial in which both respondent and one of her counsel were appearing on behalf of the criminal defendant. The criminal trial dates conflicted with hearing dates scheduled in the State Bar Court. In correspondence which was not originally provided the parties, the hearing referee accurately advised the New York judge of the nature and status of the public California disciplinary proceedings and asked if the jury trial could be accommodated in some way. (Exh. AA.) The New York judge responded that his trial schedule could not be altered (exh. BB), and later referred in court to the hearing referee's letter to respondent and her counsel in an appearance involving the criminal case after which the parties obtained copies. While the better way

may have been for the hearing referee to advise counsel on both sides of his intent to contact the New York judge and copy them on his correspondence, his conduct does not establish an appearance to a reasonable person of bias constituting a denial of due process. Attempting to coordinate conflicting trial dates is not improper in and of itself and there is no evidence in the contents of the referee's communications that showed bias against the respondent.

[13] The other claimed instance of bias was the hearing referee's recommendation to the Office of Trial Counsel to investigate the conduct of respondent's two New York counsel for possible disciplinary misconduct and to recommend to the State Bar Court that the *pro hac vice* admission of both counsel be revoked. (See Cal. Rules of Court, rule 983.) The hearing referee was careful to refer these determinations to other bodies for final determination. Because of his referral, he is not in the same position as a trial judge ruling on a contempt citation and we find inapplicable respondent's citation to U.S. Supreme Court decisions in contempt cases.

3. Expert witness testimony

[14] Respondent claims that she was entitled to present psychiatric testimony during the culpability phase of the hearing. Unless respondent was asserting a defense of insanity to the misconduct charges (see *Newton v. State Bar* (1983) 33 Cal.3d 480), or claiming inability to assist in her own defense (see *Slaten v. State Bar* (1988) 46 Cal.3d 48, 53-57), which she was not, testimony as to psychological disorders related to the misconduct constitutes at most evidence in mitigation of the discipline to be imposed. (*Porter v. State Bar* (1990) 52 Cal.3d 518; *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071; *In re Lamb* (1989) 49 Cal.3d 239.) The hearing referee's determination that such evidence be presented only after a finding of culpability is consistent with the law and did not deny respondent a fair hearing.

II. FACTS

The factual summary presents the counts in the order of the amended notice to show cause, with the exception of the Brumback matter, count five, which will be discussed separately. Unless otherwise noted,

these factual findings and conclusions of law are drawn from the referee's decision, are supported by the record and we concur in them. When we disagree with the sufficiency of the evidence for a finding or conclusion by the referee or where there is a substantial issue raised by the parties, a more thorough examination of the issue will be presented.

A. Count One (Jackson-Day)

Respondent was hired on March 22, 1983, by Rogernald Jackson, a retired scientist from the U.S. Department of Agriculture, and William Day, a college chemistry professor, to represent them in a civil lawsuit. Each paid \$1,000 in advanced attorneys fees and agreed that respondent's time would be billed at a rate of \$75.00 an hour. On August 29, 1983, respondent filed suit against two named defendants and up to 1,000 "Doe" defendants to be named later, and was able to serve one of the named defendants. Thereafter, respondent asked for an additional \$500 from each of her clients on December 26, 1983, in order to file an answer to a cross-complaint. She was paid upon request and filed the answer to the cross-complaint on behalf of Day and Jackson on January 31, 1984. Upon request of her clients, respondent prepared an accounting of her time dated December 20, 1983. Day and Jackson were unable to contact respondent thereafter despite numerous requests to her for additional information through telephone calls and letters. Jackson and Day hired new counsel on March 18, 1986, and new counsel sent respondent a substitution of attorney form and letter requesting the client file on March 18, 1986. Receiving no answer from respondent, the new counsel was forced to file a motion to discharge respondent and substitute himself as new counsel.

In 1989, respondent paid Jackson and Day \$1,500 each in exchange for releasing all claims against respondent. The releases are dated March 31, 1989 (Jackson) and May 10, 1989 (Day).

The hearing referee found that respondent had wilfully violated rule 2-111(A)(2) in that she had withdrawn from employment without taking reasonable steps to avoid prejudice to her clients, failed to perform legal services competently, contrary to rule 6-101(A)(2), and failed to communicate with her clients or ignored her clients' needs, contrary to section 6068 (a).⁶ [15 - see fn. 6] Particularly given respondent's failure to cooperate with subsequent counsel, her failure to respond to pointed letters from her clients and her total inaction after filing the answer to the cross-complaint, these conclusions are well grounded in the record.

[16] The referee made no finding on the charge that respondent had failed to return unearned fees to her clients as required under rule 2-111(A)(3). We find that in light of respondent's accounting for her time dated December 20, 1983, and her subsequent filing of an answer to the cross-complaint, the charge that she retained fees which she did not earn is unsupported in the record.

B. Count Two (Vaz)

Respondent was retained on a contingency fee basis by Toni Vaz to file and prosecute a civil lawsuit on her behalf against a retail store for assault and battery (personal injury). The retainer agreement was signed on April 25, 1984, and Ms. Vaz paid respondent \$300 in advanced costs in three payments, the last one on June 5, 1984.⁷ Ms. Vaz testified

6. In each client matter, the hearing referee concluded that respondent had committed wilful violations of sections 6103 and 6068 (a). The Supreme Court held in *Baker v. State Bar* (1989) 49 Cal.3d 804, 815, and numerous cases thereafter that section 6103 "does not define a duty or obligation of an attorney, but provides only that violation of his oath and duties defined elsewhere is a ground for discipline." Accordingly, we do not find any culpability on that basis. As to section 6068 (a), it appears to have been "appended to each conclusion that an act of moral turpitude or a violation of the Rules of Professional Conduct had occurred. As in *Baker*, we fail to see how [respondent's] alleged misconduct constitutes a violation of section 6068 (a)." (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1016.) [15] However where, as in this count, we

find a failure to communicate or an inattention to client needs which predates the adoption of section 6068 (m) (see *Baker, supra*, 49 Cal.3d at pp. 814-815), the pre-section 6068 (m) doctrine underlying this duty remains a viable ground of discipline as a violation of section 6068 (a). (*Layton v. State Bar* (1991) 50 Cal.3d 889, 903-904; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

7. The hearing referee found that on a later unspecified date the respondent represented that she had filed a lawsuit on behalf of Ms. Vaz seeking \$1 million in damages. There is no support for this finding in either Ms. Vaz's testimony at the hearing nor in the documents submitted relating to this count. Therefore, we do not adopt this finding.

that she was unable to reach respondent after that date by telephone and, after leaving numerous phone messages, finally visited respondent's office, where she learned that respondent had moved without leaving a forwarding address. Examination of court records by the State Bar investigator did not disclose any lawsuit filed on behalf of Ms. Vaz against the retail store.

Respondent repaid \$300 to Ms. Vaz by letter from her attorney dated November 25, 1988.

In this review, respondent has not disputed the facts found by the referee in this count. The hearing referee concluded, and we agree, that respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). He also found that respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice, in violation of rule 2-111(A)(2). Based on the referee's findings supported by the record showing that respondent failed to return Vaz's phone calls, we also adopt the referee's conclusion that respondent breached her duty to communicate with her client, contrary to section 6068 (a). (See *ante*, footnote 6.)

[17] We cannot concur with the referee's conclusion that respondent's failure to return unearned costs promptly constituted a violation of rule 2-111(A)(3). (Decision, p. 7.) As the Supreme Court noted in *Read v. State Bar* (1991) 53 Cal.3d 394, 410, advances for payments of expenses incurred during representation are outside the scope of rule 2-111(A)(3), which deals with the refunding of unearned legal fees.

