

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HEROICO M. AGUILUZ

A Member of the State Bar

No. 86-O-12145

Filed February 13, 1992; as modified, June 4, 1992

SUMMARY

Respondent was hired to represent the owners of a residential care home in a dispute with a state licensing agency. He filed a response to the agency's charges and secured two continuances of the administrative hearing, but then withdrew his appearance before the agency and abandoned his clients. Thereafter, respondent denied to his clients that he had withdrawn as their counsel, and refused to give them their files until they paid him additional fees and signed a substitution of attorney form. The hearing judge recommended that respondent be suspended for one year, stayed, with two years probation and restitution, but no actual suspension from practice. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing that procedural errors made in the proceeding below had denied him a fair hearing. He also contended that the record did not support the culpability findings, that no aggravating circumstances were established, and that, if culpability were found, the appropriate discipline should be an admonition or a private reproof. The State Bar examiner urged adoption of the hearing judge's findings, conclusions and recommended discipline.

The review department rejected respondent's procedural challenges and adopted nearly all of the factual and culpability determinations made by the hearing judge. However, it modified the findings in aggravation and augmented the findings in mitigation. After reweighing these considerations, it adopted the hearing judge's recommended discipline, but added probation conditions requiring that respondent attend State Bar ethics school and complete a law office management course.

COUNSEL FOR PARTIES

For Office of Trials: Dane C. Dauphine

For Respondent: Heroico M. Aguiluz, in pro. per.

HEADNOTES

- [1 a, b] **102.10 Procedure—Improper Prosecutorial Conduct—Reopening**
 102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
 135 Procedure—Rules of Procedure
A disciplinary proceeding was not barred under rule 511, Transitional Rules of Procedure of the State Bar, even though a letter was sent from the Los Angeles office of the State Bar ostensibly closing the case, where there remained a separate open, active investigative file in the San Francisco office. The closure of the Los Angeles investigation did not serve to extinguish the open investigation by the San Francisco office.
- [2] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
 119 Procedure—Other Pretrial Matters
 130 Procedure—Procedure on Review
 139 Procedure—Miscellaneous
 162.20 Proof—Respondent’s Burden
In order to establish a denial of a fair trial because of delay between the making of a complaint to the State Bar and the filing of a formal notice to show cause, an attorney must show specific instances of actual prejudice from the delay. Where information in support of respondent’s claim of prejudice was available and known to respondent at the time of respondent’s motion to dismiss before the hearing judge, but was not set forth in support of the motion, respondent could not improve on review the record he had the opportunity to make in the hearing department.
- [3] **103 Procedure—Disqualification/Bias of Judge**
 169 Standard of Proof or Review—Miscellaneous
The party making a claim of judicial bias must show that a person in possession of all the relevant facts would reasonably conclude that the hearing judge was biased or prejudiced against that party. The standard is an objective one and the partisan views of the litigants do not control.
- [4] **103 Procedure—Disqualification/Bias of Judge**
 120 Procedure—Conduct of Trial
A hearing judge may question witnesses in order to elicit or clarify testimony and test credibility, but may not, in so doing, become an advocate for one of the parties. Where the judge’s treatment of witnesses on both sides was evenhanded and did not overstep the judge’s factfinding role, there was no evidence of prejudice or bias.
- [5] **103 Procedure—Disqualification/Bias of Judge**
 120 Procedure—Conduct of Trial
 139 Procedure—Miscellaneous
 167 Abuse of Discretion
A hearing judge’s denial of respondent’s request to remove and copy exhibits already admitted into evidence, due to concern for the integrity of the record, was not improper, and did not show bias. Moreover, by failing to seek relief before the hearing judge after being denied access to the exhibits by the State Bar Court clerk’s office, respondent waived his right to raise the issue before the review department.

- [6 a-c] **103 Procedure—Disqualification/Bias of Judge**
 120 Procedure—Conduct of Trial
 165 Adequacy of Hearing Decision

A variance between the hearing judge's tentative findings on culpability from the bench, and the judge's detailed written findings of fact and conclusions of law, did not demonstrate bias. The ultimate written decision controlled, and where it was supported by the evidence, the judge's remarks in summing up the evidence were not a basis for reversal.

- [7 a, b] **103 Procedure—Disqualification/Bias of Judge**
 119 Procedure—Other Pretrial Matters

The failure of the hearing judge to rule on respondent's motion to dismiss until after the hearing did not result from bias, but from respondent's filing of the motion less than a week prior to the hearing.

- [8] **120 Procedure—Conduct of Trial**
 136 Procedure—Rules of Practice
 165 Adequacy of Hearing Decision

A hearing judge's announcement of tentative findings on culpability from the bench may be necessary due to the bifurcated nature of State Bar Court proceedings coupled with the desire to avoid an extra day of hearing. (Rules 1250, 1260, Provisional Rules of Practice.)

- [9 a-c] **148 Evidence—Witnesses**
 162.90 Quantum of Proof—Miscellaneous
 165 Adequacy of Hearing Decision
 277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Where the hearing judge found the complaining witness worthy of belief on the crucial factual issues, and that witness's testimony was bolstered by other evidence in the record, and respondent's contrary contention that he had been discharged by his clients was not corroborated by documents that ordinarily would have been prepared by an attorney upon discharge, the hearing judge's conclusion that respondent abandoned his clients without notifying them was supported by the record, even though the complaining witness's testimony was not uniformly reliable regarding exact details.

