STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PHILIP DEMASSA

A Member of the State Bar

[No. 86-C-19529]

Filed November 7, 1991

SUMMARY

Respondent was convicted in federal court of one count of harboring a fugitive and three counts of violating currency transaction reporting regulations. The currency charges were found not to involve moral turpitude or other misconduct warranting discipline, but the fugitive charge was held to involve moral turpitude per se. The hearing referee, based on substantial mitigating evidence, declined to recommend disbarment, but felt bound to recommend three years actual suspension and five years stayed suspension. (Gary R. Carlin, Hearing Referee.)

Respondent requested review, challenging the holding that his conviction involved moral turpitude. The review department held that the Supreme Court, by the language of its order referring respondent's federal convictions to the State Bar Court, had unambiguously and finally determined that respondent's conviction for harboring a fugitive constituted an offense involving moral turpitude per se. The review department also rejected respondent's contention that the State Bar Court's consideration of certain facts and circumstances surrounding respondent's conviction violated due process, holding that respondent was given sufficient notice of the relevance of those facts and had the opportunity to present evidence on the issue.

On the issue of discipline, the review department found that although respondent had been convicted of an offense which involved moral turpitude per se, the facts and circumstances surrounding the offense did not warrant disbarment or a lengthy suspension. The review department noted that the Supreme Court had granted respondent's petition not to be placed on interim suspension pending the disciplinary proceedings, thus rebutting his presumptive unfitness to practice. The aggravating circumstances found by the hearing referee were unsupported by the record, and the mitigating evidence showed that respondent's acts were aberrational and that respondent did not currently pose a threat to the public, the legal profession or the courts. The review department concluded that discipline consisting of a one-year stayed suspension and an actual suspension of sixty days was sufficient to preserve the integrity and maintain the high standards of the legal profession.

COUNSEL FOR PARTIES

For Office of Trials: William Davis

For Respondent: Charles H. Dick, Jr.

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

HEADNOTES

[1 a-e] **1518 Conviction Matters—Nature of Conviction—Justice Offenses**
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where respondent was convicted of a felony for harboring respondent's client while the client was a fugitive, even thought respondent was well-motivated, did not act for personal gain and committed no perjurious act, respondent's conviction was a serious matter, and involved acting with conscious disregard of an attorney's obligation to uphold the law. Thus, even though respondent's conduct was aberrational, respondent posed no current risk to the public, the legal profession or the courts, and respondent presented compelling mitigating evidence, a 60-day actual suspension, with one year of stayed suspension and one year of probation, was appropriate to preserve the integrity of the legal profession and enforce high professional standards.

[2 a, b] **191 Effect/Relationship of Other Proceedings**
1517 Conviction Matters—Nature of Conviction—Regulatory Laws
1527 Conviction Matters—Moral Turpitude—Not Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Based on surrounding circumstances and on subsequent federal appellate decisions holding that conduct for which respondent was convicted is not a crime, referee properly determined that respondent's convictions for violating federal currency transaction reporting laws did not involve moral turpitude or other conduct warranting discipline.

[3] **141 Evidence—Relevance**
1699 Conviction Cases—Miscellaneous Issues
In criminal conviction matters, the State Bar Court is not limited to examining only the elements of the criminal offense, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney.

[4] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
1699 Conviction Cases—Miscellaneous Issues
Where a certain set of facts was considered by the criminal court at the time of respondent's sentencing, and notice of such consideration was given to respondent at the time, there was sufficient notice to respondent prior to his disciplinary hearing of the relevance of such facts, and since respondent had an opportunity to present evidence on the issue at the disciplinary hearing, due process did not require remanding the case for submission of additional exculpatory evidence.

[5 a, b] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1521 Conviction Matters—Moral Turpitude—Per Se
Where Supreme Court directed State Bar Court only to hear evidence on appropriate level of discipline, hearing referee correctly ruled that Supreme Court had already established nature of respondent's criminal offense as one inherently involving moral turpitude, and Supreme Court's classification of offense of harboring a fugitive as one involving moral turpitude per se was final and binding on the State Bar Court.

[6 a, b] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights
1521 Conviction Matters—Moral Turpitude—Per Se
Where record established that respondent had had opportunity to be heard by Supreme Court, prior to referral to State Bar Court, on question whether respondent's criminal offense involved moral turpitude per se, respondent was not denied due process by the Supreme Court's determination of that issue.

[7] **1528 Conviction Matters—Moral Turpitude—Definition**
The issue of whether an offense constitutes moral turpitude per se is a matter of law to be ultimately determined by the Supreme Court.

[8] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
The State Bar Court acts as the administrative arm of the Supreme Court on attorney disciplinary matters and acts pursuant to its mandate.

[9] **148 Evidence—Witnesses**
166 Independent Review of Record
Credibility findings by the finder of fact are to be accorded great weight by the review department and it should be reluctant to deviate from them. Nonetheless, the findings must be supported by the record. Where the review department found insufficient evidence to support challenged findings, it declined to adopt them.

[10 a, b] **148 Evidence—Witnesses**
162.11 Proof—State Bar's Burden—Clear and Convincing
162.90 Quantum of Proof—Miscellaneous
Rejection of a witness's testimony by the hearing judge does not in and of itself create affirmative evidence to the contrary. Where respondent's testimony on a factual issue was plausible and uncontradicted, it was appropriate to resolve all reasonable doubts in favor of respondent and reject a finding contrary to respondent's testimony as unsupported by clear and convincing evidence. Where respondent's version of events was plausible, even though controverted, it supported a reasonable inference of lack of misconduct, and where there was only circumstantial evidence to the contrary, misconduct was not established by clear and convincing evidence.

[11 a-c] **143 Evidence—Privileges**
191 Effect/Relationship of Other Proceedings
196 ABA Model Code/Rules
213.50 State Bar Act—Section 6068(e)
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1691 Conviction Cases—Record in Criminal Proceeding
The whereabouts of a fugitive client known to an attorney constituted privileged communications which the attorney cannot disclose. (Bus. & Prof. Code, § 6068 (e); ABA Model Rules, rule 1.6.) The attorney must advise the client to surrender and must not assist or facilitate the fugitive in avoiding capture or committing a crime. Thus, respondent's knowledge that his fugitive client was in California and his meetings with the client to discuss the progress of negotiations with the authorities regarding the outstanding criminal charges were client confidences which respondent was obligated to preserve. However, an attorney's ethical duty not to disclose client confidences does not extend to affirmative acts which further a client's unlawful conduct, and respondent's

guilty plea constituted conclusive proof that he committed all the acts necessary to commit the charged offense of harboring his fugitive client with the intent of preventing the client's discovery and arrest by federal authorities.

[12] **740.10 Mitigation—Good Character—Found**
765.10 Mitigation—Pro Bono Work—Found
Testimonials from clients regarding respondent's service on their behalf, in some instances on a pro bono basis, constituted mitigating evidence.

[13] **710.33 Mitigation—No Prior Record—Found but Discounted**
750.10 Mitigation—Rehabilitation—Found
Respondent's lack of a prior record was not a significant mitigating factor since he had only been in practice for eight years prior to his misconduct. However, where respondent had practiced without incident for more than twelve years since the misconduct occurred, he was entitled to have this taken into account, and the review department concluded based on respondent's record that respondent's criminal conduct was aberrational and unlikely to recur.

