STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT F

A Member of the State Bar

No. 87-O-15284

Filed February 4, 1992

SUMMARY

Respondent's former clients claimed that respondent had intentionally misappropriated substantial sums from a personal injury settlement and had unilaterally withheld these sums without authorization. These claims were false, but due to the mishandling of two checks by respondent's office, respondent's trust account had contained slightly less than it should have for about six weeks. The hearing judge concluded that respondent had committed a "technical misappropriation" and had not promptly refunded the unearned part of an advance fee upon termination of employment by the former clients. Finding no aggravating circumstances and favorable character testimony as a significant mitigating circumstance, the hearing judge recommended six months stayed suspension, one year probation, and 30 days actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

Respondent sought review. The review department held that she had committed a minor trust account violation, but not misappropriation, and that she had acted properly by retaining certain funds in a trust account when she faced competing demands from her clients and from a third party to whom she owed a fiduciary obligation. In addition to favorable character testimony, the review department found two other mitigating circumstances: (1) severe emotional difficulties and time constraints which had contributed to respondent's mishandling of trust funds and (2) the extraordinarily harsh effects of the disciplinary proceeding on respondent and her ability to earn a living. The review department reduced the sanction to a private reproval.

COUNSEL FOR PARTIES

For Office of Trials: Jill Sperber

For Respondent: Frank M. Pitre, Tom Low

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] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
1099 Substantive Issues re Discipline—Miscellaneous
The respondent's name does not appear in an opinion imposing a private reproval, although the proceeding remains public. (Trans. Rules Proc. of State Bar, rule 615.)

[2] **280.00 Rule 4-100(A) [former 8-101(A)]**
Where a client authorized respondent to deduct attorney fees for one matter from settlement proceeds in another matter, respondent had no reason to keep the fees which were due to her in a trust account, and did not violate the trust account rules by failing to do so.

[3] **280.00 Rule 4-100(A) [former 8-101(A)]**
Absent guidelines from the State Bar, it was reasonable for respondent to keep $121.83 of personal funds in her trust account to pay for bank charges, as permitted by the trust account rules. This sum did not threaten the integrity of the clients' funds.

[4] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a client was not yet entitled to receive settlement proceeds because the client had not signed the necessary release, respondent's eight-month delay in sending a portion of the settlement funds to the client did not violate the obligation to pay client funds promptly upon demand.

[5 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
Where respondent inadequately supervised her trust accounts over a period of several months and carelessly wrote a check which reduced the balance in a trust account slightly below the necessary amount, respondent's conduct did not amount to gross negligence, and thus did not constitute moral turpitude, but respondent did violate the rule requiring client funds to be held in trust.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
An allegation of an act of moral turpitude or dishonesty encompasses the lesser allegation of a violation of the trust account rules, where the pleading clearly raises the issue of the misuse of trust funds.

[7] **162.20 Proof—Respondent's Burden**
163 Proof of Wilfulness
204.10 Culpability—Wilfulness Requirement
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Although an attorney cannot be held responsible for every detail of office operations, the attorney violates the trust account rules if the attorney does not manage funds as required by the rules, regardless of the attorney's intent or the absence of injury to anyone. Violations resulting from serious and inexcusable lapses in office procedure may be deemed wilful despite the absence of deliberate wrongdoing. If an attorney's trust account balance drops below the necessary amount, an inference of misappropriation may be drawn. The burden then shifts to the attorney to show that office procedures were adequate.

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

Not every trust account violation rises to the level of misappropriation. Because of the serious opprobrium attaching to the term "misappropriation," the term is appropriate only when the level of misconduct rises at least to gross negligence.

[9 a-e] **141 Evidence—Relevance**
162.19 Proof—State Bar's Burden—Other/General
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
430.00 Breach of Fiduciary Duty

When an attorney withdraws from employment or the client terminates the attorney's employment, the attorney must promptly refund any unearned part of an advance fee. However, where respondent faced competing demands regarding the funds used to pay an advance fee, from a client and from a third party to whom respondent owed a fiduciary duty, respondent had a duty to retain the funds in trust until the client's entitlement to the funds was established, and therefore did not commit misconduct by declining to refund the advance fee. Respondent's motives for retaining the funds in trust were irrelevant because the issue turned on a question of law, not motivation. The State Bar had the burden of proving that the client was entitled to receive the funds.

[10] **135 Procedure—Rules of Procedure**
166 Independent Review of Record

Factual findings made by a hearing judge and resolving issues concerning testimony deserve great weight, but may be supplemented by the review department's own findings interpreting documentary evidence. (Trans. Rules Proc. of State Bar, rule 453(a).)

[11] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty

An attorney who receives money on behalf of a party who is not the attorney's client becomes a fiduciary to the party. Where an attorney assumes the responsibility to disburse funds as agreed by the parties in an action, the attorney owes an obligation to the party who is not the attorney's client to ensure compliance with the terms of the agreement. If there is a dispute between the client and the third party, the attorney must retain the funds in trust until the resolution of the dispute.

[12] **725.11 Mitigation—Disability/Illness—Found**

Extreme emotional and physical difficulties suffered by an attorney at the time of professional misconduct constitute a mitigating circumstance when expert testimony establishes that such difficulties were directly responsible for the misconduct.

[13] **791 Mitigation—Other—Found**

The extraordinarily harsh effect of a disciplinary proceeding on the respondent and the respondent's ability to earn a living may be taken into account in assessing the appropriate discipline. Respondent's resignation from a law firm because of concern about the effect on the firm of charges of moral turpitude (later disproved) demonstrated extreme conscientiousness.