- [10] **106.30 Procedure—Pleadings—Duplicative Charges**
 213.10 State Bar Act—Section 6068(a)
 214.30 State Bar Act—Section 6068(m)
 277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
 410.00 Failure to Communicate

For a failure to communicate with a client which occurred prior to the enactment of the statute requiring such communication, grounds for discipline remain under the common law doctrine underlying this duty. However, where the information the attorney most significantly failed to convey was notice of the attorney's withdrawal from representation, the attorney's conduct violated former the rule against prejudicial withdrawal, and finding culpability of a common law failure to communicate would be unnecessarily duplicative.

- [11] **195 Discipline in Other Jurisdictions**
 710.33 Mitigation—No Prior Record—Found but Discounted
 710.39 Mitigation—No Prior Record—Found but Discounted
Seven years of law practice in California prior to respondent’s misconduct was worth only slight weight in mitigation. Respondent’s additional years in practice in a foreign jurisdiction were not shown by clear and convincing evidence to be mitigating because the record lacked information on the similarities and differences between the attorney discipline systems in the United States and the foreign jurisdiction.
- [12] **765.10 Mitigation—Pro Bono Work—Found**
Respondent’s leadership in minority bar associations, service as a delegate to the State Bar Conference of Delegates, and post-misconduct service as a municipal court judge pro tempore constituted mitigating circumstances.
- [13] **543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
 760.12 Mitigation—Personal/Financial Problems—Found
Severe emotional problems which can be related to the misconduct at issue can be considered to have a mitigating weight. Respondent’s misrepresentations to his clients, made two days after the funeral of his murdered son, while not excusable, were tempered in their otherwise aggravating effect by respondent’s emotional stress, and the hearing judge should have given such stress more weight in mitigation.
- [14] **625.10 Aggravation—Lack of Remorse—Declined to Find**
 735.50 Mitigation—Candor—Bar—Declined to Find
 802.69 Standards—Appropriate Sanction—Generally
 1099 Substantive Issues re Discipline—Miscellaneous
Respondent’s inconsistent responses to State Bar investigators precluded a finding in mitigation that respondent was cooperative with the State Bar. However, respondent’s behavior while acting as his own counsel during the disciplinary proceeding, which was consistent with an honest, if mistaken, belief in his own innocence, did not demonstrate an intent to hinder or mislead the court. A respondent is not required to acquiesce in the findings and conclusions of the State Bar Court, but the respondent’s attitude toward the disciplinary process and amenability in conforming to the Rules of Professional Conduct are proper issues for the court’s review, particularly in determining appropriate discipline.
- [15] **171 Discipline—Restitution**
Requirement that attorney who abandoned clients make restitution of amount paid by clients to successor counsel was imposed in furtherance of attorney’s rehabilitation.
- [16] **173 Discipline—Ethics Exam/Ethics School**
 174 Discipline—Office Management/Trust Account Auditing
Respondent who did not fully appreciate fundamental office practices which would alleviate any future misunderstanding with a client concerning crucial decisions, status of litigation, fee disputes or withdrawal from representation was required to attend State Bar ethics school and complete a law office management course.

ADDITIONAL ANALYSIS**Culpability****Found**

270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]

Not Found

213.15 Section 6068(a)

220.15 Section 6103, clause 2

277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation**Found**

582.10 Harm to Client

621 Lack of Remorse

Discipline

1013.06 Stayed Suspension—1 Year

1017.08 Probation—2 Years

Probation Conditions

1021 Restitution

1022.10 Probation Monitor Appointed

1024 Ethics Exam/School

1025 Office Management

OPINION

STOVITZ, J.:

This disciplinary proceeding arose largely because respondent, Heroico M. Aguiluz, failed to resolve a dispute with his clients in an ethically acceptable manner; and instead withdrew from employment in a way prejudicial to his clients' interests, abandoning their case and keeping their file.

Before us, respondent seeks review of a decision of a State Bar Court hearing judge recommending that respondent be suspended from the practice of law for one year, stayed, on conditions of a two-year probation. The judge recommended no actual suspension.

This case involves respondent's representation between December 1985 and April 1986 of Aurora and Charles Macawile, the owners of a residential care home for the elderly in Modesto. The Macawiles' state license was temporarily suspended in November 1985 based on an accusation filed by the state Department of Social Services (hereafter "DSS"). The hearing judge found that after respondent filed a response requesting a hearing and thereafter successfully secured two continuances of the hearing on the temporary suspension, respondent withdrew his appearance before the DSS and abandoned his clients, contrary to former rules 6-101(A)(2) and 2-111(A)(2).¹ Thereafter he denied to his clients that he had withdrawn, but refused to return the Macawiles' records until they paid him additional fees and signed a substitution of counsel, contrary to former rule 2-111(A)(2). The hearing judge dismissed charges that respondent had failed to return unearned fees, contrary to former rule 2-111(A)(3), and had violated Business and Professions Code sections 6068 (a) and 6103.² (*Baker v. State Bar* (1989) 49 Cal.3d 804, 814-815.)

Respondent requested review, asserting procedural and substantive errors in the proceedings below. He contends he was denied a fair hearing because of the bias of the hearing judge; his due process rights were violated by the four-year interval between complaint and filing of notice to show cause; the disciplinary proceedings were barred by a procedural rule; the record did not support the culpability findings; and no aggravating circumstances were established. Respondent argues, in the alternative, that if culpability were found, the appropriate discipline should be reduced to an admonition or, at most, a private reproof. The examiner urges us to adopt the hearing judge's findings, conclusions and recommended discipline.

After independently reviewing the record, we reject respondent's procedural challenges and adopt almost all the findings of fact and culpability determinations of the hearing judge. However, we temper the findings of aggravation and augment the findings of mitigation to reflect the evidence submitted by respondent. After reweighing these considerations, we believe the recommended period of stayed suspension with conditions, including restitution, a law office management course and the California Professional Responsibility Examination, is warranted.

