

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

## RESPONDENT E

A Member of the State Bar

[No. 88-O-11634]

Filed October 17, 1991

Reconsideration denied, December 9, 1991 (see separate opinion, *post*, p. 732)

## SUMMARY

Respondent was aberrationally negligent in handling a client's check. Although respondent had an elaborate bookkeeping system, a new employee mistakenly billed the client without respondent's knowledge for an expert witness fee which respondent had not paid. The client paid the bill, and the check was deposited into respondent's general operating account. Almost three years later, after the client had hired new attorneys, respondent discovered the mistaken billing, and told the new attorneys that he would take care of the expert witness fee matter in connection with an overall settlement of disputed fees and costs. When no settlement was reached, arbitration followed. During the arbitration proceeding, respondent offered to credit the client in the amount of the mistaken bill, by way of offset against other unpaid costs in almost the same amount. The client's new attorneys did not object, and the arbitration award stated that the client had already reimbursed respondent for all actual costs.

Respondent was initially charged with misappropriation, and the notice to show cause was later amended to charge commingling. The hearing judge found that respondent had no intent to misappropriate the client's check and engaged in no acts of deceit toward the client. She concluded that respondent was culpable of commingling, and that respondent's negligence in failing to become aware of the problem sooner and to handle it more quickly amounted to moral turpitude. She also interpreted the arbitration award as not having resolved the issue of the restitution of the expert witness fee. Considering failure to make restitution an aggravating factor, and finding respondent not to have been candid in portions of his testimony, she recommended restitution and three months actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

Respondent sought review. The review department concluded that respondent was culpable only of commingling and failing to retain disputed funds in trust. Respondent was not culpable of moral turpitude, because the misconduct arose from an isolated mistake in an otherwise careful bookkeeping system. The review department also held that restitution had been made via the arbitration offset, and that the evidence did not support the finding of lack of candor in respondent's testimony. Rejecting all of the hearing judge's findings in aggravation, and placing greater weight than the hearing judge on the extensive mitigating evidence, the review department imposed only a private reproof, conditioned on passage of the professional responsibility examination.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Daniel Drapiewski

HEADNOTES

[1] 130 Procedure—Procedure on Review

135 Procedure—Rules of Procedure

1099 Substantive Issues re Discipline—Miscellaneous

A respondent who receives a private reproof is entitled to have his or her name omitted from the published review department opinion, although the disciplinary proceeding itself is, and remains, public. (Trans. Rules Proc. of State Bar, rule 615.)

[2] 106.20 Procedure—Pleadings—Notice of Charges

106.40 Procedure—Pleadings—Amendment

192 Due Process/Procedural Rights

204.90 Culpability—General Substantive Issues

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

Where the original notice to show cause alleged misappropriation, and the examiner amended the notice to charge respondent with commingling resulting from his bookkeeper's negligence, and there was no evidence that respondent's defense was thereby prejudiced, respondent had sufficient notice of the charges to satisfy his due process rights, because the duty to keep client funds safe is a personal obligation of the attorney and nondelegable, and the attorney was therefore on notice that he could be culpable if his staff's conduct resulted in a violation of that duty.

[3] 135 Procedure—Rules of Procedure

166 Independent Review of Record

The review department gives great weight to credibility determinations by hearing judges. (Trans. Rules Proc. of State Bar, rule 453.)

[4] 148 Evidence—Witnesses

162.90 Quantum of Proof—Miscellaneous

165 Adequacy of Hearing Decision

Where respondent's testimony was plausible and uncontradicted, it should have been regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available, but was not offered.

[5] 148 Evidence—Witnesses

162.90 Quantum of Proof—Miscellaneous

166 Independent Review of Record

Where respondent's client's testimony contradicted respondent's testimony, and the hearing judge found the client's testimony to be more credible on the disputed point, but other circumstances revealed by the record nonetheless limited the effect of the client's testimony, the review department held that the record did not establish by clear and convincing evidence that respondent's testimony was a lie.

**[6 a, b] 221.00 State Bar Act—Section 6106**

Where respondent failed to catch an isolated mistake in the billing of a single matter, but had an accounting system in place which was otherwise apparently working extremely well, and there was evidence that respondent had a long history of accurate and careful handling of client funds, respondent's isolated mistake in the billing of the single matter did not amount to gross negligence constituting moral turpitude.

**[7] 163 Proof of Wilfulness  
204.10 Culpability—Wilfulness Requirement  
221.00 State Bar Act—Section 6106  
430.00 Breach of Fiduciary Duty**

Although attorneys cannot be held responsible for every detail of office operations, fiduciary violations resulting from serious and inexcusable lapses in office procedure may be deemed wilful for disciplinary purposes even in the absence of deliberate wrongdoing.

**[8] 163 Proof of Wilfulness  
204.10 Culpability—Wilfulness Requirement  
221.00 State Bar Act—Section 6106  
801.10 Standards—Effective Date/Retroactivity  
801.30 Standards—Effect as Guidelines**

The analysis of gross negligence in cases decided before the adoption of the Standards for Attorney Sanctions for Professional Misconduct is not affected by the adoption of the standards, but the discipline imposed now takes into account guidelines provided by the standards, although they are not rigidly applied.

**[9 a, b] 280.00 Rule 4-100(A) [former 8-101(A)]**

Where respondent was involved in a dispute with a former client over the fees and costs incurred for the client, and discovered that three years earlier the client had mistakenly been billed for, and had paid, an expert witness fee which respondent had not paid, respondent should have either paid the bill, reimbursed the client, or, pending the resolution of the dispute, put the erroneous cost reimbursement into a trust account. Having instead kept the funds in his general account, respondent was culpable of commingling and of failing to maintain the funds in trust.

**[10] 213.10 State Bar Act—Section 6068(a)  
220.10 State Bar Act—Section 6103, clause 2  
221.00 State Bar Act—Section 6106**

Section 6106, in contrast to sections 6068 (a) and 6103, does state a chargeable offense for which discipline may be imposed.

**[11] 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where respondent's client made a belated demand for repayment of an improperly billed cost, by raising the issue during an arbitration proceeding concerning fees and costs owed by the client, and in response, respondent offered the client credit against other fees in the arbitration, respondent was not culpable of failing to pay or deliver the funds promptly.