[14] **802.30 Standards—Purposes of Sanctions**
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Under the Standards for Attorney Sanctions for Professional Misconduct, the presumptively appropriate discipline for conviction of a crime involving moral turpitude is disbarment. However, where compelling mitigating circumstances predominate, a lesser sanction may be imposed, and the minimum of a two-year actual suspension suggested by the standards has not been applied by the Supreme Court. In such circumstances, the review department's duty is to determine the appropriate sanction in light of the purposes of attorney discipline: protection of the public, preservation of public confidence in the legal profession and maintenance of high professional standards.

[15] **1521 Conviction Matters—Moral Turpitude—Per Se**
1549 Conviction Matters—Interim Suspension—Miscellaneous
Setting aside the interim suspension of an attorney convicted of a crime involving moral turpitude is an uncommon action and occurs only when it is in the interests of justice to do so, with due regard to maintaining the integrity of and public confidence in the profession. Where respondent successfully petitioned the Supreme Court not to place him on interim suspension, he thereby made a sufficient showing that he did not pose a threat to the public, profession or the courts by his continued practice pending final resolution of the disciplinary proceedings, and rebutted his presumptive disqualification stemming from his conviction.

[16] **715.10 Mitigation—Good Faith—Found**
720.10 Mitigation—Lack of Harm—Found
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where respondent in criminal conviction matter had acted in what he believed to be the best interests of both his client and the criminal justice system, his good motives were not a defense to his breach of duty, but did constitute a strong factor in mitigation.

ADDITIONAL ANALYSIS

Mitigation

Found

735.10 Candor—Bar
745.10 Remorse/Restitution
791 Other

Discipline

1613.06 Stayed Suspension—1 Year
1615.02 Actual Suspension—2 Months
1617.06 Probation—1 Year

Probation Conditions

1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School

Other

1543 Conviction Matters—Interim Suspension—Vacated

OPINION

PEARLMAN, P.J.:

Respondent Philip A. DeMassa was admitted to the practice of law in California in 1971 and became a prominent criminal defense lawyer in San Diego. He has no prior record of discipline. This proceeding arose out of his 1985 conviction for one count of harboring a fugitive by allowing a client indicted on federal drug charges to spend the night in his home in February 1979, three days prior to surrendering to authorities, and for three counts of violating currency transaction reporting statutes. The Ninth Circuit Court of Appeals shortly thereafter declared the type of conduct underlying the currency transaction convictions not to constitute a crime.

Upon referral of the criminal convictions, the California Supreme Court instituted disciplinary proceedings but, on respondent's motion, vacated its initial order of interim suspension before it went into effect. Respondent conducted his law practice in exemplary fashion thereafter. The referee who conducted the hearing found "the most compelling mitigating circumstances clearly predominate" given "an extraordinary demonstration of good character of the Respondent attested to by a wide range of references in the legal and general communities . . . dedication to his clients . . . without equal . . . outstanding personality and great character without whom the profession would be at a profound loss." (Amended decision pp. 20-21.) Nonetheless, based in part on aggravating factors which we find unsupported by the record and in part on the perceived mandate of standard 3.2, Standards For Attorney Sanctions For Professional Misconduct (Trans. Rules Proc. of State Bar, div. V [hereinafter "standards" or "std."]), the referee recommended five years suspension stayed, conditioned on three years actual suspension. No case law is discussed in the referee's decision. Respondent thereafter sought review.

[1a] We find additional mitigating evidence of respondent's cooperation and, upon analysis of the case law, that a lengthy suspension is totally unnecessary because respondent's misconduct consisted of a single aberrational act and he poses no current risk to the public, the legal profession or the courts. Nonetheless, because the illegal act which he committed constituted a felony involving moral turpitude per se, to preserve the integrity of the legal profession and to enforce the high professional standards to which all attorneys must adhere, we deem it appropriate to recommend a short period of actual suspension. We therefore recommend that he be suspended from the practice of law for one year, that such suspension be stayed, that he be placed on one year's probation on conditions including sixty days actual suspension, and that he take and pass the California Professional Responsibility Examination within one year.

I. THE CRIMINAL CONVICTION

Respondent and other members of his office and attorneys who shared office space with him represented 26 defendants named in a federal indictment unsealed on February 14, 1978, charging the defendants with conducting an international drug smuggling enterprise known as the Coronado Company. One of the alleged "runners" for the Coronado Company, Robert Lahodny, had been a social acquaintance of respondent's and had also supervised renovation of a residence for the respondent in Santa Barbara prior to the issuance of the indictment.

The essential facts underlying respondent's conviction are undisputed. Following the indictment, respondent periodically was called by or met at hotels with the defendants who had not yet surrendered, including Lahodny, to update them on his negotiations with the federal authorities and to urge them to surrender to law enforcement authorities. Respondent persuaded Lahodny to meet him at respondent's residence outside of San Diego the last week in February 1979—the only place in the vicinity of San Diego Lahodny felt safe from apprehension. Lahodny spent parts of two days, one overnight, at respondent's home with respondent's wife and children, while respondent advised Lahodny of possible conflicts because of his representation of other codefendants and urged Lahodny to give himself up. Lahodny surrendered to federal authorities accompanied by his new attorney, Patrick Hennessey, an associate of respondent, on March 1, 1979.

On January 27, 1984, respondent was indicted by a federal grand jury sitting in the Southern District of California on a number of charges alleging that he

was a co-conspirator of the Coronado Company, that he violated currency reporting laws in depositing fees from clients and that he harbored Robert Lahodny, a fugitive. A superseding indictment was filed in October 1984. Respondent went to trial on the charges in the superseding indictment and, on November 23, 1985, the fifth week of his jury trial, respondent executed a negotiated plea agreement, withdrawing his prior plea of not guilty, pleading guilty to one count of violating 18 United States Code section 1071 (harboring a fugitive) and three counts of violating 31 United States Code sections 5313 and 5322 (currency transaction reporting). He agreed, among other terms, to waive any right to collaterally attack his plea. United States District Judge Earl B. Gilliam, on consideration of all of the factors including respondent's remorse and numerous letters attesting to his dedication and integrity, declined to order him to serve any time in prison. On December 30, 1985, respondent was sentenced on the currency transaction charges to pay a $100,000 fine over a five-year period at $20,000 per annum and on the charge of harboring a fugitive to serve a five-year prison term, which was suspended. He was ordered confined to a community treatment center (halfway house) for six months, and placed on supervised probation for five years. As part of his plea, respondent agreed not to represent clients in the federal court in the Southern District of California while the State Bar was conducting disciplinary proceedings against him.

II. PROCEDURAL HISTORY

Respondent's felony conviction was transmitted to the California Supreme Court on January 16, 1986. On March 12, 1986, the Supreme Court placed respondent on interim suspension, effective April 11, 1986, based on his "having been convicted of violating 18 United States Code section 1071, a crime involving moral turpitude." (Exh. 8.) Respondent filed a petition to set aside the order of interim suspension on March 24, 1986, asserting, among other things, that he had no prior disciplinary record, seven years had elapsed since his offense, and he posed no danger of future misconduct. His petition was accompanied by numerous exhibits including an excerpt from the transcript of his sentencing hearing and the character reference letters addressed to Judge Gilliam on his behalf. The State Bar did not file a timely response.