I. FACTS

The Macawiles owned and operated a residential care home in Modesto called Willow Tree Lodge. Their state operating license was temporarily suspended by DSS by order dated November 18, 1985, based on serious charges set forth in a 22-page accusation, alleging improper care and treatment and, in some cases, physical and verbal abuse of the residents, substandard living conditions, and noncompliance with state requirements as to employment of residential staff. (Exhs. L, M.)³ The Macawiles retained respondent⁴ on November 22, 1985, to defend

1. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar in effect from January 1, 1975, to May 26, 1989.

2. Unless noted otherwise, all references to sections are to those of the Business and Professions Code.

3. At the disciplinary hearing, respondent offered and the hearing judge admitted exhibits numbered A through MM. We correct the hearing judge's decision to so reflect.

4. Respondent was admitted to practice in the Philippines in about 1970 and California in 1978. He has no prior discipline.

the charges and paid him \$3,000 of a \$5,000 advance on fees. Respondent's agreement called for a billing rate of \$100 per hour. (Exh. A.) On November 29, 1985, respondent filed a one-page defense to the accusation (exh. C), which triggered a requirement that a hearing be held on the temporary suspension within 30 days. Requests for discovery were exchanged by the parties and the hearing was set for December 27, 1985. (Exhs. D, N.)

Respondent arranged to meet with his clients at his South San Francisco office⁵ on December 19, 1985, just prior to their departure to Hawaii for the Christmas holidays, to obtain records and other information from them and for payment of the remaining \$2,000 of his advanced fees. The Macawiles and their son, George, arrived at respondent's office, but respondent did not appear for the meeting. The Macawiles left information concerning employees of the Willow Tree Lodge and other possible witnesses (exh. E), along with Aurora Macawile's handwritten responses to the charges in the accusation (exh. AA), with respondent's office staff, but did not leave the remaining \$2,000 in advanced fees.

Prior to December 24, 1985, respondent sought to postpone the December 27 hearing and the continuance was denied. Respondent's son was murdered on December 23, 1985; and, in light of that tragedy, the administrative law judge granted respondent a continuance of the hearing until January 2, 1986. When the Macawiles returned from Hawaii on December 26, they called respondent's office and learned from his answering service of the death of his son. Respondent spoke to the Macawiles on December 27 and told them the hearing had been postponed and promised to advise them of any further proceedings. On December 30, 1985, Charles Macawile was served with a subpoena returnable at the administrative hearing in Modesto on January 2, 1986 (exh. R) for the logbook from the facility which allegedly contained accounts of incidents there, and received notice of the date and place of the administrative

hearing. (Exh. 8.) The Macawiles prepared to appear at the administrative hearing on January 2 in Modesto, although they had not heard further from respondent.

On January 2, 1986, respondent called the Macawiles from Los Angeles International Airport and told them the hearing had again been postponed, which was not the case. Respondent then flew to San Francisco and called the office of DSS's attorney, Paula Mazuski. In the meantime, because neither respondent nor his clients had appeared at the Modesto hearing, Mazuski called respondent's Los Angeles office and was told that respondent was on his way to Sacramento for the hearing, traveling via San Francisco, but was believed to be delayed because of weather. (Exh. 11, p. 2; R.T. p. 19.) The administrative law judge continued the proceedings until the afternoon to permit Mazuski to contact respondent again. (Exh. 11, pp. 2-3.) She reached respondent at his South San Francisco office and he told her he was not at the hearing because he had never received the amended notice with the location of the hearing, was not prepared to try the case that day, and wanted a continuance until February. (Exh. 11, pp. 3-4; R.T. pp. 19-20.) Mazuski told him that he had to talk to the administrative law judge. In a second call to respondent after lunch, Mazuski refused to stipulate to a further postponement of the matter without a waiver of the 30-day hearing requirement and advised respondent that the earliest hearing date available was in March. (Exh. 11, pp. 4-5; R.T. pp. 21-22.) Respondent agreed to the waiver of the hearing requirement and the January 2 hearing was adjourned.

Respondent met with Aurora and George Macawile on February 21, 1986, to review respondent's work on the case and to discuss a superior court action filed by DSS in late January 1986 to enforce a subpoena DSS had served on Charles Macawile in December 1985 for a logbook maintained at the facility. The superior court action was to be heard on February 25, but the Macawiles had yet to be served with the motion to compel.⁶

5. Respondent also maintained an office in Los Angeles.

6. The Macawiles had not produced the logbook in discovery and had resisted DSS's informal attempts to enforce its

subpoena. After filing its enforcement action in superior court, DSS was unable to serve a copy of the complaint on the Macawiles and the matter was never heard in superior court.

The Macawiles and respondent presented different versions of the events at the meeting. The Macawiles testified that they were dissatisfied with respondent's work and decided it was in their best interest, given the time that had passed since their facility had been closed, to settle the matter with DDS and not try to reopen the facility. (R.T. pp. 111, 227-228.) Respondent wanted to go forward with the hearing, but was unsuccessful in persuading his clients. They instructed him to contact DSS to reach a settlement in the case and asked for an accounting of respondent's time as billed against the \$3,000 advance. Respondent demanded the outstanding \$2,000 that the Macawiles were to pay in December under the fee agreement, but they refused to advance any further funds without first receiving an accounting, which respondent then promised to provide.