[18] The referee did not address in his conclusions of law the State Bar's charges in this count that respondent violated rule 8-101(B)(4) and section 6106. We do not find that respondent's failure to return unearned costs violated rule 8-101(B)(4) without evidence, as required by the rule's terms, that Vaz requested return of the monies. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 126-127.) Although no lawsuit was filed on Vaz's behalf and Vaz was entitled to refund of these monies without having to wait four and a half years, we do not find that respondent's inaction alone supports a finding that she misappropriated those costs or that her failures constituted acts of moral turpitude under section 6106.

C. Count Three (Peterson)

Mary Peterson was initially hired by respondent to move her offices from 2716 South Western Avenue to 2822 South Western Avenue, both addresses in Los Angeles. In payment, respondent gave Peterson a check dated December 31, 1984, drawn on her client trust account for \$126.37. The check was returned to Peterson stamped "account closed." Peterson testified that after reaching respondent by telephone, respondent promised her that she would make the check good, but never did. Respondent disputes the referee's finding that respondent was aware that the trust account was closed at the time she gave Peterson the check. We agree that the record is not clear on this point, given the limited bank records that were offered by the State Bar. [19] However, respondent gave a trust account check to pay for a personal expense and, after her bank refused to honor the check, did not meet her financial obligation represented by the NSF check, and thus committed an act of moral turpitude. (*Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1113-1114.)

After her early 1985 telephone conversation with respondent, Peterson met with respondent to seek respondent's help in two matters: a worker's compensation claim and an action to recover her home. Peterson signed a retainer agreement on February 25, 1985, advanced respondent \$600 in fees on that date and paid respondent an additional \$900 in fees by April 15, 1985. Respondent met with Peterson in early May 1985 and advised her that respondent would be meeting shortly with one of the parties that would conceivably be a defendant in the real estate action. Peterson never heard from or saw respondent after that meeting. Her phone messages to respondent were not returned and office visits were unavailing. No work was done on the worker's compensation matter and no lawsuit was filed on the real estate dispute; the latter is now pending litigation filed by Peterson's subsequent legal counsel.

Peterson received a \$1,500 refund from respondent on or about November 25, 1988, but respondent did not return or preserve Peterson's file or other documents entrusted to her.

The hearing referee concluded, and we agree, that respondent had abandoned her client, contrary to

rule 2-111(A)(2); that her refund of the advanced unearned attorneys fees was not prompt, contrary to rule 2-111(A)(3); and that in failing to take any action on the worker's compensation matter or to file any action on behalf on Peterson on the real estate matter, respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). In addition, we find, as the referee did implicitly, that respondent's violation of section 6068 (a) resulted from the breach of her duty to communicate with her client. (See *ante*, footnote 6.)

The referee also found that respondent had committed acts of moral turpitude and dishonesty by supplying an NSF trust account check to pay for her office move contrary to section 6106 (see *ante*) and by misappropriating \$1,500 in advanced fees. We have already concluded that respondent's tendering of the NSF check and subsequent disregard of the underlying debt to Peterson constituted an act of moral turpitude. [20] However, after reviewing Supreme Court decisions dealing with the retention of unearned advanced fees, we do not find a basis in the case law to support the proposition that an attorney's failure to return promptly unearned fees constitutes an act of moral turpitude encompassed by section 6106. Given that the retention of unearned fees is a violation of an express duty under rule 2-111(A)(3) (now rule 3-700(D)(2)), we need not make a duplicative finding of culpability for the same misconduct under section 6106. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

D. Count Four (Butler)

Charlotte Butler retained respondent on September 3, 1984, to file a civil suit for damages on her behalf. At her initial consultation with respondent, Butler paid \$150 in advanced attorney fees. Another \$150 was paid to respondent on September 21, 1984, to, in the words of Butler, "file the lawsuit." Two additional payments of \$150 each were made in November 1984, with respondent representing to Butler each time that the lawsuit was filed and pending court action. Butler's last payment to respondent was in March 1985, for a total of \$750 in advanced fees. Butler was unable to contact respondent after March 1985 despite numerous telephone calls and finally visited respondent's office, where

she was advised that respondent had left without a forwarding address or telephone number. A State Bar investigator testified that no lawsuit on behalf of Butler was on file in Los Angeles Superior Court.

Respondent gave Butler a check on or about November 25, 1988, for \$750, representing the monies advanced by Butler.

Respondent has not disputed the referee's findings and conclusions. We concur with the hearing referee's conclusions that respondent's failure to perform services and departure without providing her client with a forwarding address, telephone number, or her file breached rule 2-111(A)(2) as an abandonment of Butler without protecting her rights; respondent's failure to return fees advanced by Butler until November 1988 violated rule 2-111(A)(3), and her misrepresentations as to the status of the lawsuit to Butler constituted an act of moral turpitude under section 6106. The referee concluded that respondent's acts generally violated section 6068 (a). We limit that finding solely to respondent's failure to communicate with Butler. Consistent with our analysis under count three, we do not find, as did the referee, that respondent's lengthy retention of unearned fees was an act of dishonesty, corruption or moral turpitude contrary to section 6106.

E. Count Six (Allen)

Respondent was retained by Evelyn Allen on November 16, 1983, to represent Allen in her chapter 11 bankruptcy proceeding concerning her board and care facility for mentally disabled adults. Allen's prior counsel, William Tookey, had filed the initial petition and all other papers up to respondent's substitution of counsel form filed with the bankruptcy court on November 30, 1983. Allen paid respondent \$300 in advanced fees at her initial meeting with respondent and \$500 more on November 29, 1983.

Allen's real estate holdings were listed in her bankruptcy filings and as such were subject to the jurisdiction of the court. (11 U.S.C. § 525.) Allen's creditors filed their claims with the bankruptcy court and would be paid under a court- and creditor-approved plan from assets in the estate. (11 U.S.C. §§

1123, 1129.) Other than in the ordinary course of business with approval of the bankruptcy judge, Allen, as debtor in possession, could only sell or lease her property after notice and a hearing. (11 U.S.C. § 363 (b).) During this time, the bankruptcy judge assigned to the Allen case was John Bergener.⁸

Allen learned from a real estate agent that her house in Altadena was being sold. She contacted respondent, who asked for the name of the escrow agent and advised Allen that she (respondent) would send a courier to the escrow office to obtain the balance of the funds from the sale and convey those monies to the bankruptcy court. Closing on the property occurred on December 23, 1983. Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling \$6,881.60, were in the file obtained from the escrow company and showed that the checks were deposited by respondent in her bank account on or about December 23, 1983 (\$6,385.93) and March 27, 1984 (\$485.67). The escrow file also contained an order dated December 6, 1983, allegedly from the bankruptcy court, referring to a "Petition For Sale of Property Outside of the Ordinary Course of Business." The terms of the order authorized the sale of Allen's Altadena property, with the net funds to be delivered to the respondent's trust account pending further order of the bankruptcy court. The order was on respondent's letterhead, bore a date and entered stamp for December 6, 1983, and was stamped at the end of the order with the name "William J. Lasarow."⁹

The complete bankruptcy file does not contain nor does the accompanying docket sheet note the petition for the sale of the property or the order authorizing the sale. There are no additional proceedings directing the disbursal of the net funds from the

sale evident in the file or docket sheet. Allen testified that she did not receive any funds in connection with the sale, nor could she contact respondent after March 1984. The only filing respondent made in bankruptcy court on behalf of Allen which is reflected in the bankruptcy file or docket sheet was her November 30, 1983 substitution.

