

**STATE BAR COURT**  
**REVIEW DEPARTMENT**

In the Matter of

**JOEL M. WARD**

A Member of the State Bar

No. 86-O-12517

Filed February 13, 1992

**SUMMARY**

Through gross negligence, but without dishonest intent, respondent misappropriated more than \$12,000 held in trust for a client, and failed to comply with other trust fund responsibilities to the client. In another matter, respondent failed to communicate with the client, and did not bring the client's case to trial within the five-year statutory deadline. The hearing judge recommended that respondent be suspended for three years, stayed, and be placed on probation for four years on conditions including a sixty-day actual suspension. (Elias Powell, Judge Pro Tempore.)

The State Bar examiner sought review, arguing that respondent had been untruthful in his testimony at the hearing, and that his offenses warranted disbarment. The review department rejected the examiner's contentions, affirming the finding that respondent was grossly negligent, but not dishonest, in the handling of his client's trust funds, and holding that respondent's continued belief in his version of the facts did not render his testimony untruthful. Further, the review department held that respondent's conduct in missing the statutory deadline to prosecute the second client's lawsuit was due to inadvertence and fell short of constituting grounds for discipline as a reckless failure to perform legal services competently.

Considering both matters together, and taking into account aggravating and mitigating circumstances, the review department recommended increasing the actual suspension from 60 days to 90 days, and reducing the period of probation from four to three years, but adopted the remainder of the hearing judge's recommended discipline.

**COUNSEL FOR PARTIES**

For Office of Trials: Karen B. Amarawansa

For Respondent: Arthur L. Margolis

## HEADNOTES

- [1 a-c] **214.30 State Bar Act—Section 6068(m)**  
**221.00 State Bar Act—Section 6106**  
**280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**  
**801.45 Standards—Deviation From—Not Justified**  
**824.10 Standards—Commingling/Trust Account—3 Months Minimum**  
**863.90 Standards—Standard 2.6—Suspension**  
**1093 Substantive Issues re Discipline—Inadequacy**

Misconduct committed by attorney who was grossly negligent, though not dishonest, in handling a significant sum of client trust funds in one matter, and who failed to communicate adequately with a client in another matter, warranted 90 days rather than 60 days of actual suspension as condition of 3-year probation accompanying 3-year stayed suspension.

- [2 a-d] **162.20 Proof—Respondent's Burden**  
**165 Adequacy of Hearing Decision**  
**221.00 State Bar Act—Section 6106**  
**420.00 Misappropriation**

Where the evidence concerning an attorney's authority to apply client trust funds to attorney's fees consisted largely of conflicting testimony, the hearing judge's finding that the attorney did not have the authority to use the funds, coupled with the documentary evidence supporting culpability, constituted clear and convincing evidence supporting the judge's conclusion that the attorney improperly used and misappropriated client trust funds. Because the attorney's trust account balance repeatedly dropped below the necessary amount over a period of many months, and the attorney did not have an adequate explanation for his inadequate trust account balance, the attorney's misconduct, though not involving intentional dishonesty, constituted gross negligence amounting to moral turpitude.

- [3] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where an attorney failed to refund entrusted funds to a client promptly when reasonable attention to the attorney's duties would have made it apparent that the client had overpaid the attorney for fees, the attorney violated the duty to pay clients their funds promptly upon demand.

- [4 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

Where there was no evidence that an attorney's failure to bring a client's lawsuit to trial within the statutory deadline resulted from anything other than the attorney's simple error in miscalculating the date, and the attorney had expended substantial efforts on the client's behalf, there was not clear and convincing evidence of a reckless failure to perform legal services competently.

- [5] **214.30 State Bar Act—Section 6068(m)**

When a client learned independently that the client's case might be endangered by a statutory deadline, and contacted the attorney regarding that potential problem, the attorney breached the duty to communicate with the client by not having an office system in place to assure that such calls would be brought to the attorney's attention.