In contrast, respondent maintained that the Macawiles remained resistant to cooperation with DSS and had wanted him to continue with the case for a fixed fee of \$5,000, which respondent rejected as unreasonable given the anticipated length of the DSS hearing. (R.T. pp. 408-411, 415-418.) According to respondent, the Macawiles decided to represent themselves. They discharged respondent and, in response, he attempted to get Mrs. Macawile to sign a substitution of attorney and to pay the remainder of his \$2,000 advance, which he saw as a true retainer. Mrs. Macawile refused to sign the substitution form and wanted an accounting of respondent's time, which respondent agreed to provide. However, respondent was adamant at the disciplinary proceeding that he considered himself to be the Macawiles' attorney until a substitution form was filed. (R.T. pp. 427, 475-476.)

Respondent left Los Angeles on February 22 to travel to Chicago, Washington, D.C., and Manila. He did not return to the United States until March 20, 1986. During his absence, respondent's office received correspondence from John Spittler, the deputy attorney general handling the discovery matter in superior court, reciting a February 21 telephone conversation he had had with respondent in which Spittler refused to agree to a postponement of the "administrative hearing." The hearing judge concluded that Spittler was referring to the April 1 hearing on the temporary suspension of the

Macawiles' license. Respondent maintains that the conversation concerned postponing the discovery proceeding in superior court scheduled for February 25, claiming he did not know his clients had not been served. (R.T. pp. 404-410.) Spittler sent another letter dated March 4, 1986, in which he iterated the state's opposition to any continuance of the hearing date, and criticized respondent for failing to cooperate with discovery requests and for his clients' avoidance of service of process on the order to show cause in the superior court proceeding. In response, respondent instructed his staff to contact the Attorney General's office and advise them that the Macawiles were refusing to cooperate with respondent and that he "will withdraw" from the matter. (R.T. pp. 431, 472-474; exh. LL.)

Spittler contacted Mazuski about respondent's "withdrawal" and she telephoned respondent's office. Mazuski was told by respondent's administrative assistant, Lucille Penalosa, that respondent was no longer representing the Macawiles, but had been unable to execute a substitution of counsel before he left for the Philippines. Mazuski called Mrs. Macawile, advised her of respondent's call to the Attorney General's office on March 10, 1986, withdrawing respondent's appearance and Mazuski's subsequent call and conversation with Ms. Penalosa and asked Macawile if respondent was still representing her. Macawile told Mazuski that she had been in touch with respondent's office that same day, but was not told by respondent's staff that she was no longer being represented. Mazuski asked her to confirm that understanding with respondent's office. Mazuski confirmed her conversation in a letter to Mr. and Mrs. Macawile dated March 12, 1986. (Exh. 7.)

Upset by Mazuski's call, Mrs. Macawile called respondent's office at least four times in March 1986, leaving messages for Lucille Penalosa each time, but did not receive a return call. On March 17, 1986, she contacted Mazuski and said she was now acting without an attorney and wanted to know her options at that time. In a detailed letter dated March 18, 1986, Mazuski outlined the alternatives available to the Macawiles with regard to defending the license revocation charges. (Exh. 9.) The next day Mrs. Macawile consulted a Modesto attorney, Philip Pimentel, for help on her case.

In March 1986, Mr. and Mrs. Macawile went to respondent's South San Francisco office to try and see him. The date and circumstances of this meeting were exhaustively explored at the hearing. Mrs. Macawile maintained that the meeting occurred on March 20, 1986. (R.T. pp. 237, 336-337.) Respondent denied categorically that any such meeting took place. He testified and his travel documents show that he reentered the United States in Los Angeles on March 20, 1986. (R.T. pp. 422-423; exh. HH.) According to Mrs. Macawile and her son, respondent denied that he had formally withdrawn as their attorney, balked at giving them the accounting they had requested or their file and records without their execution of a substitution of attorney form, and when they refused, ordered them out of his office with the threat of calling the police.

The Macawiles called Pimentel on March 21 (exh. EE) and retained him as their counsel in the DSS case. The case was settled with withdrawal of the notice of defense on March 26, 1986, and the license was formally revoked in May 1986. (Exhs. 10, EE; R.T. p. 75.) Pimentel charged the Macawiles \$567.⁷ (Exh. EE.)

II. PROCEDURAL ISSUES

A. Respondent's Claim That the Proceeding Is Barred

Respondent has asserted a number of procedural challenges to the disciplinary proceedings, most of which can be disposed of concisely. [1a] First, he

claims that the proceedings are barred by rule 511 of the Transitional Rules of Procedure of the State Bar,⁸ which provides that once the Office of Investigation or Office of Trials determines not to institute formal proceedings, no future disciplinary action may be filed based on the same facts. There are exceptions to the rule, including for discovery of new or additional evidence, good cause, as determined at the discretion of the Director of Investigations or Director of Trials or if the Complainants' Grievance Panel orders continuation of the original action.

Respondent bases his claim under rule 511 on a letter written by Duane D. Dade, special investigator assigned to the State Bar's Los Angeles Office of Investigation, to Aurora Macawile on September 9, 1987, advising her that there were insufficient grounds for discipline and giving her information on the fee arbitration program of the Los Angeles County Bar Association.⁹ (Resp. motion, exh. E.) The Los Angeles office originally investigated the Macawile complaint file in April 1986. However, the investigation was transferred to the San Francisco Office of Investigations in June 1987 and a new file was opened since the original investigation file could not be located. (State Bar response to motion to dismiss, declaration of San Francisco State Bar investigator Laura Triantafyllos.) In response to a letter from the State Bar, Mrs. Macawile provided additional information to the San Francisco Office of Investigations on June 5, 1987, to help them reconstruct the file (exh. X) and the State Bar sought a response from respondent by letter dated August 3, 1987. (Resp. motion, exh. D.) The new investigator spoke to

7. The hearing judge found that the Macawiles paid \$700 for Pimentel's services based on Mrs. Macawile's testimony approximating the cost of those services, and, as a condition of discipline, ordered restitution in that amount. The bill from Pimentel dated June 19, 1986, reflected a charge of \$567 for hours billed to the Macawiles with an outstanding balance of \$267. Mrs. Macawile testified that she paid Pimentel's bill in full. From our review of the record, we amend the hearing judge's decision to reflect clients' payment to Pimentel of \$567 rather than \$700.