[14 a-e] 801.30 Standards—Effect as Guidelines
801.41 Standards—Deviation From—Justified
824.53 Standards—Commingling/Trust Account—Declined to Apply
824.54 Standards—Commingling/Trust Account—Declined to Apply
1092 Substantive Issues re Discipline—Excessiveness

Where respondent inadvertently mishandled a small sum of trust funds and was unlikely to repeat her misconduct, no suspension was necessary. Although standard 2.2(b) requires at least three months actual suspension for a trust account violation, the standards are guidelines to be construed in light of decisional law. A private reproval was appropriate in light of the nature of the misconduct and the mitigating circumstances, including respondent's severe emotional difficulties, her having taken the disciplinary proceeding very seriously, and her having suffered great hardship as a consequence.

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
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.05 Rule 4-100(A) [former 8-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.52 Misappropriation—Excusable Negligence
430.05 Breach of Fiduciary Duty

Aggravation

Declined to Find

555 Overreaching
695 Other

Mitigation

Found

740.10 Good Character

Found but Discounted

710.34 No Prior Record
725.32 Disability/Illness

Discipline

1055 Private Reproval—Without Conditions

OPINION

PEARLMAN, P.J.:

This proceeding illustrates why lawyers should have complete written fee agreements with their clients and why recordkeeping standards are necessary to provide practitioners with guidance on minimum requirements for handling trust accounts.[1] It also illustrates why it is unwise for a lawyer to avoid talking to an unhappy client, even if the lawyer thinks the client is being entirely unreasonable.

This unfortunately lengthy proceeding deals with original charges arising out of claims made against respondent[2] **[1 - see fn. 2]** by a married couple whom respondent represented and additional charges that arose out of discovery by the State Bar. The complaining witnesses asserted that respondent had intentionally misappropriated and unilaterally withheld without authorization substantial sums from a personal injury settlement. The claims were untrue and could easily been refuted short of a hearing if the complete agreement had been put in writing and signed by the clients.[3] During discovery, however, there came to light a minor problem resulting from the negligent handling of two checks by respondent's office. As a consequence, the balance in respondent's trust account fell $10.77 below the amount it should minimally have contained for a period of less than six weeks.

Upon our independent review of the record, we adopt virtually all of the hearing judge's extensive findings of fact. We also adopt most of the hearing judge's conclusions of law, including the conclusion that respondent failed to maintain all client funds in a trust account; but we reject the conclusion that respondent improperly failed to refund an advance fee. Further, we modify the conclusions with respect to mitigation and determine that respondent's sanction should be reduced to a private reproval.

FACTS

Respondent has been an active member of the State Bar of California since May 1981. (Amended decision ["decision"], p. 3.) In October 1985, Mrs. H, a legal secretary, employed respondent to represent her on a contingency basis in a personal injury matter. (*Id.* at pp. 3-4.) Although Mrs. H did not execute the written agreement prepared by respondent for such representation, she did not dispute its terms. (*Id.* at p. 4.)

At about the same time, Mrs. H asked respondent to handle a separate child custody matter involving her husband's daughter from a prior marriage. Respondent and Mrs. H discussed the fees for the handling of the child custody matter, including respondent's usual requirement of a retainer plus monthly payments. Because Mrs. H told respondent that she and her husband could not provide a retainer or make regular monthly payments, respondent offered to handle the child custody matter if Mr. and Mrs. H would make their best efforts to pay the monthly bills and if respondent could use the anticipated recovery from Mrs. H's personal injury matter to pay off any unpaid balance in the child custody matter. Mrs. H agreed and Mr. and Mrs. H employed respondent in the child custody matter. (*Id.* at pp. 4-5.)

In November 1985, respondent sent Mr. and Mrs. H a written agreement which listed only Mr. H as the client[4] and which set respondent's fee at an hourly rate, but did not mention the use of the

---

1. We note that rule 4-100(C) of the new Rules of Professional Conduct adopted effective May 27, 1989, authorizes the Board of Governors to adopt such standards and that the board is currently considering a proposal for trust account recordkeeping standards to educate lawyers about their trust account recordkeeping obligations and to assist them in the operation of trust accounts.

2. [1] Because we impose a private reproval, respondent's name does not appear in this opinion. (Trans. Rules Proc. of State Bar, rule 615.) The proceeding, however, remains public.

3. This agreement preceded the effective date of Business and Professions Code section 6148 requiring written fee agreements.

4. Respondent testified that Mr. H was the only named party in the custody suit, but established that both husband and wife were in fact her clients; that the bills were addressed to, and paid by, both; and that her principal contact throughout the representation was the wife. Indeed, although both were listed as complaining witnesses in this proceeding, only the wife testified at the hearing below.

proceeds from the recovery in Mrs. H's personal injury matter to satisfy any unpaid fees in the child custody matter. Mr. and Mrs. H did not execute the agreement for the child custody matter, nor did they make regular payments for respondent's work which she billed them for monthly. They did, however, express satisfaction with her efforts on their behalf and sent payments to respondent in December 1985 and in January, May, August, and October 1986. (*Ibid.*) In April 1986, respondent met with Mr. and Mrs. H and obtained their oral agreement that respondent could take a retainer[5] for the child custody matter out of the anticipated recovery in Mrs. H's personal injury matter. (*Id.* at pp. 5-6.) In July 1986, respondent told Ms. F, her secretary and office manager, not to attempt to collect the large outstanding bill in Mr. and Mrs. H's child custody matter because of the agreement to pay the balance owed out of anticipated recovery in the personal injury matter. (*Id.* at p. 6.)