**[12 a, b] 139 Procedure—Miscellaneous  
147 Evidence—Presumptions  
191 Effect/Relationship of Other Proceedings**

It is generally presumed that the arbitrators heard and decided all disputed issues in an arbitration. Where issue regarding costs was raised in an attorney's fees arbitration, and the arbitration award

showed on its face that it covered costs as well as fees, and neither party contested the arbitrators' jurisdiction to consider issues of costs, issue of whether costs had been reimbursed should not have had to be relitigated in subsequent State Bar disciplinary proceeding.

[13 a, b] **139 Procedure—Miscellaneous**

**191 Effect/Relationship of Other Proceedings**

The doctrine of res judicata seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration. Mistakes of fact or law do not affect the conclusive nature of an arbitration award against collateral attack. If the contending parties had a full and fair opportunity to litigate, there must be compelling reasons to sustain a plea for a second chance.

[14] **159 Evidence—Miscellaneous**

**169 Standard of Proof or Review—Miscellaneous**

**191 Effect/Relationship of Other Proceedings**

Although an arbitrator's testimony is admissible on the question of what issues were tried in the arbitration, the arbitrator's expression of his own belief does not bind the State Bar Court in adjudicating the effect of the arbitration award.

[15] **710.10 Mitigation—No Prior Record—Found**

Where respondent had practiced law for over 30 years before his current misconduct and where respondent's prior disciplinary record consisted solely of a private reproof for minor misconduct early in his career, respondent was entitled to a finding in mitigation based on his long years of practice.

[16] **165 Adequacy of Hearing Decision**

**765.10 Mitigation—Pro Bono Work—Found**

Evidence of respondent's extensive pro bono activities and community involvement was entitled to greater weight as mitigating evidence than given to it in the hearing judge's decision, in which it was not mentioned.

[17] **740.10 Mitigation—Good Character—Found**

Where a great number of character witnesses, including two judges who had known respondent for a very long time, testified about respondent's impeccable honesty and reliability and where two of the character witnesses were very knowledgeable about the nature of respondent's misconduct and it had no effect on their opinion, it was extremely unlikely that the extraordinarily high opinion of respondent's honesty and trustworthiness expressed by the character witnesses would change much with knowledge of the details.

[18] **615 Aggravation—Lack of Candor—Bar—Declined to Find**

Where the review department rejected the hearing judge's finding that respondent had lied, it also rejected the hearing judge's finding in aggravation that respondent had lacked candor in part of his testimony.

[19] **735.10 Mitigation—Candor—Bar—Found**

Where respondent appeared to have cooperated fully with the State Bar's investigator, and stipulated at the hearing to facts demonstrating culpability on one charge, respondent's cooperation with the State Bar was a mitigating factor.

- [20] **595.10 Aggravation—Indifference—Declined to Find**  
Where respondent had already tendered restitution to a former client in an arbitration proceeding, and nevertheless, after a culpability determination by the hearing judge, placed funds in a trust account to cover the amount which the hearing judge considered to be still at issue, the review department rejected the hearing judge's finding in aggravation that respondent displayed indifference toward rectification.
- [21] **582.50 Aggravation—Harm to Client—Declined to Find**  
Where, as soon as respondent's client discovered a billing error and brought it to respondent's attention, respondent recognized the error and offered to take care of it, and where respondent offered the client credit for the erroneous billing as part of a fee arbitration, the review department rejected the hearing judge's finding that the client was significantly harmed by respondent's negligence with respect to the error.
- [22 a, b] **824.59 Standards—Commingling/Trust Account—Declined to Apply**  
**1091 Substantive Issues re Discipline—Proportionality**  
Although standard 2.2(a) calls for 90 days minimum suspension for commingling, the Supreme Court has declined to impose suspension if the commingling results from a good faith fee dispute. Where respondent's trust fund violation was no more serious than trust fund violations in a prior Supreme Court case in which a public reproof was imposed, and where respondent presented far greater evidence in mitigation than the attorneys in that case, the appropriate discipline was a private reproof on condition of taking and passing the Professional Responsibility Examination.
- [23] **139 Procedure—Miscellaneous**  
**175 Discipline—Rule 955**  
**178.50 Costs—Not Imposed**  
Where the review department rejected the hearing judge's recommended discipline of three months actual suspension and imposed a private reproof, this rendered moot respondent's arguments against the hearing judge's recommended imposition of notification requirements pursuant to rule 955 of the California Rules of Court and the imposition of costs.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

280.01 Rule 4-100(A) [former 8-101(A)]

##### Not Found

213.15 Section 6068(a)

220.15 Section 6103, clause 2

221.50 Section 6106

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

420.52 Misappropriation—Excusable Negligence

#### Discipline

1051 Private Reproof—With Conditions

#### Probation Conditions

1024 Ethics Exam/School

## OPINION

PEARLMAN, P.J.:

This case involves aberrational negligence in handling one client check intended for reimbursement of an expert witness fee that had not in fact been paid by respondent. Respondent is a highly respected attorney with over 40 years of practice handling close to 10,000 cases in his career. If respondent had promptly resolved the matter after it was brought to his attention, no discipline would have been appropriate. However, he delayed for a year in resolving the matter, treating it as part of an ongoing fee dispute and leaving the disputed sum of \$1,754 in his general account when it should have been placed in his trust account or returned to the client. For that reason, discipline is appropriate and, in light of very strong mitigation, we impose a private reproof.<sup>1</sup> [1 - see fn. 1]

Unfortunately, at the trial below the examiner treated the case as one involving intentional misappropriation—which it did not—and sought disbarment or lengthy suspension. The hearing judge carefully considered all of the evidence and found that respondent had an elaborate bookkeeping system; that respondent's staff made the mistake without his knowledge; that there was no intent to misappropriate; and that respondent engaged in no acts of deceit towards his client. However, she reached the mistaken conclusion that his negligence in not becoming aware of the problem sooner and in handling the matter after the dispute came to light amounted to moral turpitude under the case law. At the trial examiner's urging, she also interpreted a 1986 fee arbitration award as not having resolved the issue of restitution of the expert witness payment. As a consequence, the hearing judge found failure to make restitution as an aggravating factor, ordered restitution and recommended three months actual suspension. The examiner assigned to the case on review has stipulated that restitution is unnecessary because it has already been made.