8. Rule 511 reads as follows: "The decision of the Office of Investigation or Office of Trial Counsel that a formal proceeding shall not be instituted is a bar to further proceedings against the member based upon the same alleged facts. This

rule shall not apply when there is new or additional evidence, or, upon a showing of good cause at the discretion of the Director, Office of Investigation, or the Director, Office of Trial Counsel, or, if further proceedings are ordered by the Complainants' Grievance Panel under rules 513 et seq. of these rules."

9. There is no allegation that Dade did not have the authority under rule 511 to act for the Office of Investigation to close a case. (Compare *Chang v. State Bar* (1989) 49 Cal.3d 114, 125 [former rule 511, which required closure of case by examiner, does not prohibit further proceedings in case closed by investigator, where investigator was without authority under rules to close case for purposes of barring further action].)

respondent by phone on or about August 14, 1987, concerning the complaint. (Declaration of Laura Triantafyllos.) After receiving the September 1987 closure letter from the Los Angeles office, Mrs. Macawile called investigator Triantafyllos to advise her of the letter. (*Ibid.*) Triantafyllos retrieved the closed Los Angeles file and, with her supervisor's approval, continued her investigation. (*Ibid.*)

[1b] Respondent maintains that the matter was dismissed and none of the exceptions apply under the facts. The hearing judge denied the motion to dismiss on the grounds that (1) no final decision had been made to abandon proceedings against respondent; (2) if the facts were construed to find the matter had been closed, good cause existed to reopen the case; and (3) new evidence in the case warranted reopening the matter. (Decision p. 3; order denying motion dated January 24, 1990.) From our review of the record, it is evident that there was always an active State Bar investigation open on respondent concerning the allegations raised by the Macawiles. The San Francisco investigation proceeded on a course independent of the Los Angeles office and respondent and Mrs. Macawile were so advised. The last contact the San Francisco investigator had with respondent and Mrs. Macawile was less than a month before the Los Angeles letter was sent. Given those facts, the letter from the Los Angeles examiner, resulting from the lack of coordination between the two offices, while unfortunate, did not serve to extinguish the open investigation in San Francisco. The motion to dismiss under rule 511 was properly denied.

B. Respondent's Claim of Delay

[2] Respondent claims that the passage of more than four years between the date the complaint was made to the State Bar and the filing of its notice to show cause denied him a fair trial. Before us, respondent asserts that specific witnesses (former employees) and records which would have assisted him in defending the action are no longer available because of the passage of time. Respondent must show in his motion more than the passage of time and must demonstrate actual prejudice in order to prevail. (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60; *Wells v. State Bar* (1978) 20 Cal.3d 708, 715.) In his motion before the hearing judge, no specific in-

stances of prejudice occasioned by the delay were claimed by respondent. There is no indication in this record that the information respondent now proffers was unavailable or unknown to him at the time he filed his motion before the judge. Our function of independent review is not to enable respondent to improve the record he had the opportunity to make in the hearing department. We sustain the denial of the motion to dismiss on these grounds.

C. Respondent's Claims of Bias

[3] Finally, respondent alleges bias and prejudgment by the hearing judge which he claims, in effect, deprived respondent of a fair hearing. The respondent must show that a person in possession of all the relevant facts in this case would reasonably conclude that the hearing judge was biased or prejudiced against the respondent. (Trans. Rules Proc. of State Bar, rule 230; *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) It is not "the litigants' necessarily partisan views" that control; rather it is an objective standard applied to the facts and circumstances presented in the matter. (*Leland Stanford Junior University v. Superior Court* (1985) 173 Cal.App.3d 403, 408, citing *United Farm Workers of America v. Superior Court, supra*, 170 Cal.App.3d at p. 104.)

[4] Respondent's first claim is that the hearing judge became a "second examiner" and prejudged the issues based on his pro-State Bar bias. A hearing judge, while permitted to question witnesses, cannot, during the course of that examination "become an advocate for either party or cast aspersions or ridicule upon a witness." (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 533, overruled on another point, *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, fn. 18.) The hearing judge did conduct his own questioning of witnesses, including respondent, during direct and cross-examination. Those testifying for the State Bar were subject to the same scrutiny to test their credibility as those appearing on behalf of respondent. Our review of the record shows evenhanded treatment of both sides by the trial judge. He did not overstep his factfinding role in eliciting or clarifying testimony. (See *ibid.*) The judge's comments during the trial were made in the discharge of

his duties in eliciting, evaluating and ultimately resolving the evidence and, thus, are not evidence of prejudice or bias. (*Jack Farenbaugh & Sons v. Belmont Construction Co.* (1987) 194 Cal.App.3d 1023, 1031, citing *Estate of Friedman* (1915) 171 Cal. 431, 440.)