- [6]      **106.30 Procedure—Pleadings—Duplicative Charges**  
          **214.30 State Bar Act—Section 6068(m)**  
          **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
While a lack of adequate communication with a client may warrant a finding of failure to perform legal services competently, it would be duplicative to draw such a conclusion when the attorney has been found culpable of violating the statutory duty to communicate with clients.
- [7 a, b]    **615 Aggravation—Lack of Candor—Bar—Declined to Find**  
          **745.10 Mitigation—Remorse/Restitution—Found**  
Respondent's persisting in his belief in his innocence of fundamental misconduct did not necessarily show that respondent was deceitful or had misled the hearing judge, and was not a basis for a finding in aggravation, nor did it prevent a finding in mitigation that respondent had showed recognition of ways he could handle client matters more professionally in the future.
- [8]      **214.30 State Bar Act—Section 6068(m)**  
          **582.10 Aggravation—Harm to Client—Found**  
Where respondent's disciplinable failure to communicate with his client may have prevented him from earlier discovering the non-disciplinable calendaring mistake that caused his client to lose his cause of action, the harm to the client was properly recognized as a factor in aggravation.
- [9]      **745.31 Mitigation—Remorse/Restitution—Found but Discounted**  
Restitution of misappropriated client trust funds which occurred very belatedly and after the start of disciplinary proceedings was not entitled to any significant weight in mitigation.
- [10]     **760.31 Mitigation—Personal/Financial Problems—Found but Discounted**  
          **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**  
Personal stress factors, such as the estrangement, illness, or death of a family member, can constitute mitigating evidence. However, they were properly accorded less weight than would otherwise have been appropriate, where there was evidence that the attorney was responsive to other clients during the same period, the attorney's own testimony did not convincingly show what role these stress factors played in the misconduct, and there was no expert testimony clearly establishing a nexus between the personal difficulties and the attorney's disregard of professional duties.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

- 214.31 Section 6068(m)
- 221.12 Section 6106—Gross Negligence
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

##### Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

**Aggravation****Found**

521 Multiple Acts

**Found but Discounted**

582.39 Harm to Client

**Mitigation****Found**

710.10 No Prior Record

740.10 Good Character

**Standards**

802.69 Appropriate Sanction

**Discipline**

1013.09 Stayed Suspension—3 Years

1015.03 Actual Suspension—3 Months

1017.09 Probation—3 Years

**Probation Conditions**

1021 Restitution

1024 Ethics Exam/School

## OPINION

STOVITZ, J.:

Joel M. Ward (respondent) was admitted to practice law in Illinois in 1963 and in California in 1971. He has no prior record of discipline.

The State Bar examiner has requested that we review a decision of a judge pro tempore of the State Bar Court ("judge") finding respondent culpable, in the Kranjc matter, of negligently misappropriating more than \$12,000 he was holding in trust for a client and failing to comply with other trust fund responsibilities owed to that client. As to a personal injury matter involving another client, West, the judge found that between late 1986 and mid-1987 respondent failed to communicate adequately with West and, with reckless disregard, failed to perform legal services competently by not bringing West's case to trial within the applicable five-year period.

The judge recommended that respondent be suspended for three years, stayed, and placed on probation for four years on conditions including a 60-day actual suspension.

In making his recommendation, the judge made findings in aggravation that respondent's misconduct consisted of multiple acts and harmed his clients significantly. In mitigation, the judge considered respondent's lengthy practice without prior discipline; respondent's recognition of his wrongdoing and demonstration of remorse, his making restitution, albeit after the start of disciplinary proceedings; extensive, favorable character testimony; and the stress placed on respondent by two significant family problems.

In seeking our review, the examiner urges that we make additional findings that respondent was untruthful in his testimony below and that his offenses, particularly his misappropriation of funds, warrant disbarment.

[1a] Upon our independent review of the record, we have concluded that in the Kranjc matter, the evidence convincingly shows that respondent was grossly negligent in handling his client's trust funds

but not dishonest. In the West matter, we have concluded that the evidence shows that respondent may be disciplined for failure to communicate adequately with his client but that respondent's failure to timely bring West's case to trial was due to inadvertence which falls short of serving as additional grounds for discipline. We do not find clear and convincing evidence to warrant the making of additional findings that respondent misrepresented the facts as urged by the State Bar examiner. However, when we consider both matters together, particularly the protracted breach of trust displayed by respondent in the Kranjc matter, we have concluded that 90 days of actual suspension, rather than 60 days, is the appropriate recommendation to make as a part of a three-year stayed suspension.