We conclude that respondent commingled trust funds with operating funds in violation of former rule 8-101(A) of the Rules of Professional Conduct (now rule 4-100);<sup>2</sup> that he did not commit an act of moral turpitude in violation of Business and Professions Code section 6106; and that extensive mitigating evidence justifies imposition of a private reproof with a requirement of passage of the professional responsibility examination.

## THE FACTS

With few exceptions, noted below, we adopt the hearing judge's findings of fact. Respondent was admitted to practice law in California in 1951. He has been in private practice since 1955 concentrating in business and commercial law. (R.T. Vol. V p. 10.) Half of his law practice has been litigation. As of the time of trial, he had represented over 9,500 clients in his 40-year career and had never had any claim brought for any financial impropriety other than the instant case. (R.T. Vol. V p. 17.) The hearing judge found that he maintained "an elaborate bookkeeping" system which "fell apart" for one client matter due to the number of bookkeepers and failure to closely supervise them (decision pp. 14-15), but no other clients were found to have been adversely affected. (Decision p. 28; R.T. Vol. V p. 11.) The hearing judge concluded that the instant problem was "aberrational." (Decision p. 28.)

In about July 1980, respondent began handling a number of matters for the client who became the complaining witness in this case. The client was president of a small corporation and had been sued individually in a business matter for which his employer had refused to take over his defense. Respondent represented him in that action and also brought suit against the employer for indemnification. Thereafter, the client was fired by the corporation and his stock was diluted. (R.T. Vol. I pp. 168-169.) While other matters were handled by respondent on an oral fee arrangement, the client employed respondent to bring a wrongful termination suit under a

1. [1] In light of the disposition of this matter as a private reproof, respondent is entitled to have his name omitted from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

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

written contingent fee agreement (R.T. Vol. I pp. 29-30), which provided, among other things, for a 40 percent contingent fee of all sums collected and a provision for a reasonable additional fee on appeal. (State Bar exh. 1.) The agreement required the client to pay all costs within 30 days of billing, including fees of expert witnesses.

In the spring of 1981, respondent suggested that a prominent Bay Area law firm be retained for provision of a possible expert witness in the upcoming trial in the wrongful termination suit. Respondent had a law school friend who was now a partner at that firm. Respondent consulted his friend who referred him to another business partner for his expertise. (R.T. Vol. I pp. 36-39.) A short meeting was held between that partner and an associate or paralegal and respondent and his client in May 1981, in which they discussed the possibility of the partner testifying as an expert witness at the trial. No decision was made at that meeting. (R.T. Vol. I pp. 39-46.) Thereafter, the law firm did some research on the relevant provisions of the Business and Professions Code and wrote two letters to respondent in May 1981, followed by a letter dated June 25, 1981, indicating that expert testimony might be permissible, but that the firm did not consider itself to be in a position to act as an expert witness for the trial. (R.T. Vol. I pp. 138-139.) No bill accompanied the letter.

On September 29, 1981, a bill was issued summarizing the law firm's services and indicating that the total hours spent in May and June 1981 were 82.05 and services were \$1,500 plus costs of \$253.94, for a total bill of \$1,753.94. (State Bar exh. 3.) Respondent's bookkeeper wrote a check for respondent to sign to pay for it. Respondent testified that he was "appalled" by the bill. (R.T. Vol. I p. 48.) He found it incomprehensible and testified that he discussed it with his client who also found it incomprehensible and agreed that the invoice should not be paid. (R.T. Vol. I pp. 49-50.) The client denied having such conversation. (R.T. Vol. I p. 188.) Respondent voided the check which his bookkeeper had prepared. (R.T. Vol. I p. 52.) He further testified that he thereafter objected to the bill at a luncheon meeting in November 1981 with his friend at the firm and that his friend promised to take it up with others at the firm and get back to him. (R.T. Vol. I pp. 48-

50.) Nothing further was heard from the law firm with regard to this bill for nearly four years. (R.T. Vol. III p. 55; see exh. 10a.) Respondent interpreted the law firm's silence as recognition that the bill was disputed and the client did not intend to pay it. (R.T. Vol. III p. 121.)

In early 1982, respondent conducted a three and one-half week jury trial in the wrongful termination case and obtained a \$340,000 judgment in favor of the client. (R.T. Vol. II p. 160.) The quality of his services in regard to that litigation has never been questioned by the client's new counsel. (R.T. Vol. V p. 172.) Meanwhile, unbeknownst to respondent, respondent's newly hired bookkeeper mistakenly recorded the expert witness bill as a cost advanced in the litigation and in February 1982, when respondent was vacationing in Europe, his office sent the client an invoice which included the unpaid bill as a cost advanced. (State Bar exh. 5; R.T. Vol. I pp. 58-63; resp. exh. I.) The client paid it. Since the payment was intended as reimbursement of a cost advanced, the check was deposited into respondent's general operating account. (*Id.*) The hearing judge found that these funds were justifiably deposited into that account. (Decision p. 17.)

In the ensuing two years, neither respondent's bookkeeper nor CPA picked up on the prior billing error to the client and respondent remained unaware of it. (R.T. Vol. II p. 159.) Respondent initiated additional litigation on the client's behalf in attempts to collect the judgment, but such litigation was halted when the client refused to pay the costs of any further collection efforts because he thought the likelihood of collection was too low. A dispute also arose regarding attorney's fees owing to respondent. (R.T. Vol. III pp. 2-9.)

In the spring of 1984 the client hired a new law firm to represent him in connection with his dispute with respondent over attorney's fees and costs in the five then-pending suits. (R.T. Vol. II pp. 23-24.) In December of that year, in response to a letter from the client's new lawyers, respondent directed his current bookkeeper to review unbilled costs and to produce a bill for fees and costs. (R.T. Vol. III pp. 46-47.) He included it with a letter (resp. exh. I) stating his position regarding his entitlement to fees and costs,

including both the reasonable value of his time in the contingency case and fees payable for appellate work.