[5] The judge's denial of respondent's request to remove and copy exhibits L and M after they were admitted into evidence was not improper. Respondent was ordered to have his exhibits copied and marked, with an additional copy for the hearing judge, in a November 1, 1990 order, following a status conference of the same date. (See Provisional Rules of Practice of the State Bar Court, rule 1211.) Preservation of the record before the State Bar Court is of foremost concern and we see no impropriety in the judge's determination that removal from the clerk's office of documents admitted in a disciplinary case, even for a short time, posed too great a risk to the integrity of the record. Moreover, respondent made no effort to move for relief before the hearing judge when denied access to the exhibits by the clerk's office and, thus, any objection raised thereafter would appear to be waived. Overall, the record does not support respondent's assertions of bias on this ground.

[6a,7a] Respondent's second bias argument related to the hearing judge's conduct of the case concerns two rulings made in the course of the proceeding. Respondent contends that the hearing judge's refusal to rule on respondent's motion to dismiss prior to the hearing and the variance between the judge's verbal statement of culpability from the bench and his detailed findings and conclusions reflected in the written decision constitute irrefutable evidence of bias. We disagree. [7b] Failure of the judge to rule on respondent's motion to dismiss until after the conclusion of the hearing did not result from bias, but rather from respondent's filing of the motion less than a week prior to the hearing. The judge reserved ruling on the motion until he could review respondent's papers as well as those submit-

ted by the examiner (timely filed the day before the hearing).

[6b] At the close of the hearing, the judge made tentative findings of culpability, and he advised counsel at the hearing that the findings were subject to his review of the evidence after the close of the record.¹⁰ [8 - see fn. 10] (R.T. p. 502.) The judge gave his impressions of the case and heard arguments from both counsel on the weight of the evidence on each charge. Thereafter, he accepted respondent's testimony and other evidence in mitigation and the State Bar's recommendation as to discipline. Respondent has not argued before us that his presentation of evidence on the issues of mitigation and aggravation was in any way affected by or that he unduly relied upon the oral culpability findings.

[6c] Where the hearing judge's impressions varied from his ultimate written findings of fact and conclusions of law, the written decision controls. As the Court of Appeal found in a case regarding a similar variance between judicial statements and final decision, "Where, as here, the evidence supports the findings and the findings support the judgment, we cannot reverse the judgment because of remarks made by the trial judge in summing up the evidence, where those remarks are neither reflected in the findings nor the judgment." (*Furuta v. Randall* (1936) 17 Cal.App.2d 384, 388.)

III. CULPABILITY DETERMINATIONS

[9a] Although our review of the record is independent (rule 453, Trans. Rules Proc. of State Bar), we owe deference to the findings of credibility made by the hearing judge who heard the witnesses testify and observed their demeanor, especially when the findings are based on conflicting testimony. (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1051-1052; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931.) Here, the hearing judge, in weighing contradictory versions of the facts, found the testimony of Aurora Macawile concerning the events in February and

10. [8] The hearing judge's announcement of tentative findings from the bench was necessary because of the bifurcated nature of State Bar Court proceedings (see Provisional Rules of

Practice of the State Bar Court, rules 1250 and 1260) coupled with the desire to avoid an extra day of hearing.

March and the testimony of Aurora's son as to the events through February to be more detailed and trustworthy than that of respondent and, further, concluded that respondent's testimony overall was not credible. (Decision p. 17.) Aurora Macawile's testimony is bolstered, in part, by the testimony of attorney Mazuski, who recounted Macawile's confusion and anger when Mazuski told her of the representations of respondent's staff to the DSS that respondent was no longer Macawile's attorney. (R.T. pp. 30-33.) While Aurora Macawile may not have been uniformly reliable in her testimony regarding the exact dates or details in question,¹¹ the hearing judge found her worthy of credit on this crucial issue. (See, e.g., *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099 [while complaining witness's testimony on other particulars was subject to challenge, testimony on key element as to culpability accepted by hearing panel as believable].) Respondent merely repeats his version of events presented at the hearing, which alone does not establish error by the hearing judge. (*Harris v. State Bar* (1990) 51 Cal.3d 1082, 1088.)

[9b] Looking beyond the conflict in testimony, respondent offered no documents which ordinarily would have been prepared by an attorney upon his or her discharge: a confirming letter to the client or an accounting of time and expenses. Respondent never sent a bill for fees to support his claim at the February meeting that he was owed or entitled to additional fees. When respondent alleged that his clients refused to sign a substitution form, he would have been expected to safeguard his position through some other document. Respondent did not prepare anything for the clients or DSS to indicate that he had been discharged by the Macawiles in February. Nevertheless, he instructed his office staff to inform the state's counsel that he *would* withdraw as he was not getting client cooperation.

[9c] On this record, we are given no reason to depart from the hearing judge's findings that as a

result of the February meeting, respondent agreed to attempt to settle the Macawiles' case with DSS; thereafter he intentionally ignored their instructions, contrary to rule 6-101(A)(2), and abandoned their case without notifying them, returning their file, or shielding their rights from foreseeable prejudice, contrary to rule 2-111(A)(2).

[10] There was also an allegation in the notice to show cause that respondent failed to communicate with his clients. Although the conduct at issue allegedly occurred in 1986, prior to the enactment of section 6068 (m), we have found the "common law" doctrine underlying this duty to communicate or to attend to client needs a viable grounds for discipline under section 6068 (a). (*Layton v. State Bar* (1991) 50 Cal.3d 889, 903-904; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.) However, as the hearing judge found, the information respondent most significantly failed to communicate to his client was notice of his withdrawal from the case, a requirement under rule 2-111(A)(2). Finding him culpable under section 6068 (a) as well would be duplicative and unnecessary. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

IV. DISCIPLINE

The discipline recommended by the hearing judge—one year actual suspension, stayed, two years probation with conditions, including restitution, the California Professional Responsibility Examination and attendance at the ethics school run by the State Bar—is too harsh according to respondent. The examiner asks that the discipline recommended by the hearing judge be sustained.