After the initiation of disciplinary proceedings, respondent paid Allen \$3,000 in exchange for releasing all claims against respondent.

The hearing referee concluded on this evidence that the bankruptcy order was fraudulent and that respondent misappropriated the funds owed to the bankruptcy estate. [21] Respondent's wilful violation of rule 8-101(B)(4) has been demonstrated by her failure to pay the funds as directed by the bankruptcy court. The funds can be traced to respondent's hands from the copies of the checks in the escrow file. Since then, the funds themselves have never been accounted for. Respondent was responsible for depositing them in a trust account pursuant to rule 8-101(A)¹⁰ and under the terms of the bankruptcy order authorizing the sale. We concur with the hearing referee that this evidence supports a finding of misappropriation (see *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550) and constitutes an act of moral turpitude and dishonesty as well. (Bus. & Prof. Code, § 6106; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) The record also supports the findings that respondent failed to communicate with Allen, thereafter abandoned her, and failed to perform legal services competently. These findings justify the conclusion that respondent wilfully violated section 6068 (a), and rules 2-111(A)(2) and 6-101(A)(2).

8. The matter was later transferred to Bankruptcy Judge Geraldine Mund. (Exh. 32.)

9. At the time alleged in this count, Judge Lasarow was the presiding judge of the U.S. Bankruptcy Court for the Central District of California.

10. Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling \$6,881.60, were in the file obtained from the escrow company. The first check negotiated on December 23, 1983, was not deposited in

the trust account respondent maintained at West Olympia Bank. (Exh. 34.) The back of the second check, negotiated on March 27, 1984, has written "4 X 20[;] 4 X 100[;] 1 X 5" which corresponds to the \$485 amount of the check. In addition, respondent's California driver's license number and credit card number from the May Company appear on the check, consistent with a finding that respondent cashed the check. We conclude, as did the referee, that respondent did not deposit either check in her trust account as required by rule 8-101(A).

[22] Respondent's statement to Allen that she would arrange for a courier to deliver the proceeds of the sale to the bankruptcy court was an act of dishonesty and moral turpitude contrary to section 6106 as well. Ordinarily, failure to keep a promise of future action is not by itself proof of dishonesty. (*Tenzer v. Superscope* (1985) 39 Cal.3d 18, 30-31.) The Supreme Court dismissed an argument based on the *Tenzer* dicta in an attorney discipline case where the record revealed misconduct beyond mere nonperformance. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 109 [issuance of a bad client trust account check, attorney's subsequent failure to make good on the check and failure to promptly forward client funds awarded in an arbitration together support finding of moral turpitude].) In this case, respondent's reassurance to her client that the funds would be remitted to the court was followed shortly thereafter by respondent's misappropriation of those same funds. Given these circumstances, we agree with the hearing referee that respondent's actions were intended to mislead her client and constituted deceitful conduct, contrary to section 6106.

[23] We do not find clear and convincing evidence that respondent forged the bankruptcy order to authorize the sale. In an attorney discipline proceeding, all reasonable doubts must be weighed in favor of the accused attorney. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 183.) While the evidence presented only from the documents raises an inference of irregularity, without evidence from the bankruptcy court attesting to its practices and evaluating the genuineness *vel non* of respondent's order purportedly signed by a judge other than the assigned judge, we cannot conclude that clear and convincing evidence exists to find respondent culpable of fabricating a court order in this matter.

F. Count Seven (Rule 6-101(B)(2))

The hearing referee concluded based on the evidence in six of respondent's cases in which she abandoned clients and their causes, retained unearned fees, passed at least one bad check, and misrepresented to clients the status of their cases that respondent repeatedly accepted employment and continued representation when she reasonably should have known she did not have nor would acquire in time to perform, sufficient time, resources and abil-

ity to perform in violation of rule 6-101(B)(2). The hearing referee focused his discussion on respondent's mental state and whether she had the requisite wilfulness to violate the rule. [24] The definition of wilfulness for a Rule of Professional Conduct violation is one often repeated by the Supreme Court. The attorney must simply have acted or omitted to act purposely to do the act forbidden by the rule or not to do the act required by the rule. (*McKnight v. State Bar, supra*, 53 Cal.3d 1025, 1034; *Beery v. State Bar* (1987) 43 Cal.3d 802, 815.) There is no evidence that respondent was incapable of forming the requisite purpose or intent. We adopt the referee's finding that respondent was capable of the willfulness necessary to violate rule 6-101(B)(2).

[25] There are few cases that address the elements of rule 6-101(B)(2), which became effective in October 1983. The one case with some discussion of the rule is *Garlow v. State Bar* (1988) 44 Cal.3d 689. In *Garlow*, the attorney was charged with three matters of professional misconduct. As to one client matter, the Supreme Court found that the attorney had failed to communicate with and abandoned the client, failed to provide competent legal services and failed to refund the unearned fee, along with falsely testifying that he had been fired by the client. His abandonment of the client without performing any work for her led the Court to conclude that Garlow had violated 6-101(B)(2) "because of his willingness to accept employment when he should have known he was not in the position to competently represent his client." (*Id.* at p. 706.) The fact that Garlow handled a large number of cases only bolstered the conclusion that he had accepted employment in this instance with insufficient resources to competently act on the client's behalf. (*Id.* at p. 711.) Given the evidence presented in at least four client matters establishing that respondent accepted employment and then abandoned her clients' causes with little or no work done and unearned fees retained, a violation of rule 6-101(B)(2) has been abundantly demonstrated on this record.

G. Count Five (Brumback)

1. Striking of answer and admission of allegations

On this count, the hearing referee made numerous factual and culpability findings concerning the

alleged complaint of a now deceased client, Virginia Brumback, based on evidence admitted into the record after respondent refused to testify when called by the State Bar in connection with this count of alleged misconduct.

On the third day of trial (May 10, 1989), respondent was called as an adverse witness by the State Bar as part of its case on culpability on the Brumback allegations. (Evid. Code, § 776.) Respondent had neither been served with a subpoena nor a notice in lieu of subpoena by the State Bar. On advice of counsel, respondent refused to be sworn or testify. In response to respondent's refusal to take the stand, the hearing referee conditionally struck respondent's answer to the amended complaint on this count and deemed the allegations admitted. (Order filed May 10, 1989; decision at p. 14, par. 45.) Respondent never testified during the proceeding.

We see three primary questions raised by the facts: (1) was respondent properly called to the witness stand to testify as an adverse witness for the State Bar; (2) did she have the right to refuse to testify, and (3) if she had to testify, whether the referee was empowered to enter her default for her refusal to testify?

[26a] Attorney discipline proceedings are *sui generis*, neither criminal nor civil, and ordinary criminal procedural safeguards do not apply. (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447.) The proceedings are conducted pursuant to the Rules of Procedure

adopted by the State Bar, and **[27a]** the rules of evidence in civil cases in courts of record are generally followed. (Rule 556, Rules Proc. of State Bar.¹¹) **[26b]** The California Supreme Court has noted that the procedural safeguards contained within the Rules of Procedure are adequate to assure procedural due process. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928.)