The bill respondent's bookkeeper prepared in December 1984 included the amount of "\$1,753.94" as the cost demanded and "other costs to date" of \$3.50. (Resp. exh. I; R.T. Vol. II p. 46.) Respondent did not himself review the cost records at that time. (R.T. Vol. II pp. 47-48.) By letter dated January 15, 1985 (State Bar exh. 13), the client's new attorneys responded to the December letter and pointed out that on February 3, 1982, the client was billed for the expert witness consultation in that exact amount—\$1,753.94—and paid it at that time. It was only upon receipt of the January 15, 1985 letter that respondent learned that his bookkeeper had billed the client in 1982 for the expert witness consultation invoice which respondent had not paid. (R.T. Vol. III p. 92.)

Respondent sent a letter dated April 16, 1985, to the client's new attorneys reviewing the dispute regarding collection efforts. The letter included a request for \$1,176.85 in costs; demand for \$6,495 for reasonable fees on appeal pursuant to the written agreement; cooperation in the prosecution of the actions instituted for purposes of collection or in the alternative, payment in excess of \$100,000 at the hourly rate of \$100. Also included in the letter was a statement "I have checked the records and will take care of the [expert witness consultation] matter." The letter concluded by requesting that the parties meet to attempt settlement. Absent a settlement he indicated his intention to sue for declaratory relief on the various agreements.

No settlement was thereafter reached and an arbitration clause in the parties' fee agreement was invoked. (Exh. 1.) In the hearing below, in the present proceeding, the examiner argued that the April 1985 letter was deceitful because respondent did not thereafter "take care of" the bill. Respondent testified that the statement was only included as part of a settlement offer which was not accepted. The hearing judge rejected respondent's explanation, concluding the statement was not a misrepresentation, but merely an unkept promise. (Decision pp. 12-13.)

At the arbitration proceeding in April 1986, the arbitrators considered fees and costs owed to date. Respondent put on evidence of unbilled costs totaling \$1,733.11. The client's new attorneys countered that the bill for expert witness consultation had never been paid to the consulting law firm (R.T. Vol. V p. 72), and respondent offered to credit the client in the amount thereof, leaving a \$20.83 credit for costs owing to the client. (State Bar exh. 16.) The client's new attorneys wrote back to the arbitrators questioning some of the costs, but did not voice any objection to the suggestion of crediting the amount erroneously paid to respondent as reimbursement for the expert witness bill. (State Bar exh. 17.)

The arbitrators issued an award in June 1986 to respondent in the amount of \$8,300 which was denominated "fees and costs reimbursement." (State Bar exh. 8.) The accompanying description of the award states that the award is composed of attorney's fees at \$100 per hour on two appeals. The arbitration award concludes: "All actual costs have been paid by the client." On the client's petition, that award was confirmed by the superior court by order dated December 12, 1986. (Resp. exh. Q.)

In January 1987, the client paid the \$8,300 arbitration award plus interest. (Resp. exh. Q p. 5.) The issue of the continuing rights and obligations of the parties with respect to collection efforts remained pending in a declaratory relief action. For three years thereafter, the client litigated with respondent on appeal (see resp. exh. Q) and on remand, whether respondent had a cause of action against the client for breach of an obligation to pay for costs in order to pursue collection of the judgment and, if so, any resulting damages to respondent. (Resp. exh. Q.) That action was tried in 1990 and has since settled.

#### THE STATE BAR PROCEEDING

In May 1988, the client's new attorneys filed a complaint with the State Bar asserting that respondent had misappropriated the \$1,753.94 the client had intended as reimbursement for the payment of the expert witness bill. Neither the client nor his new attorneys had ever specifically directed respondent to pay the bill or accused him of misappropriating the

funds. In fact, no mention was made of the bill in the three years following the arbitration in which they exchanged numerous letters about other issues. (R.T. Vol. II pp. 65-67.) The first time that respondent became aware that the client was charging him with misappropriation was when he heard from the State Bar investigator. Respondent wrote back a lengthy letter, complete with attachments, explaining the mistake that had occurred and noting that credit was given therefor in the arbitration proceeding. (R.T. Vol. I p. 112; State Bar exh. 7.)

The original notice to show cause alleged violation of sections 6068 (a), 6103 and 6106 and former rule 8-101(B)(4) by misappropriating to his "own use and purposes" \$1,753.94 promptly paid by his client upon billing in 1982 for the cost of an opinion letter from another law firm. The notice specifically charged that "Although the law firm repeatedly billed you and tried to collect their fee, you failed to pay the \$1,753.94 to them or to refund the money to your client." On January 19, 1990, the examiner moved to amend the notice to allege commingling in violation of rule 8-101(A) in accordance with facts adduced at the hearing. This motion was granted (R.T. Vol. II pp. 19-21), and respondent was told that he could move for a continuance if he needed additional time to respond. He elected to proceed.

Five days of hearing were conducted in the court below in two phases. Culpability hearings were conducted over a period of three days in January 1990 and an order was issued March 13, 1990, finding respondent culpable of violating rule 8-101(A) and committing misconduct covered by sections 6103 and 6106. No violation of section 6068 (a) or former rule 8-101(B)(4) was found. Two days of hearing on the issue of discipline were held in June and July 1990, and the hearing judge issued her decision on November 27, 1990. Respondent sought review.

## DISCUSSION

### A. Sufficiency of Notice.

[2] Respondent argues that his due process rights were violated because he was originally charged with a single act of misappropriation in 1982; he was not charged with failure to supervise his bookkeep-

ers, which was the basis of the culpability determination. Respondent does not claim that the granting of the motion to amend was improper, but that the amendment, like the original pleading, did not put him on notice of the misconduct of which he was found culpable. We disagree. The duty to keep client funds safe is a personal obligation of the attorney (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795), and nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) Respondent was thus at all times on notice of potential culpability for failure to supervise conduct by his staff if their conduct resulted in violation of the Rules of Professional Conduct and cited provisions of the Business and Professions Code. There is no evidence that respondent was prejudiced in putting on his defense. However, as discussed *post*, the evidence did not support the hearing judge's finding of gross negligence amounting to moral turpitude under the controlling case law.