The interim suspension was set aside for good cause shown by order dated April 8, 1986, and the Supreme Court thereafter ordered briefs to be filed to show cause why final discipline should not be entered in the case. After submissions by both parties, the Supreme Court, by order filed May 23, 1986, referred the matter to the State Bar for a hearing, report and recommendation on the discipline to be imposed for respondent's violation of 18 United States Code section 1071, an offense involving moral turpitude, and for a determination of "whether the facts and circumstances surrounding the violation of 31 United States Code, sections 5313, 5322(b), and 31 Code of Federal Regulations, Part 103, sections 103.11 et seq. involved moral turpitude or other misconduct warranting discipline, and if so found, the aggregate discipline to be imposed." (Exh. 10.)

[2a] In rulings of the United States Court of Appeals for the Ninth Circuit issued shortly after respondent's conviction, the practice followed by respondent in depositing fees was determined not to be criminal conduct within the ambit of 31 United States Code sections 5313 and 5322, the currency transaction reporting statutes. (*United States* v. *Reinis* (9th Cir. 1986) 794 F.2d 506, 508; *United States* v. *Varbel* (9th Cir. 1986) 780 F.2d 758, 761-762.)

Pursuant to the Supreme Court's directive, a compensated referee conducted seven days of disciplinary hearings between August 3, 1987, and April 20, 1988. The record closed on October 24, 1988. While the referee found that the facts and circumstances of respondent's three felony convictions regarding the currency transaction reports neither involved moral turpitude nor constituted misconduct warranting discipline, the referee also found the presumptively appropriate discipline for respondent's remaining felony conviction for harboring a fugitive, a crime of moral turpitude per se, to be disbarment and so recommended based on the findings in aggravation set forth in his decision filed on February 9, 1989.

Respondent moved for reconsideration or hearing de novo under rule 562 of the Rules of Procedure

of the State Bar, seeking to admit additional evidence with respect to the aggravating factors found by the referee. The motion was granted by order issued on February 24, 1989, as to one issue regarding respondent's knowledge of Lahodny's alleged residency and resumption of supervision of work on the property owned by respondent. Three additional days of hearing were held. An amended decision was filed on October 3, 1989, in which the referee deleted one finding and determined that disbarment was not appropriate under standard 3.2, because of compelling mitigating evidence demonstrated at the hearing. The referee recommended that respondent be suspended for five years, stayed, serve a five-year probationary term and a three-year actual suspension, comply with rule 955 of the California Rules of Court and be required to pass a professional responsibility examination. Respondent filed a request for review of the amended decision.[1]

III. THE FACTS

The essential facts underlying respondent's conviction were conclusively established by his guilty plea. (Bus. & Prof. Code, § 6101.) The hearing below involved extensive testimony as to respondent's contacts with Lahodny prior to his indictment and the surrounding circumstances during the year Lahodny was a fugitive. Where there are significant modifications to the facts as found by the referee, they are identified and discussed below.

A. Harboring a Fugitive Charge

After a year with the federal public defender program in San Diego, respondent went into a private law practice, handling criminal defense cases primarily in federal court. He met Lahodny in 1973 in Monterey and maintained a sporadic social relationship with him. Lahodny was the son of a respectable middle class San Diego family; his father had been the city manager of the city of Coronado. Prior to 1978, Lahodny had referred a number of clients to respondent for legal advice and assistance.

1. Presence of Lahodny on the Ashley Road Property

In 1977, Lahodny was residing in the Santa Barbara area and, after investigating the investment prospects of a number of parcels of real estate in the Santa Barbara area, he interested respondent in acquiring a six and one-half acre residential property in Montecito for approximately $450,000. Lahodny's proposal was for respondent to purchase the property and finance the renovation and improvement of the buildings and grounds, while Lahodny resided there rent-free as caretaker and oversaw the renovations. When the property sold, Lahodny would be entitled to some share of profit realized. Respondent agreed and he and his professional corporation purchased the property in the early spring of 1977.

Lahodny moved onto the Ashley Road property soon after escrow closed and began contacting contractors. A bank account was opened and funded by respondent on which both Lahodny and respondent had check signing powers and out of which the mortgage and property improvements were paid. Some work was directly billed to respondent in San Diego as well.

During the time in which he supervised the renovation of the Ashley Road residence, Lahodny was secretly involved as a runner for the Coronado Company. One month each year he would assist in smuggling a large shipment of marijuana from Asia into the United States. In connection with the smuggling, Lahodny used numerous aliases provided by

1. After the amended decision was filed but before the period for petitioning for reconsideration had expired, respondent filed his original request for review. Within the period for reconsideration, the examiner filed a motion to reopen the record before the referee based on newly discovered evidence. The motion was granted by the referee on November 27, 1989. The proceedings in the review department were vacated and dismissed by order filed December 19, 1989. Thereafter, the parties filed a joint motion to withdraw the motion to reopen the record, including the exhibits attached to the motion to reopen the record, and to reinstate the amended decision. The motion was granted by the referee on August 27, 1990, the amended decision was reinstated as of August 27, 1990, and the instant request for review was filed by respondent on October 3, 1990.

the Coronado Company, in order to obscure his identity and confuse any law enforcement investigation. Meanwhile, he continued to use his own name with persons who knew him. Lahodny also provided false names and identification for his girlfriends and had them assume these identities when he felt it was necessary. The referee referred to Lahodny as living "something of a double life." (Amended decision p. 10.)

Respondent was aware of a 1977 grand jury investigation of members of the Coronado Company because he represented other targets of the grand jury, but testified that he did not know of Lahodny's involvement until the indictment was unsealed in February of 1978. (R.T., vol. V, pp. 71-74.) Lahodny was living at the time at the Ashley Road residence and had recently separated from a long-time girlfriend. In response to the break-up, Lahodny testified that he decided to take a vacation and wrote a letter to respondent (addressed to Mr. DeMasse [sic]) dated February 16, 1978, advising respondent that he was leaving on a vacation and turning over the care and renovation of the Ashley Road property to David and Nora Reddy. The letter was stamped "received" by respondent's office on February 20, 1978. Respondent met with Reddy, a long-time friend of Lahodny, within a week and entrusted him with overseeing the completion of the renovation project.

Lahodny testified that he was unaware that he had been indicted until after he departed the United States for Mexico and Tahiti. (R.T., vol. IV, pp. 119-120.) The referee found that Lahodny returned to the Santa Barbara area in May 1978, assuming the name "Bob Hill." His presence was established through the testimony of contractors and kitchen appliance suppliers who met Lahodny as Bob Hill while working on the kitchen renovation, corral fencing and landscaping of the Ashley Road property in the spring and summer of 1978. Although the work orders on these projects had been changed so that they were now in the name of "Reddy" or "Ready," the referee found that upon Lahodny's return, Lahodny, not Reddy, exercised the final word on approving or authorizing work, and gave large cash tips to contractors on site. Lahodny did not deny that he was on site, but testified that he did not let respondent know of his presence and advised the Reddys not to tell respondent he had been there.