On October 29, 1986, respondent settled Mrs. H's personal injury matter for $17,500, which was $5,000 more than the anticipated settlement amount earlier approved by Mrs. H. (Exh. 12; IV Reporter's Transcript ["R.T."] pp. 42-43; decision p. 6.) The settlement agreement required that Mrs. H execute a general release. (Exh. 12.) Respondent's office sent the $17,500 settlement check to Mrs. H for endorsement on November 17, 1986. (Decision p. 6.)

Ms. F and Mrs. H had two telephone conversations between October 30 and November 28, 1986, about the distribution of the settlement from the personal injury matter. In the first conversation, Mrs. H challenged the intended deduction of overdue fees in the child custody matter, asserting that she considered Mr. H to be solely responsible for such fees. (*Id.* at pp. 6-7.) When Ms. F informed respondent about the first telephone conversation, respondent became upset. Respondent asked Ms. F to remind Mrs. H of their agreement permitting respondent to deduct the fees and to tell Mrs. H that respondent did not want to talk with Mrs. H. (*Id.* at p. 7.)

In the second telephone conversation, Ms. F told Mrs. H what respondent had asked. Ms. F stated that no prior attempt had been made to collect the fees owed in the child custody matter because of the agreement. When Mrs. H asked to speak with respondent, Ms. F said that respondent did not want to talk with her. Ms. F explained that if Mrs. H disagreed about the deduction of the fees in the child custody matter from the recovery in the personal injury matter, she could refuse to sign the check and could come to the office to talk directly with respondent. At the end of the conversation, Mrs. H said, "Okay, go ahead and distribute it." Mrs. H added that she would endorse the settlement check and would like respondent to distribute the funds as quickly as possible. (*Id.* at pp. 7-8.)

On November 28, 1986, respondent deposited Mrs. H's endorsed settlement check for $17,500 into a new client trust account which respondent opened with Bank X. (*Id.* at p. 8.) On December 9, 1986, respondent distributed Mrs. H's personal injury settlement. Respondent sent Mrs. H a letter carefully explaining the distribution, enclosing two checks. One check covered costs paid directly by Mrs. H in the personal injury matter. The other check covered the balance remaining after the deduction of all costs in the personal injury matter, respondent's one-third contingency fee in the personal injury matter, the unpaid amount owed by Mr. and Mrs. H in the child custody matter, and a retainer ($500.00) for future work on the child custody matter as agreed by Mr. and Mrs. H and respondent in April 1986. Respondent's letter enclosed a release of the insurance company and stated that Mrs. H had to execute the release before negotiating the two checks. The letter also stated that respondent would refund the $500 retainer if Mrs. H sent a signed form for substitution of attorneys. (Exhs. 14, BB; decision pp. 8-10.) The hearing judge found that Mrs. H never objected in writing to the distribution of the personal injury settlement. (Decision p. 10.) In fact, she never communicated any retraction, oral or written, of the authorization she gave by telephone to distribute the

5. Although the record consistently refers to the agreement between respondent and Mr. and Mrs. H for a retainer, it is clear that they intended the term "retainer" to denote an advance on fees rather than a true retainer paid solely for the purpose of ensuring the attorney's availability for the child custody matter. Like the hearing judge and the parties, we will use the term "retainer" to denote the $500 advance on fees authorized by Mr. and Mrs. H.

funds. Instead, Mrs. H negotiated the checks; however, she did not execute the release. (Exhs. 18, RR; decision p. 12.) Respondent dismissed the lawsuit.

On January 30, 1987, the insurance company involved in Mrs. H's personal injury matter wrote to respondent to request the executed release and a copy of the dismissal. (Exh. EE.) On February 9, 1987, respondent wrote to Mrs. H and reminded her that she should have executed the release prior to negotiating the checks sent in the letter of December 9, 1986. Respondent enclosed a new release in the letter of February 9, 1987, and asked Mrs. H to execute the release and to return it in the envelope provided. In addition, respondent stated that she took the fact that Mr. and Mrs. H had not sent a substitution of attorneys in the child custody matter to mean that they wanted her to continue to represent them. (Exh. FF.)

On February 26, 1987, Mr. H wrote to respondent enclosing a substitution of attorney and asked respondent to sign and return it as soon as possible. Also, he requested a refund of the $500 retainer for the child custody matter to his wife. (Exh. 5.) The very next day Mr. and Mrs. H filed a complaint against respondent with the State Bar falsely claiming that respondent had acted without authorization in deducting the fees in the child custody matter from the recovery in the personal injury matter and that respondent had failed to return the $500 retainer despite repeated requests. (Decision p. 11.)

On March 9, 1987, the insurance company again wrote to respondent to request Mrs. H's executed release. (Exh. GG.) On March 10, 1987, respondent signed the substitution of attorney which Mr. H had sent on February 27. (Decision p. 12.) She did not, however, immediately return it to Mr. H.[6] On March 23, 1987, Mr. H again wrote to respondent. Among other things, he asked her to respond to his earlier letter and promptly to sign and return the substitution of attorney. (Exh. 6.)