[28] Governing law and the Rules of Procedure provide that parties may compel the attendance of witnesses by subpoena. (Rules Proc. of State Bar, rule 310(b); Bus. & Prof. Code, § 6049 (c); Code Civ. Proc., § 1985.) At the time of the hearings, respondent was not a resident of California and thus was not amenable to service of a subpoena prior to the hearing. (See Code Civ. Proc., § 1989.) Since respondent is a party, the State Bar could have provided her California counsel with a notice in lieu of subpoena to require respondent's attendance as a witness at the disciplinary proceeding. (Code Civ. Proc., § 1987 (c); see also Rules Proc. of State Bar, rule 555(b).¹²)

Respondent contends in her post argument brief¹³ that the Rules of Procedure provide that respondent can only be compelled to appear as a witness if subpoenaed and to permit otherwise would abrogate the protection accorded by the subpoena process. She argues that the rules specified in our proceedings are not rules of evidence incorporated by rule 556 of the Rules of Procedure. In her view, the intent of rule 556 is to include by reference purely procedural mechanisms for conducting hearings. Code of Civil

11. Rule 556 reads in its entirety: "Except as provided in hearings authorized by rule 555 [default hearings], and subject to relevant decisions of the Supreme Court, the rules of evidence in civil cases in courts of record in this state shall be generally followed in a formal proceeding, but no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error or errors complained of resulted in the denial of a fair hearing."

12. When a member fails to appear at a disciplinary or probation revocation hearing, after the notice to show cause and the notice of hearing were properly served, a default may be entered against the member. The charges in the notice may be deemed established without further proof if and only if the

member was subpoenaed to appear or was served with a notice to appear as a witness. (Rule 555(b), Rules Proc. of State Bar.)

13. After oral argument, we requested that the parties submit briefs in response to the following inquiry: "Whether sections 177 and 1990 of the Code of Civil Procedure or any other provisions of California law apply to this State Bar proceeding to authorize the trial referee in this matter to have directed that Respondent, present in the courtroom but not under subpoena or notice to appear, be called as a witness? If the answer is in the affirmative, under what authority did the referee have the power to sanction Respondent in the manner in which such sanction occurred?"

Procedure sections 177¹⁴ and 1990¹⁵ confer judicial powers on a “judicial officer” or “court,” and referees are neither. To apply either section through rule 556 would be too broad a reading of the powers of the State Bar Court and therefore ultra vires.

The State Bar replies that it had the right to call respondent as an adverse witness under Evidence Code section 776, and that sections 177 and 1990 of the Code of Civil Procedure constitute additional support for its position. Evidence Code section 776 permits the State Bar to call respondent as a witness and examine her as if under cross-examination at any time during its presentation of evidence. The examiner finds no authority for the assertion that under Evidence Code section 776, a witness must first be subpoenaed. She also notes that respondent is obligated to appear at the disciplinary proceeding. (*Morales v. State Bar* (1988) 44 Cal.3d 1037, 1046.)

“The process by which the attendance of a witness is required is the subpoena.” (Code Civ. Proc., § 1985, subd. (a); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1036.) In the case of a party, the alternative process is notice to the party’s attorney. (Code Civ. Proc., § 1987, subd. (b); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1047.) [29] Evidence Code section 776 alone does not empower the examiner with the authority to require respondent’s presence at the hearing. Once the hearing commences the State Bar is entitled to call respondent to the witness stand as part of its presentation of evidence to prove its case.

[30] Notwithstanding the fact that respondent was neither subpoenaed nor noticed to appear at the discipline hearing, she does have the obligation to be present. (*Martin v. State Bar* (1991) 52 Cal.3d 1055, 1063; *Yokozeki v. State Bar, supra*, 11 Cal.3d 436,

447.) She was in fact in attendance for most of the proceedings.

[27b] We find the application of section 1990 of the Code of Civil Procedure appropriate in this case. Section 1990 is found in part IV of that code (Miscellaneous Provisions), and is also part of title III entitled “Production of Evidence.” Rule 556 of the Rules of Procedure of the State Bar is not limited solely to incorporating the Evidence Code. That rule encompasses “the rules of evidence in civil cases in courts of record in this state.” The law applied in civil cases includes the Evidence Code, applicable sections of the Code of Civil Procedure and judicial decisions. Proceedings before the State Bar are sui generis, neither civil nor criminal in nature. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300.) [31] The State Bar Court, in disciplinary matters, acts as the administrative arm of the Supreme Court. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47; *Herron v. State Bar* (1931) 212 Cal. 196, 199.) Disciplinary proceedings under the prior volunteer system were characterized by our Supreme Court as “in essence the initial stage of an action in court” with the State Bar acting as a fact finder or referee for the Supreme Court. (*Brotsky v. State Bar, supra*, 57 Cal.2d 287, 301.) Attorney disciplinary hearing panels were also recognized as composed of “judicial officers” within the ambit of section 6068 (d).¹⁶ (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 709; *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200.) We find that the hearing referee was functioning as a “judicial officer” in this disciplinary proceeding. Therefore, the referee had the authority to compel respondent, present in his hearing room, to be a witness under Code of Civil Procedure section 1990.

No person may be compelled to take the witness stand and be a witness at his or her own criminal trial.

14. Code of Civil Procedure section 177 reads as follows: “Every judicial officer shall have power: [¶]1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of official duty; [¶]2. To compel obedience to his lawful orders as provided in this code; [¶]3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code; [¶]4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.”

15. Code of Civil Procedure section 1990 states: “A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.”

16. Under section 6068 (d), an attorney has the duty to “employ . . . such means only as are consistent with truth, and never seek to mislead *the judge or any judicial officer* by an artifice or false statement of fact or law.” (Emphasis added.)

(U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) A witness may assert the privilege in any proceeding so as not to give answers which would subject him or her to criminal prosecution. (*Malloy v. Hogan* (1964) 378 U.S. 1.) [32a] An attorney may not be disciplined solely based on invoking the Fifth Amendment privilege against self-incrimination. (*Spevack v. Klein* (1967) 385 U.S. 511.)

[32b] However, an attorney disciplinary matter is not a criminal case for purposes of the Fifth Amendment, so an attorney may be called as a witness at his or her own disciplinary hearing (*Black v. State Bar* (1972) 7 Cal.3d 676, 686) and immunized testimony may be used. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 887.) While respondent could have been required to take the witness stand when properly called, she could have declined to answer specific questions when asked by asserting her Fifth Amendment right to protection from criminal liability. (*Black v. State Bar, supra*, 7 Cal.3d 676, 688.) No adverse inference can be drawn from a respondent's invocation of the Fifth Amendment's protection. (Evid. Code, § 913, subd. (a); cf. *Sands v. State Bar* (1989) 49 Cal.3d 919, 928, 930.)

[33a] Respondent never took the stand and disobeyed the referee's proper order to testify. She invoked the Fifth Amendment through counsel without specific questions having been addressed to her. Her actions were not warranted; and, had she been under subpoena, she could have been certified to the Superior Court for contempt proceedings. (Bus. & Prof. Code, § 6050.)

[33b] The referee also could have considered respondent's conduct to be an aggravating factor in the event culpability had been found. (Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(vi) (hereafter "stds.") However, even the examiner concedes that the hearing referee did not have the direct power of contempt (Bus. & Prof. Code, § 6051) nor could he exercise the authority to strike respondent's answer and deem the allegations at issue to have been admitted by default as a matter of law. Those latter remedies were not available as sanctions in the discovery phase of the proceeding (rule 321, Rules Proc. of State Bar); and, in our view, the referee had no authority to invoke

them as a sanction for failure to testify at the hearing. Therefore, we disagree with the referee's striking of respondent's answer to count five of the notice to show cause and find instead that respondent has not admitted the allegations therein.