Respondent admitted being in contact with Lahodny in connection with arranging terms of Lahodny's surrender, but denied any knowledge of Lahodny's presence or involvement in the work done on the Ashley Road property after May 1978. Originally, the referee found that Lahodny lived on the Ashley Road property. Upon rehearing, the referee concluded that there was insufficient evidence that Lahodny returned to live at the Ashley Road property or that respondent had authorized Lahodny to live there. (Amended decision p. 13.) Lahodny's girlfriend and other witnesses testified that Lahodny first lived with a friend and then shared with his girlfriend an apartment in the Santa Barbara polo grounds during that time period, and did not live at the Ashley Road property. In his original decision, the referee also disbelieved the testimony of Lahodny and respondent as to whether respondent was aware that Lahodny had returned to the Santa Barbara area in or about May 1978 and had resumed supervision of the Ashley Road renovation. The referee reached the same conclusion after reconsideration. Respondent challenges this finding in aggravation, which we discuss *post*.

The Ashley Road property was sold by respondent in November 1981 for approximately $1,300,000. Lahodny did not receive any portion of the proceeds from the sale.

2. The Ventura drunk driving incident

While he was a fugitive, on January 30, 1979, Lahodny was arrested and taken into custody in Ventura County for driving while under the influence of alcohol. Lahodny gave one of his Coronado Company aliases, "Gary John Classen," to the authorities on the scene and while in custody. He entered a plea of not guilty under the Classen alias, and his girlfriend, Susan Staub, posted cash bail of $300, under the alias "Karen Jackson." Both Lahodny and respondent testified that respondent did not know that Gary Classen was an alias for Robert Lahodny. Lahodny testified he was careful not to let respondent know because "it would have looked real stupid for somebody with a federal warrant out to be acting like that. And I just didn't want him to know

about it . . . ." (R.T., vol. IV, p. 84.) He told the respondent he had a friend from Idaho "Gary Classen," who had just been picked up on a drunk driving charge in Ventura and asked respondent if he knew a local attorney who could handle the case. Lahodny indicated to respondent that "Classen" was concerned whether his fingerprints might go to the FBI. (R.T., vol. V, p. 102.) Lahodny called respondent back later and was given the name of attorney Edward A. Whipple. Respondent and Whipple were not personally acquainted. Respondent spoke briefly to Whipple by telephone. Whipple sent a letter dated February 5, 1979 to respondent enclosing a waiver of constitutional rights and personal presence form for respondent to obtain "Classen's" signature. The letter detailed Whipple's best estimate of the outcome of the case and asked respondent for a phone number for "Classen" so Whipple could call and discuss the case with the client and thereafter sign the declaration of attorney in the case. (Exh. 11.) The completed waiver forms signed by "Classen" and $300 in cash were slipped under the door of Whipple's office after hours by Lahodny's girlfriend on February 12, 1979. (Amended decision p. 14.)

The drunk driving matter was heard on February 21, 1979, and Whipple, appearing on behalf of "Classen," entered a plea of no contest. "Classen" was found guilty, fined $350 and placed on two years probation. Whipple, having never met "Classen" and still unaware that Lahodny, a fugitive, was "Classen," wrote to respondent on February 21, 1979 (exh. 11), regarding the disposition of the case and enclosed the probation order with the conditions for "Classen" to sign. Whipple also stated that as soon as he had the answer to respondent's question regarding the disposition of "Classen's" fingerprints, he would call respondent. A note in Whipple's file indicated that respondent was advised that the prints would be forwarded to the state justice department in Sacramento and from there to the FBI. (Exh. 14.) Lahodny testified that he had his girlfriend or another woman pick up the forms at the respondent's office, that he then signed the probation order and slipped it under the door to Whipple's office after hours together with $50 to pay the balance of his fine. Whipple testified that he had no recollection of how the documents were returned to his office but it appeared they were hand-delivered to his secretary. (R.T., vol. IV, pp. 11-12; 33-37.)

Respondent testified that Lahodny spoke to him briefly about his friend's need for a lawyer and then he spoke to Whipple briefly at the time he referred the case. He recalled hearing of "Classen's" concern about whether the fingerprints would be sent to the FBI and that he relayed the concern to Whipple. (R.T., vol. V, p. 102.) During that period, he was busy preparing for a sentencing hearing for a different client until February 8th, and then was on a skiing trip in Colorado until February 17th. (R.T., vol. V, pp. 107-108.)

Respondent further testified that had he known Classen was an alias for Lahodny, he would not have referred the drunk driving case to a stranger, but would have sought a continuance of the case while he talked Lahodny into surrendering. (R.T., vol. V, pp. 109-112.) Whipple testified that had he learned Classen had not used his true name at the arraignment, a continuance could have been obtained in order to give him time to assess what his obligations were toward his client. (R.T., vol. IV, pp. 47-49.) An expert witness for respondent, attorney Ephraim Margolin, testified that in his opinion there would have been nothing improper in seeking a continuance for "Classen" while arranging his surrender to federal authorities. (R.T., vol. VI, p. 50.)

The referee found the testimony of both respondent and Lahodny that respondent was unaware of "Classen's" true identity inherently incredible. (Decision pp. 15-16.) Critical to the referee's assessment of the evidence was the inquiry from respondent concerning the disposition of the fingerprints and the elaborate logistics for communicating with "Classen." The referee noted that respondent's effort was expended on behalf of someone whom respondent had never spoken to, met, called or written. The referee concluded that respondent must have known that Lahodny and Classen were one and the same person. On review, respondent also challenges this finding, which we discuss *post*.

B. Currency Transaction Reports

As part of his plea, respondent admitted that on June 1, 1981, December 16, 1981, and May 3, 1982, respondent made cash deposits at the Bank of California in San Diego. In each instance, he had previously made cash deposits in amounts under $10,000

each and the sum of these cash deposits at that point in the calendar year totalled in excess of $100,000. On the dates in question, respondent made separate cash deposits which totalled in excess of $10,000, but were broken into sums of less than $10,000 each so as to avoid triggering the requirement under federal law that a currency transaction report be filed by the Bank of California concerning the deposits.

At the hearing, the referee found that respondent initially split his deposits at the request of bank officers at the Bank of California so the bank could avoid the requirement of filing a currency transaction report. Respondent continued his practice of splitting deposits even after bank officials had granted him an exemption from the filing requirement. As a rule, respondent received substantial advanced fees from clients in cash and it was the practice of criminal defense attorneys at that time to make cash deposits in a manner as to avoid triggering the cash transaction reporting requirement.

[2b] The referee concluded on this evidence that the currency convictions did not constitute crimes involving moral turpitude, nor offenses otherwise warranting discipline. He also noted that the conduct in question is no longer considered a crime. (See *ante*, at p. 743.) The State Bar does not dispute that conclusion and, upon our review, we adopt the referee's analysis and recommendation with respect to the currency convictions. With respect to the conviction for harboring a felon, our discussion follows.