On April 14, 1987, respondent replied to Mr. H's letter. She forwarded the signed substitution of attorney, acknowledged that Mr. H had requested the refund of the $500 retainer, but noted that he had not mentioned respondent's request for the executed release from Mrs. H in the personal injury matter. Respondent requested that the signed release be forwarded to her at Mr. and Mrs. H's earliest convenience to avoid problems regarding the personal injury settlement. Respondent asked Mr. H to call her office if some problem prevented the furnishing of the signed release. (Exh. H; IV R.T. pp. 93-94.)

Respondent closed her law office at the end of May 1987 and on June 1, 1987, began working for a law firm. On June 25, 1987, Mr. H again wrote to respondent. Among other things, he once more requested the return of the $500 retainer. (Exh. 7.) On August 4, 1987, after being contacted by a State Bar investigator, respondent refunded the $500 to Mr. H. (Exh. II.)

THE PROCEEDINGS BELOW

A notice to show cause was filed on September 12, 1989. Through discovery, the State Bar obtained respondent's trust account records. It then observed a $10.77 shortfall in her trust account for several weeks in 1987 and amended the notice to show cause on January 30, 1990. The amended notice alleged that respondent had wilfully violated sections 6068 (a), 6103, and 6106 of the Business and Professions Code and former rules 2-111(A)(3), 8-101(A)(2), and 8-101(B)(4) of the Rules of Professional Conduct.[7]

A six-day trial occurred in April and May 1990. A decision was filed on December 19, 1990, and an amended decision on February 12, 1991. In the amended decision, the hearing judge rejected all but two of the allegations against respondent. Concluding that respondent had violated former rules 8-101(A) and 2-111(A)(3), the judge recommended a sanction

6. As discussed in mitigation, *post*, respondent was preoccupied with her father's terminal illness at this time. Her father was in and out of the hospital during this period until his death in early April 1987 and respondent ran her father's business in addition to her own practice through May 1987.

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

of six months suspension, stayed, and one year's probation, subject to various conditions. The probation conditions included actual suspension for 30 days and until respondent pays interest at the legal rate on the $500 retainer from February 26 to August 4, 1987 (i.e., from the date when Mr. and Mrs. H terminated respondent's services to the date when respondent refunded the $500 retainer).

On January 14, 1991, the current examiner was substituted for the original examiner. On March 4, 1991, respondent requested review on the grounds that the record did not support the judge's findings of fact and that the recommended discipline was excessive.

DISCUSSION

We must independently review the record and may adopt findings, conclusions, and a recommendation at variance with the hearing department. (Trans. Rules Proc. of State Bar, rule 453(a).) We agree with the hearing judge's conclusions that respondent did not violate sections 6068 (a) and 6103. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815). We also agree that there was no violation of section 6106. (See, e.g., *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317.) Nor, as discussed below, was there proof of violation of former rules 8-101(A)(2) and 8-101(B)(4).

No Violation of Former Rule 8-101(A)(2)

[2] The amended notice to show cause alleged that respondent violated former rule 8-101(A)(2) because she did not retain in her trust account the fees which were due to her for her work on the child custody matter. The hearing judge concluded that Mrs. H authorized respondent to deduct fees from the personal injury settlement and thus respondent had no reason to keep the fees in the trust account. (Decision p. 30.)

[3] The amended notice also alleged that respondent violated former rule 8-101(A)(2) because she kept $121.83 of her personal funds in her trust account from December 1986 through April 1987. Respondent testified that she kept the funds in her trust account to pay for bank charges, particularly because she was planning to order new checks which came in a leather binder and cost $50 to $60. (*Id.* at p. 31.) As the hearing judge observed, former rule 8-101(A) (now rule 4-100(A)(1)) permitted an attorney to keep in a client trust account reasonably sufficient funds to cover bank charges. The hearing judge concluded that the $121.83 was not unreasonable, absent guidelines from the State Bar, and did not threaten the integrity of the clients' funds. (Decision pp. 31-32, citing *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916-917.) We agree.

No Violation of Former Rule 8-101(B)(4)

The amended notice to show cause also alleged that respondent violated former rule 8-101(B)(4) because she did not promptly return the $500 advance fee for further work on the child custody matter. The hearing judge concluded that former rule 8-101(B)(4) does not apply to an advanced fee, and that respondent had been properly charged for the unreturned advanced fee under former rule 2-111(A)(3).

[4] We agree that there was no rule 8-101(B)(4) violation here, but for a different reason. Rule 8-101(B)(4) requires prompt payment of funds the client is entitled to receive. The settlement funds received by respondent were all subject to rule 8-101(B)(4) and respondent was therefore properly charged with a violation of that rule as well as rule 2-111(A)(3). Respondent sent the client certain funds in December of 1986 and distributed the rest according to her transmittal letter, pointing out to the client that the client's entitlement to all such funds was predicated on her signing of the release. Since the client never signed the release, the December 1986 distribution was premature. Indeed, the client was still not entitled under the settlement agreement to receive the remaining $500 in August of 1987 although as time wore on, there might have been a basis for concluding that the opposing party waived the requirement of a release in addition to the dismissal of the lawsuit.

Violation of Former Rule 8-101(A)

[5a] We also adopt the hearing judge's conclusion that respondent did violate former rule 8-101(A). **[6]** Although the amended notice to show cause did not allege that respondent violated former rule 8-101(A), it charged respondent with failing to maintain

the balance held on behalf of Mr. and Mrs. H in respondent's trust account and alleged a violation of section 6106. (Amended notice to show cause, p. 3.) An allegation of a section 6106 violation encompasses the lesser allegation of a former rule 8-101(A) violation where, as here, the pleading clearly raises the issue of misuse of trust funds. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 321.)