### I. CULPABILITY

#### A. Kranjc Matter.

Respondent was retained by Nadia Kranjc in December 1984 to substitute for her prior attorney, George Cole, in defending a lawsuit filed against her and her husband by Vladimer Stanfel, alleging breach of a partnership agreement to share in the ownership and income of an apartment building. (R.T. pp. 308-310.) Kranjc's husband was given about \$18,400 by Stanfel, but Kranjc maintained that those funds were not used to purchase the apartment building. (*Ibid.*; exh. 15.) While representing Kranjc, Cole placed those funds in his trust account. On March 21, 1985, they were transferred by check to respondent after he was retained by Kranjc. (Exhs. 10, 11, 12 and 15.) Kranjc permitted Cole to deduct approximately \$1,200 in legal fees from \$1,600 in accumulated interest. (R.T. p. 171.) Respondent did not place the \$18,807 in his trust account until May 1985, after the lawsuit was tried. (R.T. pp. 343-344.)

Respondent had no written fee agreement with Kranjc. Respondent quoted an hourly fee of \$150. (Exh. 7.) When he was retained in December 1984 respondent estimated the cost of representing Kranjc through trial at \$5,000. (*Ibid.*)

Trial was originally scheduled for December 1984. However, after respondent had an opportunity to consult with opposing counsel and review some

aspects of the case, he became convinced that his client would have been severely prejudiced had the trial been held as scheduled. With Kranjc's consent, trial was continued until the end of April 1985, conditioned on Kranjc reimbursing plaintiff's airfare. (Exh. 7.) In the meantime, between December 26, 1984, and January 29, 1985, Kranjc paid respondent \$3,000 in legal fees. (Exh. 9.) In the months between the first trial date (December 1984) and the next trial date (April 1985) respondent conducted discovery and learned that the case was more complex than he had seen at first, for Kranjc's husband and the plaintiff had exchanged a great deal of correspondence written in the Croatian language. Each of the letters had to be translated and meetings were required between Kranjc, her son and respondent to review in detail the lengthy correspondence. This led to respondent revising his estimate of total legal fees to between \$5,000 and \$10,000. (R.T. pp. 333-337.)

The *Stanfel v. Kranjc* trial commenced in late April 1985 and concluded the next month. In April and May 1985 Kranjc paid respondent another \$4,000 in legal fees for a total of \$6,000. However, respondent had not submitted any bill to Kranjc for legal fees, nor had he accounted in writing for the time he had spent. Nevertheless, about one month after respondent deposited the \$18,807 which he received from Kranjc's predecessor counsel, he commenced using those funds. By July 12, 1985, the balance of respondent's trust account stood at only \$8,441.22 and by August 7, that trust account balance was just over \$5,000. Although the balance went up to \$18,009 two days later on August 9, 1985, the balance dropped well below \$18,000 on many occasions during the rest of 1985 and into 1986. (Exh. 13b.) It is not disputed that respondent used \$12,000 of Kranjc's funds.

On July 22, 1985, respondent sent Kranjc his first and only statement for professional services rendered. (Exh. 8.) This statement covered the period December 9, 1984 through June 1985. Broken down into the number of hours respondent spent on Kranjc's case during each of those seven months, it showed a total of 133 hours of legal work and showed a total fee of \$19,950 at respondent's rate of \$150 per hour. Respondent billed an additional \$2,025 for costs

incurred (beeper, handwriting expert, appraiser and translator) for a grand total of fees and costs of \$21,975. Respondent's July 22, 1985 statement credited Kranjc with having already paid \$6,000 for a balance due of \$15,975. Nowhere in respondent's statement did he disclose that he had already withdrawn \$12,000 from the trust funds received from Kranjc's previous counsel. Kranjc, unaware that respondent had taken any of the trust funds for his fees, continued to pay respondent's fees. The following table summarizes Kranjc's payments to respondent for fees and costs. It shows that between July 22, 1985, and March 7, 1986, Kranjc paid respondent an additional \$8,000 in fees for a total of \$14,000 in legal fees and \$925 for costs. (Exh. 9.)