IV. DISCUSSION

A. Due Process Challenges

Respondent alleges two violations of his right to due process and they are addressed in turn.

1. Evidence concerning the Ventura drunk driving incident

Respondent asserts he was denied due process in that he had no notice that the evidence regarding the Ventura incident would be considered as misconduct or as an aggravating factor. He contends that it was advanced at the hearing solely for the purpose of illustrating respondent's contacts with Lahodny during the time Lahodny was a fugitive. The referee found respondent had assisted Lahodny in using his alias to avoid alerting law enforcement and court officials of his true identity and considered that evidence as a factor in aggravation in the original hearing decision. Respondent filed his petition for reconsideration thereafter, requesting that the incident either be disregarded for purposes of determining discipline, or he should be permitted to introduce additional evidence on the issue in an effort to show his lack of knowledge of Lahodny's use of an alias. The referee denied his request as to that issue,[2] finding that the Ventura incident was related to the circumstances of respondent's criminal conviction, there was no motion at the time the evidence was offered to limit its use, and the evidence had been admitted at the hearing without objection.

[3] As the examiner points out, in criminal conviction matters, the State Bar Court is not limited to examining only the elements of the offense in question, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney. (*In re Kristovich* (1976) 18 Cal.3d 468, 472.) Our Supreme Court explained in *In Re Arnoff* (1978) 22 Cal.3d 740, 745, "We have uniformly considered in reference proceedings all facts and circumstances surrounding the commission of a crime by an attorney. [Citation.]" **[4]** The Ventura incident was considered by the federal judge at sentencing, and respondent was so advised both at the plea hearing and sentencing. (Exh. 4, pp. 3502-3503; exh. 5, pp. 35-36.) Accordingly, we conclude that there was sufficient notice to respondent prior to the hearing of the relevance of the Ventura incident to his criminal conviction. Since respondent had notice and an opportunity to present evidence before the hearing referee on the Ventura incident, we deny respondent's motion to remand this case for consideration of additional exculpatory evidence on this issue. However we also conclude, *post*, that the existing record did not demonstrate

2. The referee did grant respondent leave to present additional evidence on the Ashley Road property because respondent did not have access to documents relating to the property until his files were released to him by the U.S. District Court in February 1989.

clear and convincing evidence of an aggravating factor resulting from the Ventura drunk driving incident.

2. Moral turpitude determination

[5a] Respondent raises on review the issue of whether his conviction for harboring a fugitive is a crime inherently involving moral turpitude. The referee correctly ruled that the California Supreme Court had already found respondent's conviction for 18 United States Code section 1071 (harboring a fugitive) to be a crime of moral turpitude per se. (Amended decision p. 18.) **[6a]** Respondent argues that the Supreme Court's referral order does not support the referee's conclusion. Respondent characterizes the quoted language from the order as ambiguous and further asserts that if the issue was already determined in this manner, he has been denied due process of law. We agree with the examiner that there is no ambiguity in the Supreme Court order or any hint of denial of due process.

[7] The issue of whether an offense constitutes moral turpitude per se is a matter of law to be ultimately determined by the Supreme Court. (*In re Strick* (1983) 34 Cal.3d 891, 901.) **[6b]** The record is replete with respondent's opportunities to be heard by the Supreme Court on this issue before the matter was referred to the State Bar.[3] **[8]** We act as the administrative arm of the Supreme Court on attorney disciplinary matters and act pursuant to its mandate. (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 224.) On the currency transaction offenses, the Supreme Court asked the State Bar Court to hold a hearing, and make a report and recommendation as to whether the crimes constituted offenses involving moral turpitude or other conduct warranting discipline and, if appropriate, a discipline recommendation. **[5b]** In contrast, on the conviction for harboring a fugitive, the directive from the Supreme Court was to hear evidence relative to the appropriate level of discipline because the Supreme Court had already established the nature of the offense as one inherently involving moral turpitude. That classification of the offense of harboring a fugitive was final and binding upon the referee below and was reinforced by the Supreme Court's subsequent opinion in *In re Young* (1989) 49 Cal.3d 257 similarly categorizing the same crime.

B. Challenges to Factual Findings

Respondent attacks the referee's findings of credibility on both the issue of his knowledge of Lahodny's resumed supervision of the Ashley Road renovations and the Ventura drunk driving incident, specifically that respondent and Lahodny were not believable witnesses. **[9]** Credibility findings by the finder of fact are to be accorded great weight by us and we should be reluctant to deviate from them. (Rule 453, Trans. Rules Proc. of State Bar; *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055-1056.) Nonetheless, the findings must be supported by the record. On our independent review of the record, we find insufficient evidence to support the challenged findings and we decline to adopt them.

A number of witnesses testified as to respondent's extreme devotion to his law practice to the exclusion of his personal interests and investments in general and his neglect of the supervision of the Ashley Road renovation in particular, a project taking place 200 miles from his home. (R.T. on rehearing (May 30, 1989) pp. 183-185; (June 29, 1989) pp. 5-11; 16; 31-32; 51-53.) Indeed, it is undisputed that he allowed bills from the renovation to pile up unpaid for months

3. When the conviction was referred to the Supreme Court, respondent filed extensive papers in response to the transmittal, contending that the characterization of the offense as one involving moral turpitude as a matter of law in the transmittal papers was incorrect. After the interim suspension order was issued, respondent petitioned the Court to have the suspension set aside. His brief led with arguments that the conviction did not involve moral turpitude inherently or under the facts and circumstances in the case. When the Court set aside the interim order effective April 8, 1986, it ordered respondent to show cause why final discipline should not be imposed under California Rules of Court, rule 951(b). The rule then extant provided that the attorney's return could include "a request for termination of suspension and dismissal of the proceeding upon the ground that the crime and the circumstances of its commission did not involve moral turpitude . . . ." The respondent again argued the moral turpitude issue in his response to the Supreme Court. In its referral order issued thereafter, the Supreme Court rejected his arguments and determined as a matter of law the offense to be one involving moral turpitude.

during this period of time. (R.T. on rehearing (June 29, 1989) pp. 45-46; R.T., vol. III, pp. 74-75.) None of the paperwork transmitted to respondent in San Diego indicated that Lahodny was involved on the project after Reddy was placed in charge. (R.T. on rehearing (June 29, 1989) pp. 44-45; exh. P.) Respondent had instructed Lahodny to stay away from the Ashley Road property. (R.T. on rehearing (June 19, 1989) pp. 22-23; R.T., vol. IV, p. 75.) No witnesses testified that respondent had any knowledge that Lahodny was visiting and Lahodny asked the Reddys not to disclose his visits to respondent. (R.T., vol. IV, p. 124.)