In this regard, the evidence showed that on September 30, 1986, respondent's secretary mistakenly deposited a $500 check for a case unrelated to Mr. and Mrs. H's matters into respondent's operating account at Bank X. The check was written by client S on behalf of client R and should have been deposited into respondent's then existing trust account rather than into respondent's operating account. (Decision p. 12; II R.T. pp. 183-185, 188-196; exhs. AB, YY.) Ms. F was responsible for making deposits into the operating account and respondent did not inspect the checks which went into the operating account. (II R.T. pp. 185-185, 192.) At the disciplinary proceeding, respondent could not recall specifically which bank she was using for her trust account in September 1986. (III R.T. p. 43.) This misdeposit was the first of a series of events which eventually caused the balance in respondent's new trust account at Bank X to fall below the necessary amount. (Decision p. 23.)

Respondent's then husband (a lawyer with bookkeeping experience) normally reconciled respondent's trust account bank statements with respondent's trust account check register on a monthly basis from November 1985 to June 1987. (*Id.* at p. 13.) Yet neither he nor anyone else reconciled the client account records against the trust account transactions. Thus, the $500 misdeposit on September 30, 1986, remained undetected. (*Id.* at p. 27.) At the disciplinary proceeding, respondent testified that she annually reconciled her bank records with all her client bills. Under detailed questioning, however, respondent admitted that she performed no such reconciliation at the end of 1986. Thus, she did not detect the $500 misdeposit on September 30, 1986. (*Id.* at p. 28.)

As indicated above, respondent opened her new trust account with the settlement check from Mrs. H's personal injury suit. As of December 31, 1986, the total balance in respondent's new trust account at Bank X was $624.35. This balance represented the $500 retainer for future work on the child custody case plus cost reimbursement which she kept to cover bank charges ($121.83) and interest on the account ($2.52). The balance remained $624.35 through April 30, 1987. (Exh. 18; summary of pretrial conference ["summary"], stipulations 24 and 25, p. 3; decision p. 10.) On May 18, 1987, respondent deposited $250 from client R into this trust account. This was the second deposit into the new account at Bank X. (Exh. 18; summary, stipulation 26, p. 3.) On May 19, 1987, respondent wrote a check drawn on that account to client S for $385.12. Although respondent did not realize it at the time, this check reduced the balance in the trust account to $489.23 when it cleared on May 27, 1987. (Exh. 18; summary, stipulations 27 and 28, p. 3.)

The hearing judge found that when respondent wrote the $385.12 check to client S on May 19, 1987, it was obvious from the face of the check register that the new trust account did not contain any deposit on behalf of client S. Further, the hearing judge concluded that it should have been patently obvious that the balance would dip below the $500 which respondent had received as a retainer from Mr. and Mrs. H. (Decision pp. 28-29; exh. RR p. 3.)

From May 27, 1987, to July 3, 1987, the balance in respondent's trust account remained $489.23, slightly less than the $500 which respondent should have kept in it until Mrs. H signed the release. On July 3, 1987, a $4,807.45 deposit from another matter raised the balance in the account to $5,296.68. (Exh. 18.) None of the $500 which Ms. F had misdeposited into respondent's operating account was ever transferred to the new client trust account. (Exhs. 18, RR.) Respondent never determined on her own that a trust account problem had ever occurred. She realized this for the first time when reviewing the trust account records in connection with her deposition in this case.

The hearing judge concluded that, although respondent acted in good faith, respondent committed a technical misappropriation in violation of former rule 8-101(A) because she negligently failed to keep

in her trust account the entire $500 held for Mr. and Mrs. H. (Decision p. 30; see also *id.* at pp. 27-29.)

Respondent asserts that the hearing judge ignored "a critical distinction" between a situation in which the attorney "does the act" resulting in misuse of trust funds and a situation in which such misuse results "from the actions of a member of the attorney's support staff." Respondent acknowledges that the former situation requires no showing of wrongful intent, bad faith, or damage for the imposition of discipline. Relying on *Palomo* v. *State Bar* (1984) 36 Cal.3d 785 and *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, respondent argues that culpability must rest on a finding of gross negligence in supervising support staff. Further, respondent contends that the misdeposit of the $500 check in September of 1986 and the subsequent events resulting in a trust account balance of $489.23 from late May to early July 1987 did not amount to such gross negligence.

[7] "Attorneys cannot be held responsible for every detail of office operations." (*Palomo* v. *State Bar*, *supra*, 36 Cal.3d at p. 795, citing *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at p. 857.) Nevertheless, an attorney violates former rule 8-101 if the attorney fails to manage funds as required by the rule, regardless of the attorney's intent or the absence of injury to anyone. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976; *Alberton* v. *State Bar* (1984) 37 Cal.3d 1, 13, cert. den. (1985) 470 U.S. 1007; *Doyle* v. *State Bar* (1982) 32 Cal.3d 12.) If "serious and inexcusable lapses in office procedure" result in fiduciary violations, such violations "may be deemed 'wilful' for disciplinary purposes" in the absence of deliberate wrongdoing. (*Palomo* v. *State Bar*, *supra*, 36 Cal.3d at p. 795; see also *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37.) Once the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn. (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474.) The burden then shifts to the respondent to show that the office procedures she had in place were adequate.