PAYMENTS BY NADIA KRANJC  
TO RESPONDENT (EXH. 9)

Date	Paid to Fees	Cumul. Fees	Paid to Costs
12/26/84	\$1,000	\$1,000	
1/29/85	1,000	2,000	
4/25/85	1,000	3,000	
5/17/85			\$225
5/18/85	1,000	4,000	
5/20/85			200
5/28/85			500
5/30/85	2,000	6,000	
7/22/85	1,000	7,000	
8/30/85	1,500	8,500	
10/23/85	1,500	10,000	
11/10/85	1,000	11,000	
12/5/85	1,000	12,000	
1/16/86	1,000	13,000	
3/7/86	1,000	14,000	
Totals	\$14,000		\$925

To recap, respondent's billing in July 1985 for fees and costs totalled \$21,975. By March 1986 Kranjc paid respondent nearly \$15,000 of that sum, but respondent had taken from his trust account for fees \$12,000 of the \$18,707 he had received from Kranjc to hold in trust. Thus, respondent had collected \$5,000 *more* from Kranjc than he was entitled to by his one and only billing.

Although no formal judgment was filed in *Stanfel v. Kranjc* until the fall of 1985, the result was adverse

to Kranjc. The trial court awarded her opposing party a one-half interest in the property at issue and ordered Kranjc to pay slightly more than \$250,000 in damages, attorney fees, interest and costs. (Exh. C.)<sup>1</sup> Kranjc wished to appeal. Respondent informed Kranjc that it would be better for her to hire someone more objective than he might be and more expert in appeals. (R.T. p. 362.)

The key issue in dispute at the hearing below on this count was whether Kranjc had authorized respondent to use the \$18,807 of trust funds for his fees. Kranjc testified at the hearing that she never gave respondent permission to invade trust funds to pay for his services. (R.T. pp. 152-153.) It was her desire to keep the funds intact through the appeal because in her view they were owed to plaintiff Stanfel and were not her funds. (R.T. p. 152.) When she received respondent's July 1985 bill, she believed she had already paid respondent \$15,000, and did not realize her error until the disciplinary hearing. (R.T. pp. 196-197, 207-208.) Kranjc testified that the amount of the bill shocked and dumbfounded her because it was more than she had agreed to pay. (R.T. pp. 183-191.) As shown *ante*, she continued to make periodic payments to respondent totalling an additional \$7,000 after receiving respondent's one and only 1985 bill. (Exh. 9.)

Respondent testified at the hearing that he had spoken to Kranjc once or twice about her outstanding legal fees,<sup>2</sup> advised her that the trust funds were hers to dispense as she wished and, although Kranjc preferred to continue to make periodic payments to respondent, she agreed to allow respondent to use his discretion in choosing to withdraw trust funds to pay his fees. (R.T. pp. 353-354.) Respondent admitted that he did not memorialize Kranjc's consent to the withdrawal. (R.T. pp. 380-381.) He was not aware that Kranjc had overpaid him until he was preparing for the hearing of this disciplinary proceeding. (R.T. pp. 366.) He cited his carelessness for his trust

account falling below the amount required to be held for Kranjc. (R.T. p. 367.)

In October 1985 after Kranjc retained Peter K. Levine, Esq., new counsel for the appeal, Levine wrote to respondent to discuss the appeal and to request that respondent transfer the \$18,807 to Levine's trust account. (Exh. 1.) Levine testified at the hearing below, it was of "paramount importance" to Kranjc that the funds remain in trust during the pendency of the appeal. (R.T. pp. 13-14.) Respondent spoke to Levine thereafter but did not forward any trust funds. In a letter to respondent dated May 8, 1986, Levine reminded respondent of his October letter requesting transfer of the almost \$19,000 in trust funds. Respondent spoke to Levine on May 14, 1986, and Levine summarized respondent's reply in a letter dated May 16, 1986: "You stated you were preparing a letter to Mrs. Kranjc, and would not return all the monies because of outstanding legal fees allegedly owed to you by her." (Exh. 4.) Levine and Kranjc both objected to respondent taking his fees out of the trust funds. Levine also asked for return of the file in order for Levine to prepare a motion in the case scheduled for May 29, 1986. The file was not returned for three weeks after the May 8 request.