The referee concluded that, contrary to respondent's testimony, respondent knew that Lahodny had come back to work on the renovation because he was "cognizant of the progress on the property." (Amended decision p. 12.) **[10a]** The referee may not have found respondent's testimony credible on this point, but "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.'" (*Edmondson* v. *State Bar* (1981) 29 Cal.3d 339, 343, quoting *Lubin* v. *Lubin* (1956) 144 Cal.App.2d 781, 795.) Indeed, respondent's explanation of his preoccupation with his law practice and lack of awareness of Lahodny's participation on the project in Santa Barbara was plausible and uncontradicted. In such circumstances it is appropriate to resolve reasonable doubts in favor of the respondent and reject a contrary finding as unsupported by clear and convincing evidence. (*Davidson* v. *State Bar* (1976) 17 Cal.3d 570, 573-574.) Therefore, we do not find clear and convincing evidence that respondent was aware of Lahodny's work on the Ashley Road renovation after May 1978.

We reach a similar conclusion as to the referee's findings concerning the Ventura drunk driving incident. Whipple relied entirely on his sketchy notes and the documents in his file for the substance of his testimony. He had no independent recollection of any conversations with respondent or "Classen." There is nothing in Whipple's testimony and file to support the conclusion that respondent was necessarily aware that "Classen" was an alias of Lahodny. The referee found that Whipple did not know he was dealing with a fugitive despite never having met his client; despite the "highly unusual handling of the paperwork"; and despite the "unusual inquiry" as to whether or not the FBI would receive Classen's fingerprints. The testimony of respondent that he was likewise kept ignorant of Classen's true identity is not inherently incredible.

The record discloses that respondent was busy with another case when he received a brief phone call from Lahodny seeking a referral for a friend. There is no indication that respondent gave the referral a great deal of attention, or that he knew that Lahodny was lying to him. Respondent testified that had he known that Lahodny himself needed a defense lawyer, he would have handled the matter himself, and sought a continuance in Ventura to allow Lahodny time to surrender in San Diego and still claim the disposition of the drug charges respondent had negotiated with the U.S. Attorney. (R.T., vol. V, pp. 109-110.) The course he testified he would have taken had he known the truth appears more consistent with his generally zealous concern for his clients and his repeated prior counsel to Lahodny to surrender. The action he did take—referring "Classen" to a stranger—appears more consistent with ignorance of "Classen's" true identity.

[10b] Where the respondent's version is plausible in the context of the entire record, even when controverted, it supports a reasonable inference of lack of misconduct. (*Davidson* v. *State Bar*, *supra*, 17 Cal.3d at p. 574.) Here, there was no direct testimony establishing, as found by the referee, that respondent "knowingly aided Mr. Lahodny's use of an alias in the disposition of the Ventura County misdemeanor complaint against 'Gary John Classen' . . . ." (Amended decision p. 19.) There was only circumstantial evidence suggesting that respondent could have known and uncontradicted testimony of respondent and Lahodny that he did not know. Even if respondent's testimony were not worthy of belief, "'it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.'" (*Edmondson* v. *State Bar*, *supra*, 29 Cal.3d at p. 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265.) We therefore cannot conclude on this record that clear and convincing evidence established that respondent knowingly aided Lahodny in the use of an alias before the Ventura court.

C. Evidence in Mitigation and Aggravation

The extensive mitigating evidence considered by the referee included respondent's lack of a prior record of discipline, character testimony from persons knowledgeable of the criminal conviction proceedings including a judge of the California court of appeal, a federal magistrate, numerous fellow practitioners in San Diego and prominent colleagues throughout the state, and statements by respondent as to his remorse and contrition. As noted earlier, the referee concluded that "[t]here has been an extraordinary demonstration of good character of the [r]espondent attested to by a wide range of references in the legal and general communities who are aware of a substantial extent of the [r]espondent's misconduct, all of whom strongly believe that the [r]espondent is a brilliant lawyer, whose dedication to his clients is without equal, who possesses an outstanding personality and great character without whom the profession would be at profound loss." (Amended decision p. 20.) This community esteem is a strong mitigating factor. (Cf. *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 331; *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 801.)

The referee also took into account respondent's view of his ethical obligations toward his client as a factor in mitigation and respondent's good faith in persuading Lahodny eventually to surrender. Respondent and other witnesses testified to the atmosphere of distrust and hostility between the Department of Justice and the criminal defense bar and, particularly, the U.S. Attorney's office and the defense bar in San Diego, starting in the 1970's. (See, e.g., R.T., vol. I, pp. 75-77, 80-83; exh. B-1, pp. 14, 19-22.) It was not uncommon for attorneys to be called to appear before the federal grand jury in San Diego. (*Id.* at pp. 75-76.) Respondent was subpoenaed to testify before grand juries in Los Angeles and San Diego at least four times and other subpoenas were served and later withdrawn. (*Id.* at pp. 58-60; 73-74.)[4] His law office and home were searched over three days in connection with the criminal offenses underlying this proceeding. The search was later determined to be illegal. (*Id.* at p. 79.) His office records and personal files were seized by federal agents and portions remain in federal custody to date. (*Id.* at pp. 77-79; see *ante* fn. 2.) Respondent's response at the time was vigorously to resist all government efforts to make him a willing or unwilling witness against his clients in order to protect their confidences. (*Id.* at pp. 59-60.)

[11a] On review, respondent argues that all his actions concerning Lahodny were consistent with his obligation under Business and Professions Code section 6068 (e)[5] and the American Bar Association Model Rules of Professional Conduct, rule 1.6,[6] to keep the confidences of his client inviolate, even to his own peril. The attorney-client privilege protects from disclosure information confided by the client to the attorney in the course of their relationship.

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4. In 1990, the American Bar Association's House of Delegates adopted a new paragraph in its Model Rules of Professional Conduct to forbid the subpoenaing of an attorney to present evidence concerning a past or present client except by prior judicial approval, after opportunity for an adversarial hearing, and a showing that the prosecutor reasonably believes the information is not privileged, is essential to the case and cannot be obtained by an alternative means. (ABA Model Rules Prof. Conduct, rule 3.8(f); Lawyers' Manual of Prof. Responsibility (ABA/Bur.Nat.Affairs) 6 Current Reports, No. 2 (Feb. 28, 1990), pp. 25-26.)

5. Business and Professions Code section 6068 (e) sets forth the duty of an attorney in California "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client."

6. Rule 1.6 *Confidentiality of Information* reads as follows:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

"(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: [¶] (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or [¶] (2) to establish a claim or defense on behalf of the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

[11b] The ethics opinions of the various states cited by respondent support his contention that the whereabouts of a fugitive client known to an attorney constitute privileged communications which cannot be disclosed by the attorney. Those opinions also recognize the attorney's obligation to advise the fugitive client to surrender to authorities and prohibit acts by the attorney to assist or facilitate the fugitive in avoiding capture or committing a crime.

[11c] We agree with respondent that his knowledge that Lahodny was in California and his meetings to discuss the progress of negotiations with the federal authorities on the outstanding criminal charges are client confidences which he was obligated to preserve. However, in his guilty plea, respondent affirmed that he harbored his client with the intent of preventing his client's discovery and arrest by federal authorities. (Exh. 4, pp. 3498, 3501-3502.) "A criminal conviction, including a plea of guilty, is conclusive proof that the attorney committed all the acts necessary to constitute the offense." (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110; Bus. & Prof. Code, § 6101 (a).) Under the facts established by the conviction, respondent took affirmative acts—albeit extremely limited in nature—which served to hide and shelter his client Lahodny who remained at large for an additional three days thereafter. The California Supreme Court has specifically held that an attorney's ethical duty not to disclose his client's confidences does not extend to affirmative acts which further a client's unlawful conduct. (*In re Young*, *supra*, 49 Cal.3d at p. 265.)