[5b] Although respondent's supervisory omissions did not amount to the gross negligence of the attorneys in *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, *Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d 465, and *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d 847, neither did respondent's trust account balance fall below the required amount solely because of an error by support staff. As the hearing judge correctly observed, Ms. F's September 1986 misdeposit into respondent's operating account of the $500 check was only the first step leading to the eventual shortfall in respondent's new trust account. The misdeposit remained undetected because neither respondent nor her former husband reconciled the client account records against the trust account transactions. Respondent never testified that she made any arrangements at all to transfer funds from her old trust account to the new trust account, which was opened on November 28, 1986. At the end of 1986, respondent did not discover the misdeposit because she did not perform her annual reconciliation of bank records with client bills.

[5c] As the hearing judge recognized, it was obvious from the face of the check register when respondent wrote the check to client S on May 19, 1987, that the balance in the trust account would fall below the $500 which respondent had retained in trust from Mrs. H's settlement funds. Respondent violated former rule 8-101(A) because the shortfall in her new trust account resulted from her inadequate supervision of her trust accounts over a period of several months, culminating in her careless writing of the $385.12 check on May 19, 1987.

[8] The hearing judge referred to respondent's violation of former rule 8-101(A) as a "technical misappropriation." (Decision pp. 27, 28, 37, 38, 39.) Not all trust account violations rise to the level of misappropriation. Indeed, standard 2.2, Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) (hereafter "standards"), distinguishes between trust account violations that do not amount to wilful misappropriation and those that do. Because serious opprobrium commonly attaches to the term "misappropriation" and because we deem such opprobrium to be appropriate only when the level of misconduct rises to at least gross negligence—which was not found here—we do not consider the term applicable to respondent's rule violation.

No Violation of Former Rule 2-111(A)(3)

[9a] Pursuant to former rule 2-111(A)(3), an attorney who withdraws from employment must promptly refund any unearned part of an advance fee. The same duty applies when a client terminates the employment of an attorney. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 365; see also *Academy of California Optometrists, Inc.* v. *Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.)

Respondent explained at trial that she kept the $500 to encourage Mrs. H to sign and return the release as required by the terms of the personal injury settlement agreement because she was concerned over the possibility of a motion for compliance with the terms of the settlement and felt the $500, as part of the $17,500 settlement, should not be disbursed without compliance. (IV R.T. pp. 94-96.)

The hearing judge did not find respondent's explanation credible. Although the hearing judge acknowledged that respondent had written to Mr. and Mrs. H after each inquiry from the insurance company and had asked for the release to be signed and returned, the hearing judge observed that respondent had not specifically told them that she was holding the retainer because of Mrs. H's failure to sign and return the release. Also, the hearing judge stated that the deteriorating relationship between respondent and Mr. and Mrs. H partly affected respondent's failure to return the $500. (Decision pp. 35-36.)The hearing judge concluded that respondent had a duty promptly to refund the $500 retainer after Mr. H sent her a letter on February 26, 1987, requesting that she sign the substitution of attorney and return the retainer. Because respondent failed to refund the $500 until August 4, 1987, the hearing judge determined that she wilfully violated former rule 2-111(A)(3). (*Id.* at pp. 32-33.)

Respondent argues that competing interests to the $500 justified her keeping the retainer in her trust account. Respondent points to the fact that for months she had repeatedly asked Mrs. H to sign and return the release, as required by the settlement agreement, and had given her word to the insurance company that the release would be forthcoming. (See exhs. EE, FF; IV R.T. pp. 94-96.)

[10] Factual findings made by a hearing judge and resolving issues concerning testimony deserve great weight. (Trans. Rules Proc. of State Bar, rule 453(a); *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 724, reconsideration den. and sub. opn. filed Dec. 9, 1991, 1 Cal. State Bar Ct. Rptr. 732; *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 274.) However, on this issue the hearing judge was interpreting a written document—the April 1987 letter. That letter could have been written more clearly, but it also invited the clients to call if they had any question. The clients did not do so. There was no evidence that Mrs. H misunderstood her duty to sign the release. In writing to Mrs. H in December 1986, respondent had already unequivocally conditioned Mrs. H's entitlement to *any* settlement funds, including the $500, on the signing of the release. Mrs. H testified that as a legal secretary she had dealt with releases as part of her job and had also previously executed one as a plaintiff settling a prior lawsuit. We therefore supplement the hearing judge's findings with our own finding that, taking all of her correspondence to the client on this subject together, respondent did condition the refund of the $500 retainer upon the return of the signed release.

[9b] We do not disturb the hearing judge's finding with respect to respondent's motivation, but conclude that the issue turns on a question of law, not motivation. We accept respondent's argument that she was legally obligated to keep the $500 in trust when faced with the competing demand of the H's and the insurance company. **[11a]** An attorney who receives money on behalf of a party who is not the attorney's client becomes a fiduciary to the party. (*Crooks* v. *State Bar* (1970) 3 Cal.3d 346, 355, quoting *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156.) When an attorney assumes the responsibility to disburse funds as agreed by the parties in an action, the attorney owes an obligation to the party who is not the attorney's client to ensure compliance with the terms of the agreement. (*Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979; see also *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d 317, 330, fn. 7; *Wasmann* v. *Seidenberg* (1988) 202 Cal.App.3d 752, 755-757; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 470.)