2. Hearsay nature of evidence presented

In her answer, respondent denied every allegation in count five, including the allegation of an attorney-client relationship. The only witnesses presented by the State Bar as to this count were its investigators David T. Fritz and Tim Biagas. Fritz testified that he was assigned to investigate a complaint filed by a Virginia Brumback against respondent. He wrote Brumback a letter and received a handwritten response on the same sheet of paper. (Exhibit 10.) Fritz's portion of exhibit 10 is admissible as a business record, having been prepared in the ordinary course of his employment with the State Bar. (Evid. Code, § 1271, subd. (a).) Biagas testified that he had done a court records search and that no civil actions had ever been filed by respondent on Brumback's behalf. As noted, Brumback was deceased at the time of the hearings below.

The remainder of the documentary evidence, including a retainer agreement, the complaint filed with the State Bar, and documents accompanying the complaint were all written by Brumback. The referee found that the Brumback statements in exhibits 10 and 11 fit within three exceptions to the hearsay rule: (1) as adoptive admissions of the respondent; (2) for the limited purpose of showing Brumback's state of mind; and (3) as "[c]orroborated hearsay under the decisional exception for hearsay corroborated by non-hearsay evidence, i.e., Exhibits 12, 13a, 13b and 13c (Evidence Code section 1200(b); *PG&E v. Thomas Drayage and Rigging Co.* (1968) 69 C 2d 33)." (Decision, pp. 16-17.)

[34a] The handwritten complaint and its accompanying documents remain hearsay as out-of-court statements of a now deceased declarant. (Evid. Code, § 1200.) None of the exceptions to the hearsay rule concerning deceased declarants apply under these facts. (See Evid. Code, §§ 1242 [dying declarations]; 1227 [wrongful death action]; 1261 [action against decedent's estate].) The complaint form could be

admitted for the limited use of showing the state of mind of Brumback; i.e., to show Brumback believed she had a complaint against respondent which she desired to bring to the attention of the State Bar by filing a complaint, and only where her state of mind is at issue in the case. (Evid. Code, § 1251.) The truth and substance of the complaint are not in evidence, however, under this exception to the hearsay rule. (Evid. Code, § 1251, subd. (b).) Moreover, Brumback's state of mind is not an element in the charged violations; it is respondent's state of mind which is at issue.

[34b] Brumback's letter to respondent (exhibit 13a) could have been admitted as an adoptive admission, as proposed by the referee under *Bowles v. State Bar*, *supra*, 48 Cal.3d at p. 108, if Brumback had testified. In *Bowles*, the client's mother testified that she had written to Bowles accusing him of failing to communicate or perform services for the client, her daughter. Because Bowles had failed to respond, the witness's testimony was admissible as an adoptive admission. (*Id.* at p. 108.) Had Brumback been available to testify that she did not receive a response to the letter, as did the complaining witness in the *Bowles* case, her testimony and, conceivably, the letter memorializing her act, would have been admissible. Without some admissible evidence, such as testimony, that there had been words or other conduct manifesting respondent's adoption of the statement, the letter alone is not an adoptive admission under Evidence Code section 1221.

Evidence Code section 1200, subdivision (b) states that hearsay evidence is inadmissible except as provided by law, thereby recognizing exceptions created by case law as well as statute. *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 (hereafter *Pacific Gas & E. Co.*) created the corroborative evidence exception to the hearsay rule. (Jefferson, Synopsis of Cal. Evidence (1985) The Hearsay Rule, § 1.3, pp. 16-17.) The *Pacific Gas & E. Co.* case involved, in part, the admissibility of invoices, bills and receipts to prove the amount of damages plaintiffs sustained. The Court found the documents to be hearsay and thus unusable as proof of liability, payment for the repairs or the reasonableness of the charges. (*Pacific Gas & E. Co.*, *supra*, at pp. 42-43.) The Court noted, "If, however a party

testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony." (*Id.* at p. 43.) There was testimony in the *Pacific Gas & E. Co.* record that the invoices had been paid, so that the invoices could be admitted for the limited purpose of corroborating that testimony.

Admission of the documents to corroborate independent testimony is a limited hearsay exception, similar in effect to the "state of mind" exception. The Court in *Pacific Gas & E. Co.* further ruled that the documents admitted to corroborate a party's testimony could not be used to prove that the actual repairs had been made. Expert testimony on the reasonableness of the charges for the repair work, which was based on the individual items listed on the invoices, was therefore inadmissible. (See, e.g., *People v. Maki* (1985) 39 Cal.3d 707, 711-712 [admission of a hearsay document as an adoptive admission, "not merely as corroboration," requires additional evidence of knowledge by the party against which it is sought].)

California courts have invoked this hearsay exception to sustain the admission of invoices from a packing house after the manager of the cattle company testified to receiving them and arranging for payment (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 272); of dental bills and the reasonableness of the charges, where the plaintiff/patient testified as to the services received, his receipt of the bill and his payment (*McAllister v. George* (1977) 73 Cal.App.3d 258, 263); and of doctor bills and the reasonableness of the charges therein, where the plaintiff/patients first identified each bill, testified as to what each charge was for and the amount of each which had been paid. (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 626.) We have found no cases authorizing the use of otherwise hearsay documents to corroborate admissible evidence other than testimony.

[34c] The admissibility of the Brumback complaint, attached documents and response to the State Bar investigator's inquiry were argued to be "corroborated hearsay." This misstates this narrow decisional exception to the hearsay rule. The hearsay evidence must corroborate admissible evidence, gen-

erally testimony, already in the record, not the other way around. Therefore, under the "corroborating hearsay rule," the Brumback complaint was sought to be admitted for the truth of the matters asserted therein for the purpose of corroborating exhibits 12 (retainer agreement) and 13a (April 12, 1985 letter from Brumback to respondent), 13b (copy of check from respondent's trust account) and 13c (back of 13b). However, these exhibits could not properly be admitted into evidence because those documents are themselves hearsay, and do not fall within one of the hearsay exceptions.

We are then left with the testimony of the two investigators, the evidence of Brumback's intent to file a complaint against respondent and the Fritz letter seeking information from Brumback concerning a returned check for \$17,500 written on the respondent's trust account. Based on this record, we cannot find there is clear and convincing evidence of misconduct alleged in this count.

III. EVIDENCE IN MITIGATION AND AGGRAVATION

[35] Circumstances in mitigation or aggravation must be established by clear and convincing evidence. (Stds. 1.2(b) and (e); *Rose v. State Bar*, (1989) 49 Cal.3d 646, 667.) We consider the evidence in aggravation and mitigation in turn.

A. Facts in Aggravation

The referee identified several aggravating factors which he found were established by clear and convincing evidence. These include respondent's suspension between August 5, 1985, and October 16, 1986, for non-payment of fees, her "contemptuous" attitude toward her misconduct and the disciplinary proceedings, and her failure to cooperate with the State Bar. In the referee's view, respondent's misconduct constituted multiple acts of wrongdoing, involved bad faith and concealment, and reflected a pattern in which respondent failed to communicate with her clients, did not perform legal services on their behalf and eventually abandoned them. The misconduct he found included misappropriation of client trust funds and advanced fees, totalling over \$10,000, and acts of moral turpitude and bad faith in

addition to the theft of funds. (Decision, pp. 46-47; 49.) Overall he concluded the misconduct resulted in harm to her clients, the public and the administration of justice. (Decision, p. 47.) The referee also found that respondent lacked candor toward her clients and the State Bar during the pendency of the discipline proceedings. (Decision, p. 49.)