### B. Disputed Findings of Fact in Aggravation.

Respondent also challenges two findings in aggravation that he was untruthful in giving background testimony regarding the history of the billing dispute over the expert witness fee. (Decision p. 24.)

#### *Finding No. 9.*

In finding number 9, the hearing judge found that, contrary to respondent's testimony, "respondent never contacted the firm to dispute the bill." The hearing judge noted that respondent's appointment calendar (resp. exh. E) "at most establishes" that he did meet with his original contact at the firm, his law school friend, in November 1981, about a month after receiving the bill he had refused to pay. The hearing judge rejected respondent's testimony "as uncorroborated" that he told his friend at that November meeting that he objected to the bill. (Decision p. 4.) [3] Although we give great weight to credibility determinations by hearing judges pursuant to rule 453 of the Transitional Rules of Procedure and the case law (see, e.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055), the hearing judge appears to have mistakenly believed that respondent's testimony was controverted by the State Bar when it was not. Respondent contends that she also applied the wrong burden of proof.

Upon our own review of the record, we find that respondent's testimony was not controverted and was consistent with his voiding of the check prepared by his bookkeeper and his non-payment of the bill. His friend was not called to testify by either side. The State Bar did call the potential expert witness who was in charge of the billing for his firm's consultation services. (R.T. Vol. I pp. 136-147.) He testified that "he did not recall" any objection to the bill. (R.T. Vol. I p. 146.) He and another partner also testified (R.T. Vol. I pp. 147-165) as to the firm's general billing and collection practices to the effect that the firm did not have any written record of objections to the bill and that objection would be recorded in the ordinary course of business and brought to the attention of the partner in charge of billing. (R.T. Vol. I pp. 145, 149, 155-157.)

None of this evidence contradicted respondent's testimony that he conveyed to his friend an oral objection to the bill. When the bill remained unpaid, no follow-up bill was sent by the law firm for more than three years.<sup>3</sup> This is circumstantial evidence unmentioned by the hearing judge which tends to support respondent's testimony that he did communicate his objection to the bill. [4] Since respondent's testimony is plausible and uncontradicted, it "should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 543; see also *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574.)

We therefore modify finding 9 to reflect that "no clear and convincing evidence was presented to contradict respondent's testimony that an informal objection to the bill was raised by respondent to his friend at a meeting in November 1981. Although no notation of an objection to the bill was ever made on the firm's file, no further billing was sent by the firm for its services in the case in the ensuing three years."

#### *Finding No. 23.*

[5] We also find no clear and convincing evidence that respondent "falsely testified" that in the fall of 1981, his client agreed that the bill should not be paid as submitted. (Decision pp. 7, 16, 24; finding no. 23.) The hearing judge found the client to be more credible on this point because the client thereafter paid the respondent the February 1982 bill, which included the amount of the invoice, without questioning it. (Decision p. 7.) Nevertheless, there are other circumstances revealed by the record which limit the effect of the client's testimony and actions.

First of all, it was undisputed that respondent met with the client weekly in the fall of 1981 preparing for the trial. Respondent's testimony that at one of those meetings they discussed and agreed not to pay the bill as submitted is plausible. Second, the client testified to having had a stroke in 1986, which temporarily destroyed his entire memory after which he "substantially" recovered his memory. (R.T. Vol. IV p. 66.) It is thus very possible that he forgot any conversation in the fall of 1981 with respondent on the subject of the bill. Third, the client was specifically found to have grossly exaggerated other testimony regarding the cost of his new attorneys. He testified that he had spent \$30,000 on their services; they testified that they had billed him approximately \$12,000, and the hearing judge so found. (Decision p. 25.) With regard to the expert witness bill, the client testified that he "always told everybody that it [the bill] was a just bill and should be paid." (R.T. Vol. V p. 65.) This testimony contradicted the client's action in never directing respondent to pay the bill once the client discovered it had not been paid. He instead permitted respondent to offer the amount as a credit in arbitration against respondent's other bills.

Thus, we find that the record does not establish by convincing proof that respondent lied about his recollection of a conversation with his client in the

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3. Apparently only after the client's new attorneys made inquiry of the law firm regarding the issue did the law firm send belated bills in 1985 and 1986 to respondent for payment, which respondent refused to pay. (State Bar exhs. 10 a-j.) In

response to collection efforts in 1986, respondent asserted the bills were barred by the statute of limitations (R.T. Vol. I p. 51), and the law firm thereafter wrote the bill off.

fall of 1981. *Davidson v. State Bar, supra*, 17 Cal.3d at p. 574 is right on point. There the court noted that testimony of one witness was hedged by admission that he could not accurately recall the events in question and was uncertain of their sequence. Another witness's testimony was less equivocal, contradicting petitioner's version. The court concluded, "Petitioner's testimony, however, is plausible and not otherwise contradicted by the record. The evidence when viewed in the context of the entire record supports a reasonable inference of petitioner's lack of misconduct." (*Id.*)

### C. Gross Negligence As Moral Turpitude.

[6a] The hearing judge based her finding of gross negligence on respondent's failure to catch the billing error in this single case despite having an accounting system in place which was otherwise apparently working extremely well. [7] In *Palomo v. State Bar, supra*, 36 Cal.3d at pp. 795-796, the Supreme Court reviewed the standard of supervision of office operations required of attorneys and concluded that "Attorneys cannot be held responsible for every detail of office operations. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857.) However, where fiduciary violations occur as the result of serious and inexcusable lapses in office procedure, they may be deemed 'wilful' for disciplinary purposes, even if there was no deliberate wrongdoing. [Citations.] . . . [¶] Some decisions imply that only 'gross' negligence or 'habitual' disregard of client interests warrants discipline. [Citations.] But the record demonstrates such pervasive carelessness here." The record in *Palomo v. State Bar, supra*, 36 Cal.3d 785, showed that the client's signature to a settlement check was forged by Palomo's bookkeeper. Palomo testified that his bookkeeper had complete, unsupervised control of the office banking and bookkeeping. She routinely used a stamp for his signature on checks without needing to obtain specific approval. He "never instructed her on trust account requirements" and "never examined either her records or the bank statements for any of the office accounts." (*Id.* at p. 796, emphasis in original.) The Supreme Court therefore found a pattern of gross negligence and ordered the recommended one-year fully stayed suspension coupled with probation.