[9c] In March 1987, respondent found herself in a dilemma. On the one hand, former rule 2-111(A)(3) required respondent promptly to refund all advanced fees to which Mr. and Mrs. H were entitled when she ceased to represent them in the child custody matter. On the other hand, she had an obligation to the insurance company to ensure that the $500, which constituted the remainder of the $17,500 settlement in Mrs. H's personal injury matter, was not disbursed until compliance with all of the terms of the settlement agreement by Mrs. H, who had ignored repeated requests from respondent to return the signed release.

[11b] In this regard, former rule 8-101(A)(2) (now rule 4-100(A)(2)) is instructive. Pursuant to that rule, an attorney must retain funds in trust when the attorney's right to the funds is disputed by the client. The funds are required to be kept in trust until the resolution of the dispute. The rule also applies to obligations to third parties. (See, e.g., *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979.)

[9d] We therefore find that regardless of her motives for doing so, respondent took the appropriate course. She kept the $500 in her trust account and again reminded Mr. H, in her letter of April 14, 1987, that Mrs. H's signed release in the personal injury matter should be sent to her as soon as possible. Such conduct appropriately balanced respondent's competing duties to Mr. and Mrs. H and to the opposing party and its insurance company.

[9e] Thereafter, no release was ever signed, nor was there evidence of any further contact with the insurance company. Respondent's failure in the ensuing three months to take any affirmative steps to resolve the issue, while not commendable, did not violate former rule 2-111(A)(3). The client had it within her own power to execute the necessary document and simply failed to do so. The State Bar had the burden of proving that the client was entitled to receive the funds. The client's compliance with the settlement agreement was not established, nor was evidence offered to establish waiver of the required release by the opposing party in the lawsuit.[8]

DISCIPLINE

No Aggravating Circumstances

The hearing judge concluded that the current proceeding presented no aggravating circumstances. (Decision p. 33.) Without challenging any of the factual findings of the hearing judge, the examiner argues that the fact that respondent took "the lion's share" of the personal injury settlement is an aggravating factor. The examiner concedes that the hearing judge was entitled to find, as she did, based on the evidence presented at the hearing, that the client agreed to pay and that the respondent earned all of the fees that were paid her. Except for a minor quibble regarding paralegal and law clerk charges, the clients expressed no dissatisfaction with the monthly bills for respondent's services in the child custody matter and indicated they were pleased with her work on their behalf. In the personal injury case, her efforts were similarly satisfactory—the recovery was found to be almost one and one-half times the amount the client was willing to accept. Not only does respondent's ultimate collection of both fees at the same time fail to show an aggravating circumstance, it shows the great accommodation respondent was willing to make for a client unable to keep up monthly payments.

Mitigating Circumstances

We adopt the hearing judge's conclusion that, in view of respondent's relatively short period of law practice, her lack of a prior disciplinary record was not a strong mitigating factor. (*Ibid.*; cf. *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658.) On the other hand, the hearing judge considered significant, as do we, the testimony from respondent's seven character witnesses. (Decision p. 37; standard 1.2(e)(vi)). Respondent's character witnesses included two retired judges, a former opposing counsel, a former

8. We do not consider that respondent acted culpably in ultimately refunding the $500 retainer to the H's on August 4, 1987, without obtaining consent of the opposing party. By this time, respondent was under pressure from the State Bar to make the refund and she clearly did so in response to such pressure.

co-counsel, a friend, a former client, and an attorney in the community. These witnesses knew about the allegations against respondent, as well as the hearing judge's tentative culpability determinations, and uniformly attested to respondent's honesty, truthfulness, integrity, skill, and dedication as a lawyer. (Decision p. 37.)

The hearing judge acknowledged that the illness and death of respondent's father, to whom she was very close, undoubtedly affected respondent during the time of her dealings with Mr. and Mrs. H. (Decision p. 36.) **[12]** Pursuant to standard 1.2(e)(iv), extreme emotional and physical difficulties suffered by an attorney at the time of professional misconduct constitute a mitigating circumstance when expert testimony establishes that such difficulties were directly responsible for the misconduct. (See, e.g., *Porter* v. *State Bar* (1990) 52 Cal.3d 518.) In the current proceeding, in addition to respondent's testimony, respondent's family doctor and a doctor friend testified that respondent suffered extreme emotional stress from the time of her father's first hospitalization in the middle of February 1987.

Respondent learned in October 1986 that her father was ill. From December 1986 through her father's death on April 8, 1987, respondent worked extremely long hours not only to continue her practice of law, but also to run her father's business. Between the middle of February 1987 and the beginning of April 1987, her father was hospitalized three times. During his hospitalizations, she visited him each day, sometimes several times a day. Even after her father's death, respondent ran her father's business to prepare it for sale and spent time winding up her father's affairs. (Decision pp. 34-35.)

The hearing judge concluded that respondent had failed to demonstrate a sufficient causal nexus between such extraordinary demands and respondent's violation of former rule 8-101(A). (*Id.* at p. 36.) We agree that no causal nexus was demonstrated between such difficulties and the lapses in handling the trust account in the fall of 1986 which resulted in the violation of former rule 8-101(A). We conclude, however, that the severe time constraints and emotional difficulties which respondent suffered after her father's illness became acute until she ceased her independent practice at the end of May 1987 contributed to the violation of former rule 8-101(A), particularly respondent's careless writing of the $385.12 check to client S on May 19, 1987. It was undisputed that respondent's running of two businesses for 15 to 16 hours per day and her preoccupation with her father's terminal illness greatly diminished the time and attention she would have otherwise paid to the manner in which she managed her trust account during this period of time.