[36] The hearing referee found that respondent's 14-month suspension for failure to pay bar dues constituted prior discipline. (Decision, p. 46.) The Supreme Court has, in some cases, referred to an attorney's suspension for nonpayment of State Bar membership fees as "prior discipline." (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 950; *Farnham v. State Bar* (1976) 17 Cal.3d 602, 608; *Demain v. State Bar* (1970) 3 Cal.3d 381, 383.) However, in other cases of attorneys previously suspended for nonpayment of fees, the Supreme Court declined to treat those prior suspensions as part of a record of prior discipline. (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 701, 708; *Bate v. State Bar* (1983) 34 Cal.3d 920, 922.) Given that the suspension for nonpayment of fees arises solely from that administrative fact (§ 6143) and not from any finding of misconduct, we believe that the Court's treatment in *Hitchcock* and *Bate* is the appropriate one and we therefore decline to consider respondent's administrative suspension for failure to pay bar fees to be a prior record of discipline for purposes of weighing the appropriate discipline in this case. However, we do not find her lack of prior discipline to be a factor in mitigation in light of the evidence that her misconduct began just over one year after her admission to practice. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 256.)

[37] We find that respondent failed to cooperate with the State Bar insofar as she failed to keep her address current with membership records so that much of the State Bar's investigation was delayed and stymied. [38] We will not impute any aggravating effect to respondent's failure to take the stand when properly called (see discussion *ante*) in that she was following the advice of her counsel on that issue and the law was not clear at the time. Nor, in assessing her cooperation with the State Bar in this case, will we attribute to respondent the courtroom behavior and rhetorical fervor of her counsel.

[39] We do not find respondent to have demonstrated insight into her misconduct. Her failure to pay restitution until well after she was financially able to do so and only under the pressure of these proceedings weakens her claim to rehabilitation. (*Read v. State Bar, supra*, 53 Cal.3d at p. 426.) Although Allen testified that in November of 1988, she agreed to accept \$3,000 from respondent in full settlement, the record is clear that respondent misappropriated \$6,881.60 of Allen's proceeds. From at least a moral standpoint, respondent still owes Allen an additional \$3,881.60. An attorney may be required to make restitution as a moral obligation even if there is no legal obligation to do so. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008.) She misrepresented the status of the lawsuit to Butler and misled Allen as to the supposed deposit of the net proceeds from the house sale with the bankruptcy court. Such acts of bad faith and concealment toward her clients are aggravating factors. (Stds. 1.2(b)(iii) and (b)(vi).) Respondent's assertion that it was the State Bar's duty to contact her clients and safeguard her client files when she left her California clients suddenly, ignores her responsibilities to communicate with her clients, safeguard their interests and protect their confidences. (See, e.g., *Read v. State Bar, supra*, 53 Cal.3d at p. 426 [attorney's belief that it was the State Bar's duty to contact her clients and develop restitution plan illustrated lack of insight into misconduct and questionable rehabilitation].) Those obligations are imposed on all attorneys admitted to practice in California and respondent cannot shift them to the State Bar.¹⁷

Respondent's wrongdoing involved multiple acts of misconduct (std. 1.2(b)(ii)), and resulted in harm to respondent's clients. (Std. 1.2(b)(iv).) Day, Jackson and Peterson incurred costly delays and required

additional proceedings by subsequent counsel in pursuing their lawsuits. Vaz and Butler lost their causes of action altogether as a result of respondent's inaction and abandonment. The misappropriation in the Allen case resulted in a loss to Allen's bankrupt estate, and consequently to her creditors of almost \$7,000, but we cannot conclude that respondent's inadequate legal assistance caused the conversion of Allen's chapter 11 proceeding to a chapter 7 action.

B. Facts in Mitigation

Respondent's case in mitigation concentrated on her emotional distress and disability, her recovery from her emotional problems, and her subsequent activities on behalf of the underrepresented, primarily in New York City. Her evidence of emotional disability consisted of the testimony of Bette Braun, the psychotherapist who co-led respondent's group therapy sessions from November 1985 until March 1987, and her treatment summary of respondent prepared in June 1989, prior to her testimony. To formulate her summary, Ms. Braun relied in part on treatment summaries written by Lenora Fulani, Ph.D., and Fred Newman, Ph.D.,¹⁸ also prepared in preparation for respondent's disciplinary hearing.¹⁹ Respondent was treated by Dr. Fulani from June 1985, soon after her arrival in New York from Los Angeles, until September 1985. She then had a few individual sessions with Dr. Newman and joined the group therapy sessions with Ms. Braun and Dr. Newman.

Ms. Braun testified that in her view, respondent arrived from California suffering from a deep depression, triggered when respondent's seventeen-year-old son ran away from his mother's home in 1984 and threatened to kill himself if respondent attempted to force him to return.²⁰ She identified respondent's state

17. In the limited circumstances where an attorney is shown to be incapacitated, the State Bar may then seek an order from the superior court for the court to assume jurisdiction over the law practice. (Bus. & Prof. Code, §§ 6180, 6190, 6190.1, et seq.)

18. Dr. Fulani practiced under the supervision of Ms. Braun. Dr. Newman is the founder of the social therapy approach to psychotherapy and practices in New York in partnership with Ms. Braun.

19. The summaries by Drs. Fulani and Newman were admitted into evidence (exhs. P and Q) for the limited purpose of indicating the source of information for Ms. Braun in making her diagnostic assessment of respondent, and not for the truth of the statements therein.

20. The son had been the focus of a two-year custody fight during respondent's college and law school education between respondent and an elderly couple who had kidnapped the boy from respondent at an early age. Respondent also suffered from other traumatic events which occurred during her adolescence.

as "crisis paralysis," an immobilizing condition characterized by feelings of inadequacy, self-destruction and self-blame resulting from the racism in American society. In the view of Ms. Braun, professional people of color are susceptible to this emotional illness. Social therapy helps such patients overcome the condition by teaching them to avoid self-blame for the racism in society and relinquish the role as victim, and instills confidence in their ability to change society.

After her initial crisis was resolved, respondent became involved in community-based free legal clinics in Harlem and other minority communities in New York City. She has also been very active in the AIDS Bill of Rights and human rights struggles in Haiti and elsewhere. Twenty letters attesting to her community and human rights activities were admitted in evidence. About a third of the letters made no reference to the disciplinary charges against respondent. Of those which evidenced some familiarity with the charges, a few simply stated that they were aware that respondent's misconduct occurred around the time she closed her practice in California. The remainder indicated that they had been told that respondent had been found culpable of abandoning clients and mishandling client funds prior to June 1985. Most character references asserted that any unethical conduct by respondent would be aberrational in light of their experience with respondent. Two letters questioned the motives of the State Bar in proceeding against respondent.

In rebuttal, the examiner presented testimony from Robert Pasnau, M.D., director of the Adult Psychiatric Clinical Services and Professor of Psychiatry at the University of California's Los Angeles campus. Dr. Pasnau's testimony dealt solely with the treatment summaries of respondent prepared by respondent's New York therapists. Dr. Pasnau's criticism focused on the failure to conduct a physical examination or other diagnostic tests of respondent, failure to verify or attempt to corroborate any of the family or background history provided by respondent with other sources, the lack of any notation or consideration of a personality or character disorder which respondent's file might suggest and the limited diagnostic evaluations made. In his view, the reports reviewed and relied upon by Ms. Braun did

not encompass the period of respondent's misconduct in California and failed to address the bearing, if any, her mental state had on her law practice. Dr. Pasnau was not familiar with the "crisis paralysis" condition and did not find a definition or description of it after consulting a number of psychiatric treatises.