Kranjc filed a complaint with the State Bar. The State Bar investigator wrote to respondent on August 20, 1986, seeking his response to Kranjc's complaint. (Exh. 16.) In his response dated September 6, 1986, respondent indicated that he had been assured of monthly payments from Kranjc but had not received any monies since November 1985. (Exh. 15.) As to payment of his outstanding fees, respondent indicated that he had reviewed his records of Kranjc's payments and stated: "On several occasions, I suggested to Mrs. Kranjc that the balance owed, (at varying times) be taken from the funds that she gave me to hold, *however, she told me that she preferred to pay me direct.* There was no reason given as to why

1. Respondent testified that the trial court also awarded Stanfel punitive damages against Kranjc, but those damages are not referred to in the later opinion affirming most of the award. (R.T. p. 344; exh. C.)

2. The hearing judge found, based on respondent's testimony, that respondent had 10 meetings with Kranjc during which his fees were discussed. (Decision pp. 7-8.) Respondent's testimony indicated that he met with Kranjc 10 times after the trial but only one or two of these meetings concerned his fees. (R.T. pp. 347-349, 353.)

she requested this—only that this was her preference [sic]. During those conversations, I had advised her that I thought it only fair that I would be protected, and exercise any statutory or other attorney's lien that I had for the remaining balance, towards the funds that I was holding. I also had several conversations with Mr. Levine to the same effect, and further assured him as well as Mrs. Kranjc that the entire fund would be released upon payment of the balance of my fees and costs in full. Since I was still owed approximately \$11,000, and these funds belonged to Mrs. Kranjc, I felt there was nothing wrong with this and maintain that position today. I have always been prepared and remain prepared today to tender the balance of \$7,807 to Mrs. Kranjc, which would balance out my statement, assuming that my figures are correct. I would appreciate your checking the correctness of these figures with Mr. Levine, and if correct, I will pay the difference forthwith . . . ." (*Ibid.*, emphasis added.)

In January or February 1990 respondent's counsel in this disciplinary proceeding tendered a check to Levine for approximately \$7,800, which Levine deposited in his trust account. (R.T. p. 24.)

The judge found that respondent's acts did not violate Business and Professions Code sections<sup>3</sup> 6068(a) or 6103, based on *Baker v. State Bar* (1989) 49 Cal.3d 804. He concluded that respondent violated section 6106 by misappropriating client funds and former rule 8-101(B)(4), Rules of Professional Conduct<sup>4</sup> by failing to promptly pay Kranjc her funds after her repeated demands. Respondent's failure, after repeated requests, to provide Levine with Kranjc's file violated rule 2-111(A)(2). Although the judge found that respondent violated section 6106 in misappropriating Kranjc's funds, it is clear from the judge's decision as a whole, that he did not find respondent's misappropriation to be malicious or intentionally dishonest. Rather, the judge found that although respondent's violations were wilful, they were the result of gross negligence and mismanagement in handling Kranjc's trust funds. (See decision p. 22.)

The examiner sought review contending that the judge should have found that respondent had an unreasonable belief that Kranjc had given permission to use the trust funds to satisfy his fees. Before us, respondent concedes that his trust account fell below the amount required to be held for Kranjc, though he contends it was the result of inadvertence. However, respondent has not expressly disputed the finding or conclusions of the hearing judge that respondent misappropriated trust funds.

Our review of the record is an independent one. That is, we reweigh the evidence and reach our own determination as to the findings of fact and conclusions which should be made based on that record. (See rule 453, Trans. Rules Proc. of State Bar; *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 333.) [2a] Here, the record consists of both testimony and documentary evidence. A great deal of the evidence bearing on whether respondent had authority to use any portion of Kranjc's \$18,807 in trust funds was disputed testimony: Kranjc and attorney Levine testified that respondent had no authority to use such funds and respondent testified that he did have that authority. We give great weight to the hearing judge who saw and heard that conflicting testimony and reached the conclusion that respondent misappropriated trust funds, although as a result of gross neglect or mismanagement and not through intentional dishonesty. As did the hearing judge, we also consider the documentary evidence and we note that it supports the conclusions of respondent's culpability. Respondent's own July 22, 1985 statement to Kranjc failed to show that respondent started using \$12,000 of Kranjc's trust funds one month earlier. When dealing with Kranjc's new counsel, Levine, respondent never stated that Kranjc had given him authority earlier to use the trust funds for fees. Moreover, in August 1986, when respondent wrote to a State Bar investigator looking into Kranjc's complaint, respondent acknowledged that Kranjc told respondent that she wished to pay respondent's fees directly to him. Although respondent stated his view in that letter that he thought it proper to be protected for his

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

4. Unless noted, all further references to "rules" are to the former Rules of Professional Conduct in effect prior to May 27, 1989.

fees, he failed to state or show clearly or expressly how Kranjc manifested her consent to respondent to use trust funds. Admittedly, respondent never placed in writing the consent he claimed Kranjc had given him.<sup>5</sup> In the circumstances, we conclude that clear and convincing evidence exists that respondent improperly used trust funds, and we also agree with the hearing judge that his misuse of those funds, while not dishonest, was nevertheless a violation of section 6106 as interpreted by our Supreme Court.