[6b] On review, the examiner strives to characterize the instant case as likewise not involving "a single error, or even a small number of isolated errors, in office procedure by Respondent or his staff," but "a chain of events supportive of the Hearing Department's conclusion that respondent's 'elaborate bookkeeping system' 'fell apart'." We disagree. However inexcusable, these isolated mistakes do not indicate that the system respondent set up was improper any more than his consultant's failure to pursue its billing in the matter from 1981 until sometime in 1985 indicated that its office billing system was poorly designed. The record showed that as of the time of the trial respondent had represented over 9,500 clients in the course of his practice and that he had set up a bookkeeping system with both an independent CPA and a trained in-house bookkeeper. No evidence of any billing errors in other cases was presented. To the contrary, respondent produced a number of clients, his CPA for 33 years and his current bookkeeping service testifying to a long history of accurate and careful handling of client funds. His CPA also testified to his honesty, conservatism and accuracy in reporting income for tax purposes. (See R.T. Vol. IV pp. 179-184; pp. 189-193; pp. 211-214; pp. 216-221; pp. 221-224; pp. 226-229; pp. 231-236; pp. 238-241.)

The hearing judge cited several cases finding gross negligence, all of which were predicated on grossly inadequate recordkeeping practices. In *Vaughn v. State Bar, supra*, 6 Cal.3d 847, it was found that Vaughn's trust account repeatedly fell below the balance required to be maintained and that Vaughn kept trust fund cash at his home. Vaughn also was charged with culpability for applying for a writ of execution and garnishing a client for fees already paid and ignoring a court order quashing the writ and ordering repayment of the excess amount already garnished. Vaughn's defense was that his office manager signed Vaughn's name to court documents in connection with the garnishment, and that Vaughn himself had no knowledge of the proceeding or the client's prior payment because of the inefficiency of his office procedures and the chaotic records produced by low caliber secretarial staff and frequent burglaries in which files were "dumped on the floor and irreparably disarranged." (*Id.* at p. 856.)

The Supreme Court held him accountable for gross negligence and imposed a public reproof.<sup>4</sup> [8 - see fn. 4]

In *Murray v. State Bar* (1985) 40 Cal.3d 575 and *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, the respondents both generally failed to maintain adequate office records and their trust accounts, as Vaughn's, repeatedly fell below the balance necessary to cover entrusted funds. In *Murray v. State Bar*, the respondent argued that because he did not keep adequate records, he could not be certain of the appropriate balance. (*Murray v. State Bar, supra*, 40 Cal.3d at p. 581.) The Supreme Court noted that it did not matter to the client whether the funds were deliberately misappropriated or unintentionally lost. (*Id.* at p. 582.) Here, in contrast, there was no loss of funds or any suggestion by the examiner of a risk of loss. The funds were never used by respondent for his own purposes, but apparently were maintained in respondent's firm general account or firm savings account throughout the entire time. They were just not segregated. (R.T. Vol. I p. 114.) Thus, even if this incident is attributable to extremely poor supervision of this one account, respondent's lapse in supervision does not compare to the wholesale office mismanagement which the court found in *Murray v. State Bar*, *Giovanazzi v. State Bar* and *Vaughn v. State Bar*.

The record in *Waysman v. State Bar* (1986) 41 Cal.3d 452 also disclosed a pervasive operational problem. Waysman, while trying a case out of town, instructed his secretary to place a \$24,000 settlement check in his general account so that it would clear faster than in the trust account. He returned to the office to find she had quit after using a set of presigned checks to pay office expenses. Waysman's office was found to be, at the time of the misappropriation, "in a financial disaster" (*id.* at p. 455), due in part to Waysman's poor judgment resulting from dependence on alcohol and confusion resulting from Waysman's own complicated banking transactions

and heavy trial expenses for which he had written checks while out of town. In view of mitigating factors, Waysman received no actual suspension, but six months stayed suspension and one year probation on conditions including restitution and abstention from alcohol.

The facts here also show far less of a lapse than those in *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 331-332, cited by the hearing judge, in which the attorney failed to maintain adequate records relating to estate assets and expenses including \$2,000 in reimbursed expenses; failed to give a receipt for a \$31,000 payment of attorneys fees or to obtain a receipt for disbursement of \$18,000 to a third party on the asserted oral instructions of his client, both of which disbursements required court approval which Fitzsimmons had not obtained in advance. Fitzsimmons was held grossly negligent, but, like Vaughn, received a public reproof.

Here, respondent was *not* found to have an inadequate accounting system, nor was he found to have any knowledge until 1985 of the mistaken billing and payment. Until that time, it is difficult to see how he had committed any culpable act. (Cf. *Palomo v. State Bar, supra*, 36 Cal.3d at p. 795.) [9a] His only culpability appears to be his commingling of the funds thereafter in violation of rule 8-101(A). Upon discovery of the error in 1985, he should have either paid the bill or reimbursed the client, or in the alternative, put the erroneous cost reimbursement into a trust account while he was disputing other fees and costs.

#### D. Alleged Violation of Business and Professions Code Sections 6068 (a) and 6103.

[10] The hearing judge correctly concluded that respondent did not violate section 6068 (a). She also correctly concluded that he did not violate sections 6103 or 6106 although she concluded that respondent was still subject to discipline under sections

4. [8] *Vaughn v. State Bar, supra*, and the other gross negligence cases discussed in this section were all decided before the adoption of the Standards for Attorney Sanctions for Professional Misconduct ("standards") (Trans. Rules Proc. of State Bar, div. V). While the analysis in these cases of what

conduct constitutes gross negligence is unaffected by the adoption of the standards, the discipline imposed now takes into account guidelines provided by the standards although they are not rigidly applied. (See discussion on degree of discipline, *post.*)

6103 and 6106. We find section 6103 inapplicable pursuant to the authority of *Baker v. State Bar* (1989) 49 Cal.3d 804, 815 and its progeny. Section 6106, in contrast, does state a chargeable offense (see *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343), but, as discussed above, was not violated here.