The referee concluded that there was not clear and convincing evidence in the record that respondent suffered from extreme emotional distress nor sufficient proof that what difficulties she experienced played a significant role in her misconduct. (Decision, pp. 43-44.) He discounted her character references because they were in the form of declarations and because he did not find that the declarants were fully conversant with the disciplinary charges against respondent. (*Weller v. State Bar* (1989) 49 Cal.3d 670, 677.)

[40a] The Supreme Court has recognized that "extreme emotional difficulties are a mitigating factor where 'expert testimony establishes [that the difficulties were] directly responsible for the misconduct; . . . provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties.'" (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527, quoting std. 1.2(e)(iv).) Aberrational conduct resulting from extremely stressful family circumstances can also be considered emotional stress warranting mitigation of discipline. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245; *In re Demergian, supra*, 48 Cal.3d 284, 294.) The expert testimony must establish more than the impairment of the attorney's judgment or distortion of values caused by stress generally; there must be evidence that the emotional difficulties caused the misconduct. (*In re Naney, supra*, 51 Cal.3d at p. 197.) There must be clear and convincing proof of the attorney's complete and sustained recovery such that further misconduct is unlikely in the future. (*Porter v. State Bar, supra*, 52 Cal.3d at p. 528; *In re Lamb, supra*, 49 Cal.3d at p. 246.) Absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

[40b] We disagree with the referee's conclusion that no weight should be accorded the testimony

regarding respondent's psychological problems. The shortcomings of Ms. Braun's analysis as identified by Dr. Pasnau do not negate her observations that respondent was in a state of depression and distress when she joined Newman and Braun's therapy sessions in New York in late 1985. Her conclusion that respondent, after a year and a half of therapy, conquered her psychological problems and developed coping mechanisms for dealing with any future challenges, carries convincing weight as well. [41] The critical issue is the relationship, if any, between these family and psychological problems and respondent's misconduct. Many of the acts of misconduct predate the departure of respondent's son in 1984. Since the son's running away from home was the triggering event in respondent's emotional crisis, ethical violations arising prior to this time cannot be traced to these problems. (See, e.g., *Read v. State Bar, supra*, 53 Cal.3d at pp. 424-425 [family and emotional problems which overwhelmed attorney in February 1984 do not mitigate misconduct which occurred prior to that date].) We do not find sufficient evidence in the record relating respondent's emotional and psychological problems to the most serious misconduct found, namely the misappropriation of the proceeds of the Allen property sale totaling approximately \$6,900, and the misleading information given to her clients concerning the status of their cases.

[42] Acute depression and other psychological problems can explain, but not excuse, inattention to the demands of a law practice and the ethical improprieties that result. (*Silva-Vidor v. State Bar, supra*, 49 Cal.3d at pp. 1078-1079; *Frazer v. State Bar* (1987) 43 Cal.3d 564, 577-578.) Therefore, to the degree that her emotional problems underlay respondent's failure to provide competent legal services, to apprise her clients of significant developments in their cases and to protect them and their rights from prejudice when she closed her law office and left California, evidence of her recovery from and unlikely recurrence of these ailments is mitigating. (*Hawes v. State Bar, supra*, 51 Cal.3d at p. 595; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent refunded monies to settle with five of her six clients and refunded \$3,000 of \$6,881.60 owed to Allen, but did not restore the funds until after

the notice to show cause had been filed in this matter, and, in the case of Messrs. Day and Jackson, the settlements were not reached until shortly before the start of the disciplinary hearing in May 1989. Respondent's restitution to her former clients has little significance as a factor in mitigation, since the payments were prompted by the institution of disciplinary proceedings against her. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664.) Her misconduct began soon after she was admitted to practice, thus the lack of any prior record of discipline is not a factor in mitigation. (See discussion *ante*; *Amante v. State Bar, supra*, 50 Cal.3d at p. 256.) [43] Nor is her inexperience a factor to be weighed; where the misconduct involves misappropriation, inexperience is an irrelevant consideration. (*Id.* at p. 254.) [44] The lack of any misconduct charges against respondent since her move to New York is not compelling, in our view. Respondent has removed herself from California clients and is performing legal services only in New York on a limited basis on *pro hac vice* admission. Misconduct allegations arising in New York would not necessarily be reported to discipline authorities in California.

Respondent's attorneys' characterization of respondent's practice in California as one servicing poor and underrepresented persons is not established by convincing evidence in this proceeding. We know that among the clients who were abandoned by respondent in the matters before this court were the owner of a board and care facility (Allen), an employee of a moving company which provided services for respondent (Peterson), a college professor (Day) and a federal government scientist (Jackson). [45] Even if respondent's California practice did serve people of limited or no means, they are entitled to able, responsive and trustworthy counsel from the attorney they hired. Representing those of limited means does not excuse improper or unethical conduct. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 289.)

IV. APPROPRIATE LEVEL OF DISCIPLINE

The hearing referee recommended that respondent be disbarred, in light of the findings of wilful misappropriation of substantial funds and acts of moral turpitude toward clients, without substantial mitigation, and under standards 2.2(a) (wilful misap-

propriation of entrusted funds) and 2.3(a) (offenses involving moral turpitude). The examiner concurs in that judgment. Respondent maintains that the matter should be dismissed but contends in a footnote in her brief that should culpability be found on any of the counts, no actual suspension should be imposed and respondent should be permitted to continue in practice.

The purpose of attorney discipline proceedings is not to punish the attorney but rather to protect the public, preserve public confidence in the legal profession and maintain the highest possible standards for the profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) The standards are guidelines (*In re Young* (1989) 49 Cal.3d 257, 268) and any recommended discipline should be consistent with prior Supreme Court case law as well. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

There have been a number of recent cases which have dealt with claims of emotional problems underlying and mitigating serious attorney misconduct. In *Silva-Vidor v. State Bar*, *supra*, 49 Cal.3d 1071, the attorney stipulated to misconduct affecting 14 clients, involving numerous instances in which she abandoned clients, failed to provide competent legal services, failed to refund or account for unearned fees and misappropriated \$760 in client funds. Most of her misconduct took place in a two-year period and demonstrated a common pattern of willful misconduct. (*Id.* at pp. 1077-1078.) During this same period, *Silva-Vidor* was beset with a series of emotional problems, beginning with a severe depression, an unstable relationship with her drug-abusing husband, the break-up of her marriage after her husband was diagnosed with a brain tumor, and one automobile and two slip-and-fall accidents resulting in serious injury to the attorney, and adding to her depression. She also had a difficult pregnancy which required bed rest for the final four months and her daughter was born with cerebral palsy. She sought help from a licensed clinical social worker to overcome her debilitating depression, became employed as a legal services attorney, and volunteered her services to three organizations helping the underrepresented. She cooperated fully with the State Bar, stipulating to facts and discipline in her disciplinary proceeding, and offered remorse and restitution to her former

clients. The Court found that the evidence demonstrated personal difficulties for which her inattention to her practice was not condoned, but understood. It imposed a five-year suspension, stayed, with a five-year probation period and one-year actual suspension.

In *In re Naney*, *supra*, 51 Cal.3d 186, the Supreme Court considered and rejected evidence of emotional and fiscal problems as mitigating circumstances. Naney had been convicted of three counts of grand theft for misappropriating \$17,950 in client trust funds over a period of less than one year. During this same period, Naney had increasing marital problems resulting in separation from his wife and children, for which he sought the help of a psychologist, and suffered financial difficulties. Noting that the misappropriations occurred after two years of weekly therapy, the Court concluded that his emotional problems stemming from his marital difficulties were either not directly responsible for his misappropriations or that his problems were so deep seated to negate any showing of rehabilitation. (*Id.* at p. 197.) The Court disbarred Naney.