Through June 1985, respondent expended nearly \$20,000 of billable time representing Kranjc in pre-trial preparation and at trial and no one has disputed respondent's performance of those services. In addition, respondent expended another \$2,025 in costs. However, no monthly billings were provided that would have allowed the client to object to any of the services or seek to limit his future services on her behalf. From respondent's perspective, he had amassed nearly \$22,000 of billable time and expenses and Kranjc had paid only \$6,000 up to that time. Thus, it was not inappropriate for respondent to seek to be paid the balance of his fees and costs which had been earned up to that time. However, the amount of time and effort was well beyond what he had estimated and he improperly invaded trust funds for payment, as the evidence convincingly shows that he lacked consent from Kranjc. **[2b]** As Kranjc's attorney, respondent had a fiduciary duty to Kranjc and a specific obligation under the Rules of Professional Conduct of the State Bar to safeguard Kranjc's trust property and to timely and properly account for it. (See *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 330, fn. 7.) But unlike the situation in *Sternlieb, supra*, and *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, where the evidence warranted conclusions that only rule 8-101(A) and not section 6106 was violated, the record before us shows support for the judge's conclusion that respondent violated section 6106 through gross neglect or carelessness of his responsibility to oversee client funds.

**[2c]** In neither *Sternlieb v. State Bar, supra*, nor *Dudugjian v. State Bar, supra*, was there any evidence of any extended carelessness or inattention to the trust account as the record reveals here. Over many months respondent's trust account balance dropped repeatedly below the amount he was obligated to hold for Kranjc. All the while, Kranjc continued to pay his fees. As respondent admitted, due to carelessness, he was unaware until State Bar proceedings were well underway that he had collected a considerable overpayment from Kranjc.

In *Giovanazzi v. State Bar* (1981) 28 Cal.3d 465, 474, the Court held that "[t]he mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. This is a serious violation of professional ethics likely to undermine the public confidence in the legal profession. [Citations.]" The Court also observed that even though Giovanazzi's misappropriation stemmed from poor trust account management rather than from intentional acts, "[g]ross carelessness and negligence . . . involve moral turpitude as they breach the fiduciary relationship owed to clients." (*Id.* at p. 475.)

In the more recent case of *Edwards v. State Bar* (1990) 52 Cal.3d 28, the Court again held that evidence that an attorney's trust account balance fell below the amount credited to a client was sufficient to support a wilful misappropriation finding. The Court continued, "[i]f the misappropriation was caused by serious and inexcusable violations of an attorney's duties to oversee client funds entrusted to his care and to keep detailed records and accounts thereof, the violation is deemed wilful even in the absence of deliberate wrongdoing. [Citations.]" (*Id.* at p. 37.)

**[2d]** Considering respondent's extent of inattention to his fiduciary responsibility to Kranjc and

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5. Although respondent cites portions of the record wherein Kranjc and her later attorney, Levine, each had shown less than complete recollection of all events, respondent's testimony was not precise or persuasive on some of the important

events and very significantly it was unaccompanied by documentary proof establishing and manifesting consent by Kranjc for respondent's use of her trust funds.

the lack of adequate explanation or records to overcome the effect of his inadequate trust account balance, we adopt the judge's conclusion that respondent violated section 6106 and misappropriated his client's funds by his gross carelessness.

[3] In addition, as concluded by the judge, respondent breached his trust account responsibilities under rule 8-101(B)(4) to promptly refund Kranjc's funds when reasonable attention to his duties would have made it apparent that Kranjc had overpaid him.

We also conclude that the evidence clearly and convincingly showed that respondent delayed unreasonably in turning over to Kranjc's new counsel, Levine, Kranjc's file after repeated requests to do so. Under the circumstances, we uphold the referee's conclusion that respondent thereby violated rule 2-111(A)(2).