Young had been convicted of one count of being an accessory to a felony (Pen. Code, § 32), by assisting a client with the intent of avoiding arrest and with knowledge that the client had been charged with committing a felony.[7] Young provided financial assistance to the client who had fled to Hawaii after being charged with robbery,[8] although Young consistently counseled the client to surrender. Nevertheless, when the client was arrested after his return to California on a petty theft offense and gave a false name to authorities, Young arranged for bail under the client's assumed name. He later reserved a motel room for the client near the court for his arraignment on the theft charge, where the client was to surrender on the robbery charges as well. Young and his client were arrested when they arrived at the motel. The Supreme Court found Young's conviction constituted a crime involving moral turpitude per se, noting that in assisting the client in this manner an attorney "necessarily acts with conscious disregard of his obligation to uphold the law." (*In re Young*, *supra*, 49 Cal.3d at p. 264.) Of greatest concern to the Supreme Court was the fraud on the court perpetrated by Young in arranging bail for his client under a false name. (*Id.* at p. 265.)

No dishonesty toward the court was established here or any other factor in aggravation of the essential facts established by the conviction, but compelling mitigating evidence was properly found by the referee.

[12] Before us, the parties also stipulated to the admission of numerous additional declarations, including several from clients in various civil matters presenting impressive testimonials regarding respondent's service on their behalf.[9] In a number of instances, respondent represented these clients on a

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7. Respondent argues that the *Young* case is distinguishable from this matter because, as noted in a footnote in the case, Young did not represent the fugitive client on the underlying criminal charge of robbery. (*In re Young*, *supra*, 49 Cal.3d at p. 261, fn. 3.) However, respondent likewise did not represent Lahodny once he surrendered. As here, it is evident that there was an attorney-client relationship established between Young and the fugitive client (see *Beery* v. *State Bar* (1987) 43 Cal.3d 802, 811-812), and Young invoked the duties and protections that flowed therefrom, including the duty to protect client confidences. (*In re Young*, *supra*, 49 Cal.3d at p. 265.)

8. The robbery charge later led to a felony-murder charge when the victim died, although there was no evidence Young knew of the victim's death at the time of his actions. (*In re Young*, *supra*, 49 Cal.3d at p. 266.)

9. One case resulted in a published opinion interpreting rule 985(i) of the California Rules of Court to allow waiver of transcript costs for an indigent quadriplegic client seeking to proceed in forma pauperis. (*Mehdi* v. *Superior Court* (1989) 213 Cal.App.3d 1198.) In another case respondent successfully challenged the arrest of his client on seven-year-old murder charges in a writ proceeding before the court of appeal resulting in remand of the case and its subsequent dismissal by the trial court for prejudicial delay.

pro bono basis. In addition, although not accepted by the referee as mitigating evidence, the examiner acknowledged respondent's candor and cooperation at the hearings below. (R.T., vol. 7, pp. 142, 144.) It is manifest from our review of the record that respondent fully cooperated with the State Bar in this proceeding and that should be recognized as a mitigating circumstance as well. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131.)

[13] Respondent's lack of a prior discipline record is not a significant factor in and of itself given that he had been in practice only eight years at the time of his misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 196; *In re Demergian* (1989) 48 Cal.3d 284, 294.) Nevertheless, respondent is entitled to have taken into account his subsequent practice without incident for more than 12 years since his criminal conduct. (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 256.) His long otherwise unblemished career also allows us to make the finding his conduct was aberrational and unlikely to recur. (Cf. *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

The examiner concedes that respondent never harmed his client because his crime resulted from excessive zeal in acting on his client's behalf, not from acts in derogation of his client's interests. (R.T., vol. 7, pp. 141-142.) Rather, respondent's crime, like Young's, was in derogation of his duties as a citizen and an attorney not to violate the law while seeking to act on behalf of his client.

D. Recommended Discipline

[14] Under the Standards for Attorney Sanctions for Professional Misconduct, the presumptively appropriate discipline for a conviction of an attorney of a crime which involves moral turpitude is disbarment. (Std. 3.2; *In re Crooks* (1990) 51 Cal.3d 1090, 1101; see also *In re Berman* (1989) 48 Cal.3d 517, 523.) Nonetheless, as the referee below found, standard 3.2 provides that a lesser sanction may be imposed where, as here, compelling mitigating circumstances predominate. (See also *In re Leardo* (1991) 53 Cal.3d 1, 10.) The referee failed to note, however, that where compelling mitigation exists, the Supreme Court has rejected application of the two-year minimum actual suspension suggested by standard 3.2. (*In re Young*, *supra*, 49 Cal.3d at pp. 268-270.) Our duty remains to determine the appropriate sanction in light of the purposes of attorney discipline: protection of the public, preservation of public confidence in the legal profession and maintenance of high professional standards. (*Harford* v. *State Bar* (1990) 52 Cal.3d 93, 100.)

We turn first to *In re Young*, *supra*, 49 Cal.3d 257, for guidance on analyzing the issue of the appropriate level of discipline. The approach of the Court in *In re Young* suggests that the circumstances here warrant significantly less discipline. Both attorneys were convicted of harboring fugitives—felonies inherently involving moral turpitude—and thus were presumed to be unsuitable legal practitioners. (*In re Higbie* (1972) 6 Cal.3d 562, 573.) As a result, both were ordered on interim suspension. Both petitioned the Supreme Court to set aside the suspension order to permit continuation of their legal practice during the pendency of the disciplinary proceedings. Young's petition was denied. Respondent's petition was granted. **[15]** While we cannot speculate as to which, among the myriad facts presented by respondent, proved ultimately persuasive to the Supreme Court on the petition to set aside respondent's interim suspension, such action is relatively uncommon and occurs only "when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of and confidence in the profession." (Bus. & Prof. Code, § 6102 (a).) Thus, unlike Young, at the outset, respondent made a sufficient showing to the Court that he did not pose a threat to the public, profession and the courts by his continued practice during the pendency of these proceedings, rebutting his presumptive disqualification stemming from his conviction of a crime inherently involving moral turpitude.

[1b] The full record developed at the hearing and by stipulated additional evidence on review similarly discloses no current risk to the public. However, we must consider the integrity of the State Bar and the public's confidence in the legal profession. Conviction of a felony is a serious matter. As indicated above, the Court found in *In re Young* that even when a well-motivated attorney harbors a fugitive while seeking to talk him into surrendering, he or she "necessarily acts with conscious disregard of his

obligation to uphold the law." (*In re Young*, *supra*, 49 Cal.3d at p. 264.) We must conclude that the same applies to the federal conviction in this case.