A. Mitigating and Aggravating Circumstances

We review the appropriateness of discipline recommendations in light of the primary purposes of discipline: protection of the public, the courts and the

11. As noted *post*, Mrs. Macawile steadfastly contended that she met with respondent on March 20, 1986, the date on which he reentered the United States from the Philippines, according to his passport. (R.T. pp. 237, 336-337; exh. HH.) The judge

believed Mrs. Macawile insofar as finding that she and respondent did meet but determined that the meeting took place "on or about" March 20. (Decision pp. 15-16.)

bar. All relevant mitigating and aggravating circumstances must be considered. (*Harris v. State Bar, supra*, 51 Cal.3d at p. 1088.) Respondent contends that there are no aggravating circumstances present in the case and emphasizes mitigating factors such as his work with the State Bar, the Philippine and Minority Bar Associations, and as a judge pro tempore in the Los Angeles Municipal Court; the impact of his son's murder; his cooperation with the State Bar; and lack of a prior record of discipline.

We agree that respondent's mitigating evidence was not accorded as much weight by the hearing judge as it deserved. [11] The lack of a prior disciplinary record is a mitigating factor recognized by the hearing judge. (Decision pp. 26-27; Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("standard(s)"), std. 1.2(e)(i).) Respondent's seven years of practice in California prior to his misconduct should be accorded only slight weight in mitigation. (Std. 1.2(e)(i); *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658.) Moreover, there is some question whether respondent's 15-year membership in the Philippine bar is mitigating, given the lack of information in the record on the similarities of and differences between attorney discipline systems in the United States and the Philippines. (Compare *Brockway v. State Bar* (1991) 53 Cal.3d 51, 66 [attorney's combined years of practice in California and Iowa considered a mitigating circumstance].) Without more proof submitted on this question, we do not find clear and convincing evidence that respondent's Philippine bar membership is a mitigating factor.

[12] Respondent's leadership of minority bar associations and service as a delegate to the State Bar Conference of Delegates were clearly established. Such legal community activities are recognized as mitigating circumstances. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 529.) Respondent continued his involvement after the misconduct here, serving as a judge pro tempore in the Los Angeles Municipal Court. We find this service to be a mitigating circumstance, given respondent's prior record of community involvement. (*Ibid.*)

[13] The emotional stress on respondent resulting from the murder of respondent's son was not, in

our view, accorded sufficient weight. Severe emotional problems which can be related to the misconduct at issue can be considered to have a mitigating effect. (*Read v. State Bar* (1991) 53 Cal.3d 394, 424-425.) Respondent's misconduct occurred in the shadow of his tragic loss. The hearing judge properly considered the impact of the murder in concluding that respondent's unavailability for the first scheduled hearing was not misconduct. We find that respondent's actions on the second hearing date, January 2, 1986, two days after respondent's son's funeral, were understandably affected by his emotional state. While we do not excuse respondent's misrepresentations to his clients as to the status of the case that day, we conclude that the otherwise aggravating impact of this conduct is tempered by respondent's emotional stress. (*Porter v. State Bar, supra*, 52 Cal.3d at p. 529.)

[14] We do not find clear and convincing evidence that respondent was cooperative with the State Bar. Respondent's inconsistent responses to State Bar investigators regarding his status as the Macawiles' attorney preclude a finding of cooperation. However, we do not agree with the hearing judge that respondent's behavior during the disciplinary proceedings constituted an intent to mislead or hinder the court in its factfinding mission. Upon reviewing the record, we find respondent's actions to be consistent with an honest, if mistaken, belief in his own innocence. (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 933.) Further complicating matters, respondent has acted as his own legal counsel. As such, he walks a fine line between the freedom of vigorous advocacy and being judged for his character in presenting his case in the State Bar Court. Respondent is not required to acquiesce in the findings and conclusions of the State Bar Court. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 816.) However, his attitude toward the disciplinary proceeding and amenability in conforming his conduct to the Rules of Professional Conduct are proper issues for our review, particularly in determining the appropriate discipline. (*Van Sloten v. State Bar, supra*, 48 Cal.3d p. 933.)

We agree that respondent lacks insight into the consequences of his misconduct in failing to follow his clients' instructions and thereafter failing to with-

draw from their cause without prejudice to their interests. As noted *ante*, some of respondent's misrepresentations to his clients we have tempered because of their proximity to the murder of respondent's son. We have insufficient information in this record to determine what economic harm the Macawiles suffered in the delay in the eventual settlement of their case (and closure of their business facility) caused by respondent's inattention and abandonment. (See, e.g., *Harris v. State Bar*, *supra*, 51 Cal.3d at pp. 1086-1087 [succeeding attorney, an expert in field, testified as to diminution in value of settlement resulting from attorney's misconduct].) The cost to the Macawiles of retaining another attorney to settle their case is harm which we weigh in determining discipline as well.

B. Comparable Case Law

The hearing judge discussed two prior disciplinary decisions in which attorneys with no prior discipline failed to perform services for and abandoned a single client: *Van Sloten v. State Bar*, *supra*, 48 Cal.3d 921 and *Wren v. State Bar* (1983) 34 Cal.3d 81.