The mitigating evidence presented in *Porter v. State Bar*, *supra*, 52 Cal.3d 518, involved "stresses far in excess of those usually associated with a dissolution" (*id.* at p. 528) and were coupled with the theft of his client files and his eviction from his home and office, all occurring between 1983 and 1985. The bulk of Porter's misconduct, to which he stipulated, took place during that same time and involved abandonment of clients, failure to provide competent legal services, retention of unearned fees and multiple acts of moral turpitude, including misappropriating over \$14,500 in trust funds. Porter also practiced law while suspended for nonpayment of fees. He demonstrated an outstanding record of community involvement and service both prior and subsequent to his misconduct. (*Id.* at pp. 524-526.) Porter sought psychological treatment for his emotional difficulties beginning in 1987 and his psychoanalyst concluded at the hearing that Porter was fully recovered. (*Id.* at pp. 525-526.) Balancing the seriousness of his misconduct against his evidence in mitigation, the Court imposed a five-year suspension, stayed, five years on probation and a two-year actual suspension.

The most recent case of emotional and psychological disability involving a number of matters of misconduct is *Read v. State Bar*, *supra*, 53 Cal.3d 394. In that case the attorney engaged in 13 instances of misconduct, involving multiple acts of bad faith, dishonesty, misappropriation of entrusted funds, concealment and misrepresentations to the court, abandonment of clients and, at one point, counseling a client to perjure herself. Read did not provide restitution to her clients until shortly before her disciplinary case was heard, although she had the financial resources to do so earlier. (*Id.* at pp. 424-425.) In mitigation, Read emphasized her severe emotional and financial problems stemming from the breakdown of her marriage and the criminal conduct of one of her sons, who was abusing drugs. These events resulted in the financial ruin of her family and law practice, and threw Read into a deep depression. (*Id.* at p. 424.) However, the Court concluded that not all of Read's misconduct could be traced to these difficulties and although she may have recovered her psychological health, she had not sufficiently established her rehabilitation or demonstrated recognition and acceptance for her serious misdeeds. (*Id.* at p. 425.) The Court ordered that she be disbarred.

The Supreme Court has considered cases involving multiple abandonments of clients or abandonment of clients coupled with other serious misconduct to warrant significant discipline, even when the attorney has no prior record of discipline. However, *Read v. State Bar* is the only recent one where the Court found it necessary to disbar the attorney to protect the public's interest. In *Borre v. State Bar* (1991) 52 Cal.3d 1047, the attorney abandoned the appeal of an incarcerated client and fabricated evidence to support his lies to the contrary before the State Bar during its investigation and at the hearing. The Court found the "fraudulent and contrived misrepresentations to the State Bar" to be more egregious conduct than the serious matter of the abandonment of the incarcerated client. (*Id.* at p. 1053.) However, the Court concluded that a five-year suspension, stayed, a five-year probationary term and a two-year actual suspension recommended by the State Bar Court was sufficient under the facts. The Court in *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, found that four instances of client abandon-

ment (one involving misrepresentations to the client and two cases where Bledsoe failed to return unearned fees), coupled with a finding that Bledsoe did not cooperate with the State Bar, did not merit the attorney's disbarment, as recommended by the State Bar Court. The Court did not find a pattern to the abandonments and gave some mitigating weight to Bledsoe's 17 years in practice. Again, a five-year suspension, stayed, a two-year actual suspension, with a five-year probation term was deemed sufficiently severe discipline for the misconduct found. Finally, in *Martin v. State Bar*, *supra*, 52 Cal.3d 1055, the attorney abandoned four clients, making misrepresentations to clients in two cases and improperly retaining a client's personal property in another. He also used an NSF check in a fifth case to pay filing fees. Disbarment was rejected again by the Court, finding that a five-year suspension, stayed and probation reporting for five years, with a two-year actual suspension, was appropriate.

We do not find that disbarment is warranted in this case. The misconduct at issue is neither as extensive as that present in the *Read* case nor is the case for rehabilitation as weak as in *Naney*. However, as the Court noted in *Porter*, "Though we are persuaded by [respondent's] showing of mitigation, we are nonetheless constrained to observe our responsibility to preserve confidence in the legal profession and maintain the highest possible professional standards for attorneys." (*Porter v. State Bar*, *supra*, 52 Cal.3d at p. 528.) Respondent commenced her misconduct just over a year after her admission to practice of law, misappropriated a substantial amount of entrusted funds, did not provide competent legal services and took cases when she knew she would be unable to devote sufficient time and energy to them, did not communicate with her clients and, in some instances misled them as to the status of their cases, finally abandoning her law practice with no notice to her clients. Substantial discipline is warranted.

Therefore, we recommend that respondent be suspended for five years, stayed, with probation for five years on conditions which include that she actually be suspended for three years and until she has demonstrated her rehabilitation, fitness to practice and learning and ability in the general law to the satisfaction of the State Bar Court pursuant to stan-

dard 1.4(c)(ii) and has made restitution to Evelyn Allen of \$3,881.60 plus interest. Imposition of the showing of fitness under standard 1.4(c)(ii) is necessary, in our view, to establish respondent's progress in rehabilitation over the lengthy period of her suspension from the practice of law and to safeguard the public interest in the legal profession and assure the competency of its practitioners. The restitution condition is consistent with the goals of furthering respondent's rehabilitation and the public's confidence in the legal profession. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) In light of respondent's current residency in New York and professed intent to remain there for the foreseeable future, we recommend also that respondent be required to pass the multistate professional responsibility examination required of applicants for admission to practice in California, available nationally, rather than the California professional responsibility examination tailored for members of the California State Bar, and that she do so prior to the end of her actual suspension. Further, we recommend that she be required to comply with rule 955, California Rules of Court, and to perform the acts specified within subsections (a) and (c) within 30 and 40 days, respectively after the effective date of the Supreme Court's order in this case.

V. FORMAL RECOMMENDATION

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

1. That respondent shall be suspended from the practice of law in the State of California during the first three years of said period of probation and until: (a) respondent has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4 (c)(ii), Standards for Attorney Sanctions for Professional Misconduct, and (b) respondent has made restitution to Evelyn Allen in the sum of \$3,881.60 with interest of 10% per annum from March 1984 until paid in full and provided satisfactory evidence of said restitution to the Probation Department, State Bar Court, Los Angeles;

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

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

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

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

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

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

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and

truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

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

7. That if she is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, she shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with her practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account designated as a "trust account" or "clients' funds account" in a bank authorized to do business in the State of California or in conformance with the rules governing trust accounts in the jurisdiction in which respondent is practicing *pro hac vice*;

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf

the transaction occurred and the date and amount thereof:

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s)

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

8. Respondent shall maintain with the Probation Department a current address and a current telephone number at which telephone number respondent can be reached and respond within 12 hours;

9. That respondent shall provide satisfactory evidence of completion of a course on law office management which meets with the approval of her probation monitor within the period of her actual suspension;

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

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

We further recommend that within the period of actual suspension, respondent be required to take and pass the multistate examination in professional responsibility administered by the National Conference of Bar Examiners and provide proof thereof to the Clerk of the State Bar Court, Los Angeles.

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

We concur:

PEARLMAN, P. J.
NORIAN, J.