E. Former Rule 8-101(B)(4).

[11] We agree with the hearing judge's conclusion that former rule 8-101(B)(4) was not violated, but we do not agree that there was no demand made. None was made prior to the arbitration, but the client's new attorneys admittedly sought credit on the client's behalf for the expert witness bill in the arbitration proceeding (R.T. Vol. V p. 72) and credit was clearly offered by respondent there. (Resp. exh. G.) We find no violation of rule 8-101(B)(4) because, upon demand, respondent did not fail to promptly pay or deliver the funds.

F. Former Rule 8-101(A).

[9b] The hearing judge found a violation of former rule 8-101(A) for commingling, but not a violation of former rule 8-101(A)(2). She interpreted the issue as solely involving the alleged dispute over the amount of the expert witness bill which she found not to have been communicated. We conclude that there was a former rule 8-101(A)(2) violation. When respondent realized the billing error in 1985, he had knowledge that the client had advanced costs not yet paid. Pending resolution of the fee and cost dispute, he was clearly obligated under former rule 8-101(A) to put the money in trust except to the extent his interest therein had become fixed. Respondent is wrong in arguing

that money erroneously placed in a general account cannot ever be retrieved. The exact same funds could not be retrieved, but the exact amount could have been placed in a separate trust account in 1985, just as respondent ultimately did in 1990. (Exh. P.)

G. Restitution.

In the State Bar proceeding, the client's new attorneys contended that while the issue of the unpaid expert witness bill had been presented at the arbitration hearing, the arbitrators did not in fact offset that unpaid bill against other outstanding costs and that the bill remained an obligation thereafter either to be paid by respondent to the expert's law firm or reimbursed to the client. No such reservation of a claim for cost reimbursement was ever articulated when the arbitration award was confirmed, nor was any demand ever made to respondent by the client's new attorneys in numerous correspondence between the parties following the arbitration. Based on the evidence in the record, the hearing judge found that respondent reasonably believed that an offset had occurred in the arbitration.

The State Bar put on the testimony of an attorney who served as the chair of the three-person panel of arbitrators to prove that an offset for the amount of the bill had not in fact been made in the arbitration. (R.T. Vol. I pp. 118-135.) This view first came to light in a private conversation the client's new counsel had with the arbitrator shortly before he testified at the hearing in January 1990. (R.T. Vol. II pp. 84-85.) The arbitrator's testimony was somewhat vague about what had happened four years earlier and ambiguous as to what costs were considered. He testified, however, that no offset occurred.<sup>5</sup> Based on

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5. It is far from clear upon reading the transcript whether the arbitrator understood what he was being asked. His answer that no offset occurred was expressly predicated on the fact that the award itself consisted solely of attorney's fees. (R.T. Vol. I p. 125.) There were two types of offsets that could have occurred with respect to costs and no clarification appears on the record as to which the arbitrator was being questioned about. The first type of offset would have been the one proposed by respondent: offsetting the expert witness bill against unbilled costs for which he produced documentation at the arbitration hearing. Because of the amounts involved an offset of that type could have resulted in a virtual "wash" and only attorney's fees would have been awarded. The other type of offset would have occurred if the arbitrators had rejected

the evidence of unbilled costs and had credited the admitted erroneous receipt of \$1,753.94 from the client for the expert witness bill against attorney's fees then owing. In that event, the award, which expressly included the issue of costs, would presumably have been reduced from \$8,300 to approximately \$6,546. The fact that such did not occur is obvious from the face of the award and the arbitrator's testimony sheds little, if any, additional light on the subject. In contrast, the client's payment of the entire award without again claiming entitlement to credit for the cost bill appears to indicate that, like respondent, he interpreted the award as having already credited the expert witness fee against unbilled costs in reaching the amount awarded.

the arbitrator's testimony, the hearing judge found that an offset had not actually occurred and that respondent still was obligated to make restitution. Respondent disputed that conclusion but, after receiving the culpability determination, he put that amount of money in a trust account. (Resp. exh. P.)

[12a] It is generally "presumed that all issues in the dispute were heard and decided by the arbitrators." (*Horn v. Gurewitz* (1968) 261 Cal.App.2d 255, 262.) Credit for advancing the cost of the bill was clearly presented by respondent and the client's new counsel to the arbitrators as one of the cost issues. (R.T. Vol. I. p. 124; exhs. 16, 17.) The arbitration award showed on its face that it covered costs as well as fees. Neither party ever contested the jurisdiction of the arbitrators to consider issues of costs as well as fees. Indeed, it was the client who petitioned for confirmation of the award (resp. exh. Q p. 5) and the award, which expressly covered issues of costs as well as fees, was duly confirmed by a superior court and became final and binding. (*Goldkette v. Daniel* (1945) 70 Cal.App.2d 96; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 219, p. 656.)

[13a] The doctrine of res judicata "seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." (7 Witkin, Cal. Procedure (3d ed. 1985) Res Judicata, § 188, p. 621.) The conclusive nature of the award against collateral attack is unaffected by mistakes of fact or law. (*Id.*, Judgment, § 217, at p. 655.) [14] While an arbitrator's testimony is not inadmissible on the question of what issues were tried (*Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 327), his expression of his own belief is not binding on our court in adjudicating the effect of the arbitration award. (Cf. *Goddard v. Security Title Insurance and Guarantee Company* (1939) 14 Cal.2d 47, 54.) [13b] If the contending parties had a full and fair opportunity to litigate, "there must be compelling reasons to sustain a plea for a second chance." (7 Witkin, Cal. Procedure (3d ed. 1985) Res Judicata, § 192, at p. 626.) None was demonstrated here. After the arbitration award was confirmed and paid, the client's attorneys waited three years before raising the cost reimbursement issue in a different forum. Following oral argument on review, the examiner stipulated that restitution of

the erroneously advanced cost is not an issue. [12b] It should not have had to be relitigated.