After finding aggravating factors of fraud on the bail bondsman surrounding the conviction for harboring or aiding a principal in a felony (Pen. Code, § 32), the Court in *In re Young*, *supra*, 49 Cal.3d 257 imposed a five-year suspension, stayed, and a four-year actual suspension, with credit for the three years Young had spent on interim suspension. Based on the Court's comment as to the arbitrariness of the length of Young's interim suspension, it is unlikely that *In re Young* would have resulted in a total period of disciplinary suspension of four years, absent the lengthy interim suspension. (*In re Young*, *supra*, 49 Cal.3d 257, 267, fn. 11.) Indeed, the Court pointed out that only one year of the ordered suspension was prospective. (*Id.* at p. 270, fn. 14.) If Young's misconduct were limited to the attempt to put his client up overnight at a motel prior to surrendering and not aggravated by the fraud in securing his client's bail, the Supreme Court would presumably have not felt it necessary to order one year of prospective suspension. This is because the Supreme Court, in modifying the degree of discipline in *In re Young*, cited as illustrative cases where the attorneys committed acts constituting crimes involving moral turpitude in which the actual suspension ordered ranged from no actual suspension to one year of suspension depending on the balance of mitigating and aggravating factors. (*Id.* at p. 270; see, e.g., *Chadwick* v. *State Bar*, *supra*, 49 Cal.3d at p. 112 [attorney convicted of insider trading and counseling another to lie to Securities and Exchange Commission; five years probation and one year actual suspension]; *Bach* v. *State Bar* (1987) 43 Cal.3d 848, 856 [attorney deliberately sought to mislead judge; three years probation and sixty days actual suspension]; *In re Chira* (1986) 42 Cal.3d 904, 909 [attorney convicted of conspiring to impede the IRS by backdating lease of personal vehicle as part of tax shelter; one year stayed suspension and three years probation, no actual or interim suspension]; *Montag* v. *State Bar* (1982) 32 Cal.3d 721 [false testimony before the grand jury and other misconduct resulting in six months actual suspension].)

In several cases where original proceedings were brought resulting in a finding of a single instance of giving knowingly false testimony or making a knowingly false statement, the Court, upon consideration of substantial mitigating evidence, limited discipline to a reproval. (*Mushrush* v. *State Bar* (1976) 17 Cal.3d 487 [rejecting a one-year recommended period of actual suspension and ordering public reproval for one instance of false statements in obtaining a court order confirming a bankruptcy sale]; *Di Sabatino* v. *State Bar* (1980) 27 Cal.3d 159 [three justices dissenting in favor of no discipline]; *Sullins* v. *State Bar* (1975) 15 Cal.3d 609 [attorney publicly reproved for nondisclosure of material information, no prior record of discipline in his 45 years as an attorney]; *Mosesian* v. *State Bar* (1972) 8 Cal.3d 60 [local committee's recommendation of three months suspension reduced to reprimand].)

The mitigating circumstances most comparable to the instant case were those found in *In re Chira*, *supra*, 42 Cal.3d 904. The United States District Court sentenced Chira to one year of probation. Chira's acts were in connection with his personal affairs and had a devastating effect on his personal and professional life. The Supreme Court noted that Chira had otherwise spent a total of 24 years in law practice without incident and rejected any actual suspension as overly punitive. (*Id.* at p. 909.) Thereafter, in *Schneider* v. *State Bar*, *supra*, 43 Cal.3d 784 the Supreme Court cited *In re Chira* in rejecting the volunteer review department's recommendation of two years actual suspension for two instances of misconduct in favor of three years stayed suspension, three years probation and thirty days actual suspension. It found the review department recommendation grossly excessive in light of extensive mitigating evidence similar to that offered here. The Court noted that "the record shows that petitioner's transgressions were confined to a relatively short period. His conduct before and since has been beyond reproach . . . . Petitioner has been candid, cooperative and contrite." (*Id.* at pp. 800-801.)

In re Kristovich, *supra*, 18 Cal.3d 468, is also instructive because it involved a criminal conviction constituting moral turpitude per se. There, an attorney acting as a public administrator of estates probated in Los Angeles County, provided false names in three sales from estates administered by his agency in order to avoid a prohibition against purchases from estates by employees or agents of the agency. None of the sales was actually prohibited by law and

all were made for market value. Kristovich was convicted of perjury for submitting the false names to the probate court for approval of the sales, sentenced to five years probation (later reduced to two years) and ordered to pay a $2,000 fine. Upon his conviction, he was placed on interim suspension, which was vacated a month later upon good cause shown. His mitigating evidence at his disciplinary hearing included a long unblemished record, the lack of any personal gain from his misconduct, and many character witnesses to his distinguished career before and since the misconduct. The Supreme Court imposed three years stayed suspension, three years probation, and three months actual suspension. Like Chira, Kristovich obtained no personal gain and did not harm clients or other individuals. **[1c]** In this case, while the misconduct was related to respondent's law practice, likewise we find no personal gain to respondent from his misconduct or harm to his client. Moreover, unlike Kristovich or Chira, respondent committed no affirmative perjurious act in committing his crime. Indeed, he was affirmatively obligated by his duty to his client to conceal knowledge of Lahodny's whereabouts so long as he did not actively engage in harboring Lahodny. His problem was in crossing the line from zealous protector of client confidences to providing Lahodny with lodging while a fugitive.

We also note the devastating impact that respondent's criminal conviction and the surrounding publicity had on him and his family, the nature of his law practice and ability to earn income therefrom. (Cf. *In re Chira*, *supra*, 42 Cal.3d at p. 907; *Schneider* v. *State Bar*, *supra*, 43 Cal.3d at p. 799.)

[1d] Respondent's lengthy period of exemplary behavior since his conviction indicates that the recommended three-year actual suspension is clearly unnecessary in this case. While respondent transgressed his ethical duties, he did so, like Schneider, Chira, Mushrush and Kristovich, for a very short period. **[16]** Unlike the lawyers in the cited cases, it is evident respondent believed he was at all times doing his best to serve the ultimate interests of both his client and the criminal justice system. (*Ames* v. *State Bar* (1973) 8 Cal.3d 910, 921.) While good motives are not a defense to his breach of duty, they constitute a strong mitigating factor. (*In re Young*, *supra*, 49 Cal.3d at pp. 268-269.) **[1e]** Moreover, given the opportunity to practice law during the pendency of these proceedings, respondent has demonstrated that he can and will in all likelihood continue to adhere consistently to the high standards of the legal profession. Respondent's criminal conduct can now be viewed as aberrational. We conclude on the facts in this case that, upon due consideration of the nature of the crime, the circumstances of its commission and the compelling mitigation, one year of stayed suspension conditioned on one year of probation and sixty days of actual suspension, coupled with a requirement to take a Professional Responsibility Examination is appropriate to accomplish the goals of attorney discipline.

FORMAL RECOMMENDATION

For the reasons stated above, we recommend that respondent be suspended from the practice of law for one year, that execution of such order be stayed, and that respondent be placed on probation for one year on the following conditions:

1. That he shall be actually suspended for the first sixty days of the period of his probation;

2. That during the period of probation, he 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, he shall report not later than January 10, April 10, July 10, and October 10 of each calendar year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, 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, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he 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 he has complied with all provisions 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) hereof;

4. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professional Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

5. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court or her designee at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge or designee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge or designee relating to whether respondent is complying or has complied with these terms of probation;

6. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of one year shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination given by the State Bar within one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.