In *Van Sloten*, *supra*, 48 Cal.3d 921, an attorney with no prior record of discipline represented a client in a marital dissolution case, worked on the matter for the first five months, submitted a proposed settlement agreement to the opposing side; and, thereafter, failed to communicate with his client, take action on the matter, or withdraw. His inattention spanned one year. Eventually, the client hired new counsel who completed the dissolution. The attorney claimed that he agreed to represent his client only if the client's spouse agreed to be cooperative in the matter. When the client's spouse refused to return the agreement, the attorney refused to take any further action, although he made no attempts to formally withdraw from the case. The Court concluded that a single act of failing to perform requested services without serious harm to the client, aggravated by the attorney's lack of appreciation for the discipline process and the charges against him, as demonstrated by his failure to appear at the review department proceedings, warranted a six-month suspension, stayed, one year of probation on conditions and no actual suspension.

In *Wren*, *supra*, 34 Cal.3d 81, an attorney, in practice for 22 years without a disciplinary record, represented a client in a dispute over a mobilehome sold by his client. The attorney was to file suit for repossession. Over a 22-month period, the attorney had two meetings with the client, misrepresented the status of the case to the client, leading the client to believe that a lawsuit had been filed and a trial date was pending, when the case had never been filed, and did nothing to prepare the case for filing. The attorney blamed the client for vacillating on the decision to go to trial, an argument which the Court found unsupported in the record. (*Id.* at pp. 88-89.) The Court concluded that the attorney had failed to communicate adequately with his client, misrepresented the status of the matter to his client, failed to prosecute his client's claim and submitted misleading testimony to the hearing panel. The attorney was suspended for two years, stayed, with two years of probation and 45 days of actual suspension.

Two other cases in the past two years in which the misconduct revolved around the abandonment of a single client are *Harris v. State Bar*, *supra*, 51 Cal.3d 1082 and *Layton v. State Bar*, *supra*, 50 Cal.3d 889. In *Harris*, the attorney, admitted to practice 10 years earlier, neglected a personal injury matter for over four years, doing virtually nothing on the case beyond filing the case and serving the defendant shortly before the statute of limitations ran. (51 Cal.3d at p. 1088.) There was significant harm to the client, who died during the pendency of the case, and a considerable financial loss to the estate when the matter was finally settled by new counsel. (*Id.* at pp. 1086-1087.) The Court also found that there was little, if any, recognition on the part of the attorney of her wrongdoing and no remorse. (*Id.* at p. 1088.) Some mitigating weight was given to the effect of a debilitating illness suffered by the attorney during part of the period of misconduct. (*Ibid.*) The Court suspended Harris for three years, stayed, with an actual suspension of 90 days.

In *Layton*, *supra*, 50 Cal.3d 889, the "client" ignored by the attorney was an estate and trust created from the residue of the estate. The attorney, in practice for over 30 years, served as both attorney and executor of the estate and trustee. Over a five-

year period, the attorney neglected his responsibilities as executor and attorney to conserve assets of the estate and to fulfil important duties as executor, including failing to file an accounting of the estate for almost five years. The primary beneficiary of the estate was unable to contact the attorney, was significantly harmed by his inaction and successfully sued for his removal. The Court adopted the review department recommendation, which noted that the attorney's cooperation with the State Bar was undercut by his contradictory explanations for his conduct and also noted the attorney's indifference toward rectification or atonement. The attorney's many years of practice were accorded mitigating weight. The Court concluded that his failure to perform legal services competently and diligently warranted a three-year suspension, stayed, three-year probation period and 30 days actual suspension.

The *Wren*, *Harris*, and *Layton* cases can be distinguished in part because the misconduct at issue here did not extend over as long a period of time. The discipline imposed in the *Harris* and *Layton* cases included some actual suspension, which could be justified in those cases based on the duration of the misconduct and the seriousness of the harm suffered as a result of the misconduct, factors not present in this case. Although respondent's record of practice prior to misconduct is not as lengthy, and thus as not compelling, as those presented in *Layton* and *Wren*, respondent's emotional stress after his son's murder is an equally compelling circumstance in determining discipline. As in *Wren* and *Harris*, respondent failed to recognize the effect of his misconduct, was not candid with his clients or the State Bar, and acted contrary to his clients' instructions, all aggravating factors. However the lack of candor in this case is mitigated by the emotional stress suffered by respondent. There was no issue of lack of candor in *Van Sloten*, nor was there significant harm shown to the client, and, accordingly, the period of stayed suspension was less. However, the conduct in this case is more serious than that in *Van Sloten* and warrants a longer period of probationary supervision than that imposed in the *Van Sloten* case.

V. RECOMMENDED DISCIPLINE

After reweighing the factors addressed above, we come to the same result as the hearing judge. We recommend that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be placed on probation for two years, subject to conditions. We have two modifications to the conditions as set forth in the hearing judge's decision. [15] We first modify condition 1 of the probation terms to reduce the amount of restitution to Aurora and Charles Macawile to \$567 from \$700, reflecting the sum actually paid by the Macawiles to their new attorney. This condition of probation is in furtherance of respondent's rehabilitation. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044-1045.)

[16] Further, it is evident that respondent does not fully appreciate fundamental office practices which would alleviate any future misunderstanding with a client concerning communicating crucial decisions in defending a case, the status of litigation, fee disputes or withdrawal from representation. We therefore recommend that respondent be required to attend the State Bar's ethics school within one year of the effective date of the Supreme Court's order herein. We also recommend as an added condition of probation that respondent be required within one year from the effective date of his probation to complete a law office management course approved in advance by his probation monitor referee.

With the foregoing modifications, we adopt the conditions of probation and all other recommendations, including the award of costs found on pages 34-36 of the hearing judge's decision filed May 3, 1991, as though fully set forth herein.

We concur:

PEARLMAN, P.J.
NORIAN, J.