#### H. Findings in Mitigation.

[15] The hearing judge found in mitigation that respondent had been in practice since 1951 with only one prior private reproval in 1957 or 1958 for contacting the spouse directly in a divorce action he handled for a friend. Since it was so remote in time and minor in nature, the examiner had not offered it as evidence in aggravation and the hearing judge properly found that respondent was entitled to a finding in mitigation based on his long years of practice. (Decision p. 19.)

[16] Other mitigating evidence established by the record is entitled to greater weight than given to it in the decision below. The hearing judge gave no mention at all to the mitigating effect of respondent's extensive pro bono activities and community involvement. (See, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646, 665, fn. 14.) Among other things, he has been a director and pro bono attorney for many years for a mental health facility, pro bono attorney for other charitable organizations, and a consultant for many school districts. He has received a number of community awards, and contributes financially to numerous local charitable and educational organizations. (R.T. Vol. V pp. 15-16.) In addition, he has served as an unpaid judge pro tem many times over a seven- to eight-year period for a local superior court. (R.T. Vol. V p. 13.)

[17] A great number of character witnesses, including two judges who have known respondent for a very long time, testified about his impeccable honesty and reliability. While the hearing judge correctly points out that most of the character witnesses were unaware of the precise nature of respondent's misconduct, it is extremely unlikely that the extraordinarily high opinion of respondent's honesty and trustworthiness expressed by the character witnesses would change much with knowledge of the details. Indeed, two witnesses were very knowledgeable about the facts and it had no effect on their opinion. (See R.T. Vol. IV pp. 184, 193-202, 220-221.)

## I. Findings in Aggravation.

[18] We decline to adopt any of the hearing judge's findings in aggravation. The finding that in part of his testimony respondent lacked candor (std. 1.2(b)(vi); decision p. 24), was predicated on State Bar witness testimony summarized in findings 9 and 23 which we find did not in fact constitute clear and convincing evidence that respondent lied. [19] Indeed, we find his cooperation with the State Bar as a mitigating factor. He appears to have fully cooperated with the investigator (resp. exh. I), and also stipulated at the hearing to the facts demonstrating commingling. (R.T. Vol. I pp. 19-23.)

[20] We also must reject the finding of an aggravating factor of indifference toward rectification (std. 1.2(b)(v); decision p. 23) in respondent's failure to make restitution "especially after the culpability finding." (*Ibid.*) Respondent had already tendered restitution in the 1986 arbitration proceeding. After receiving the culpability determination in March 1991, respondent nevertheless put funds in a trust account to cover the amount the court thought still to be at issue. (Resp. exh. P.)

[21] We also decline to adopt the finding that the client was significantly harmed by respondent's negligence with respect to the billing error. (Decision p. 25; std. 1.2(b)(iv).) According to the client's testimony, for three years he thought that a legitimate bill had been paid. When he discovered it had not and brought that to respondent's attention, respondent recognized the mistake and offered to take care of the matter in a letter seeking to settle their fee and cost dispute. Until shortly before the 1986 arbitration, the client had no reason to believe the bill was not resolved. At the arbitration, respondent offered the client credit for the advanced cost which ended his obligation of restitution.

## DEGREE OF DISCIPLINE

[22a] Standard 2.2(a) calls for 90 days minimum suspension for commingling. However, the Supreme Court has declined to impose suspension where a good faith fee dispute is the basis for the commingling. (See, e.g., *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092.) The *Dudugjian* opinion

issued two months after the hearing judge issued her decision below. Respondent also cites to our recent decision in *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, in which we recommended no actual suspension for an aggravated rule 8-101 violation in honest, but mistaken, belief the application of the trust funds to the attorney's outstanding bill was permissible.

In *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092, the Supreme Court ordered public reproof for two attorneys who violated rule 8-101(A) by retaining client settlement funds in their own account and refusing to pay them to the clients in the mistaken belief the clients had given them permission to retain the funds in partial payment of their fee. The respondents were members of the bar for only eight years. One of the two clients made ambiguous oral remarks which the attorneys interpreted as permission to retain a settlement check for fees. The attorney-client relationship later deteriorated. Pending resolution of any questions about fees, *Dudugjian* placed the check in a desk drawer and informed the client of its receipt. Two weeks later, having not heard from the client, *Dudugjian* deposited the check into his firm's general account without the clients' endorsement. Shortly thereafter the client demanded the funds and the attorneys believed the client was "attempting to take back what he had already given. While waiting for the check to clear, the attorneys falsely represented that they would comply with the request." (*Id.* at p. 1096.) Two weeks later, the attorneys formally applied the funds to their outstanding bill without authorization to do so.

Both attorneys were held to have violated rules 8-101(A) and 8-101(B)(4). Their conduct was not held to involve moral turpitude or amount to wilful misappropriation. In mitigation, they offered their good faith, numerous character reference letters and their past, albeit short, blemish-free record. The hearing referee recommended public reproof on condition of restitution and taking and passing of the Professional Responsibility Examination. The volunteer review department, by a vote of 11 to 4, increased the recommendation for one attorney to two years stayed suspension and two years probation on conditions including ninety days actual suspension. The recommendation for the other attorney was

one year stayed suspension, one year probation and thirty days actual suspension. In light of the mitigation, the Supreme Court agreed with the hearing referee, stating: "Most significant, petitioners honestly believed that the Collinses had given them permission to retain the settlement funds. Also, they are not likely to commit such misconduct in the future; they have generally exhibited good moral character; their failings here are aberrational." (*Id.* at p. 1100.)

[22b] Respondent's evidence in mitigation is far greater than that in *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092. We therefore impose a private reproof. We include as a condition thereof a requirement that respondent take and pass the California Professional Responsibility Examination within one year of the effective date of this reproof. A similar condition was imposed in *In the Matter of Lazarus, supra*, 1 Cal. State Bar Ct. Rptr. 387 and *Dudugjian v. State Bar*.

[23] In light of our disposition, respondent's arguments against the hearing judge's recommended imposition of a rule 955, California Rules of Court requirement and the imposition of costs are moot.

We concur:

NORIAN, J.  
STOVITZ, J.