[13] Another factor we take into account in assessing the appropriate discipline is the extraordinarily harsh effect of the disciplinary proceeding on respondent and her ability to earn an income. (See, e.g., *In re Chira* (1986) 42 Cal.3d 904, 907, 909 [no actual suspension ordered in part because respondent's criminal conviction had a devastating impact on him and his ability to practice law].) Having closed her law office, respondent worked for a firm from June 1987 through December 1989. The hearing judge found that respondent resigned from the firm precisely because of her concern about the effect on the firm of charges of moral turpitude in the current disciplinary proceeding—serious charges which were later disproved. Respondent's resignation from the firm while these proceedings were pending demonstrates extreme conscientiousness on behalf of the firm and its clients. According to papers submitted by her counsel on review, respondent thereafter suffered severe economic hardship culminating in bankruptcy.

Discipline

[14a] Even if there were no mitigating factors here, there appears little need for any suspension as a sanction to protect the public, the courts, and the legal profession, to maintain high professional standards, and to preserve public confidence. (Standard 1.3.) Respondent's rule violation was inadvertent, involved a small sum, and is unlikely to be repeated.

In *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, the attorney gave the office manager "no supervision, *never* instructed her on trust account requirements and procedures, and *never* examined either her records or the bank statements for any of the office accounts." (*Id.* at p. 796, original emphasis.) Such pervasive

carelessness amounted to "gross negligence involving serious violations of an attorney's duty to oversee client funds entrusted to his care, and to keep detailed records and accounts thereof." (*Ibid.*) The attorney's omissions caused a four-month delay in notifying a client of the arrival of funds due to the client and resulted in commingling. (*Ibid.*) The Supreme Court ordered a sanction of one year's stayed suspension, with probation. (*Id.* at pp. 790, 798.)

In *Vaughn* v. *State Bar*, an attorney's trust account fell below the required balance at least 12 times during a 20-month period. (*Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at pp. 852-853.) The attorney commingled funds and kept trust fund cash in an envelope in his home. (*Id.* at pp. 853-855.) He did not know that he had received some funds because of inefficient office procedures and "chaotic records." The Supreme Court found the attorney culpable of gross negligence amounting to moral turpitude and imposed a public reproval. (*Id.* at pp. 855-856, 859.)

Both *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, and *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d 847 were decided before the State Bar adopted standards for the degree of attorney discipline. **[14b]** Standard 2.2(b) provides that a violation of former rule 8-101(A) which does not involve the wilful misappropriation of entrusted funds or property must result in at least three months actual suspension, regardless of mitigating circumstances. The hearing judge found the minimum called for by standard 2.2(b) inappropriate to these facts. We agree. The standards are guidelines which must be construed in light of decisional law. (*Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1100; *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222; *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828; *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550.)

[14c] The nature of the violation is very important to the propriety of suspension as opposed to reproval. In *Dudugjian* v. *State Bar*, which the California Supreme Court issued shortly after the hearing judge's amended decision, two attorneys—Dudugjian and Holliday—were found to have violated former rule 8-101(A) by depositing a settlement check into their general account instead of their trust account and to have violated former rule 8-101(B)(4) by subsequently refusing to honor their client's demand for the funds. The former volunteer review department, relying on standard 2.2(b), recommended that Dudugjian be suspended for two years, stayed, conditioned on 90 days actual suspension and restitution. It recommended that Holliday receive one year of stayed suspension conditioned on 30 days actual suspension and joint restitution with Dudugjian. (*Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d at pp. 1099-1100.)

Before their violation of former rules 8-101(A) and 8-101(B)(4), Holliday and Dudugjian had practiced law with no prior record of discipline for approximately seven and one-half years. In reducing the recommended discipline for both attorneys to public reprovals, the Supreme Court stated that the attorneys "honestly believed that the [clients] had given them permission to retain the settlement funds." In addition, the Court stressed that the attorneys "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.)

We find similar in many respects the facts underlying the private reproval we issued in *In the Matter of Respondent E*, *supra*, 1 Cal. State Bar Ct. Rptr. 716, eight months after the hearing judge's amended decision in this case. In *In the Matter of Respondent E*, culpability rested solely on the attorney's failure to act promptly to redress inadvertent commingling of trust funds with operating funds in violation of former rule 8-101(A). The record contained clear and convincing evidence of no aggravation and of extensive mitigation, including long years of the practice of law with no prior disciplinary record, substantial pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability. (*In the Matter of Respondent E*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 729-730.)

The same hearing judge presided over the trial of respondent E as presided below and recommended greater discipline in that case than for this respondent. We consider respondent, like respondent E, to

deserve less discipline than received by Holliday and Dudugjian. **[14d]** Unlike Holliday and Dudugjian, respondent suffered from severe emotional difficulties which partially mitigated her misconduct. She also has taken the current disciplinary proceeding very seriously, suffered great hardship as a consequence, and is extremely unlikely to ever repeat the inattentiveness to her trust account which occurred here.

[14e] For the reasons stated above, we therefore impose a private reproval. As we suggested at the beginning of this opinion, we believe that respondent is representative of many attorneys in this state who would benefit from improved guidelines for the handling of trust funds. We encourage the Board of Governors of the State Bar to proceed expeditiously in formulating appropriate standards.

We concur:

NORIAN, J.
STOVITZ, J.