#### B. West Matter.

As to the second count of the charges, respondent was retained in 1982 by Bob West, a band and studio musician, writer and arranger, to file suit on his behalf against the owners of a dog which caused an accident, injuring West and damaging his motorcycle. After some investigation, respondent filed a lawsuit against the dog owners on January 25, 1983, and opened discussions with the owners' insurer, Farmer's Insurance Company, concerning West's claims. Until 1985, West was satisfied with respondent's efforts. During 1986, however, West found it increasingly difficult to contact respondent to discuss the status of his case. His phone calls were not returned promptly and a number of calls were required before West was contacted by respondent. West testified that at times in 1986, he could not get an understandable explanation from respondent as to what steps respondent was taking to move the case along. (R.T. pp. 84-86, 95.) Nevertheless, West testified that as late as March 1986 respondent was still meeting with him and reporting action he (respondent) was taking with the insurer to get it to narrow its demands for medical or other reports so that a firm settlement offer could be made. (R.T. pp. 87-88.) However, by October 1986, West was sufficiently frustrated by the communication problems with respondent to complain to the State Bar. (Exh. D.)

In March or April 1987, West contacted Farmer's Insurance Company directly and was told by the employee handling the claim that the statute of limitations on West's cause of action (apparently the five-year limit to bring the case to trial) was close to expiring and the company was not going to do anything on the case. (R.T. pp. 72-73, 99-100.) Afterwards, West tried to speak with respondent, but was only able to leave a message with respondent's receptionist. According to West, the substance of his message for respondent was that the statute was about to run and he (West) was going to be forced to take some action because of respondent's inaction. (R.T. pp. 320-322.) West called respondent twice in May 1987 and twice in June 1987 without a response. In West's last contact with respondent's office, he was told by respondent's secretary to come to respondent's office if he wanted to pick up his records. (R.T. p. 75.)

Respondent testified that the last letter in his file between respondent and the insurer was dated May 8, 1987. (R.T. p. 273.) The five-year statutory deadline for prosecuting the civil case (Code Civ. Proc., § 583.310) expired in January 1988. Respondent had erroneously calendared the deadline for January 1989. (R.T. p. 288.) By order dated September 9, 1988, the lawsuit was dismissed for failure to bring the case to trial within the prescribed time. (Exh. 5.) Thomas Weindorf, Farmer's Insurance Company's branch claims supervisor, testified that while he recalled few details of this matter, he recalled that it was the only non-denied claim with medical specials in the insurer's files in which the five-year statute was "blown." (R.T. p. 114.)

Respondent did not introduce his file in evidence, but testified it consisted of 279 pages. The file included six letters he wrote to West, one letter from West, eleven letters to doctors, seven letters from doctors, four letters to the insurer, four letters from the insurer, one hundred six pages of West's prior employment records and many bills from doctors, plus x-rays and photographs. (R.T. pp. 264-277.) Respondent testified to some difficulty he had with the case. Although there was no problem of liability, there were damage proof problems. Because West's income from music was cyclical and because West did not want respondent to talk to others in the music industry about West's case, respondent found it

difficult to make a convincing wage loss case. According to West, his wife's medical insurance covered some of the medical bills he incurred. (R.T. p. 311.) Respondent testified that could affect the settlement. (R.T. pp. 299-300.) Also, the insurer kept changing or adding adjusters. Every time respondent was close to settlement with one adjuster, another adjuster would enter the picture and set back progress. (R.T. pp. 273-274.) Finally, West wanted the insurer to bifurcate settlement—settle his medical claims promptly and the rest later. The insurer refused and respondent so told West. (R.T. pp. 277-280.)

According to respondent, he never received any messages from West referring to any statute of limitations problem. (R.T. pp. 290, 295-296, 329.) Although respondent denied ceasing work on West's case, he had no records of any communications to West after May 1987. (R.T. pp. 296-297.)

Although West had some difficulty recalling the precise dates or sequence of events, respondent, too, had difficulty recalling some key events, such as when the last phone call was made by West which respondent returned. (R.T. pp. 300-302.) Respondent testified that in January 1988 he personally went to the insurer's office to see if he could negotiate a settlement in person. At that time, he discovered the statute's expiration. (R.T. pp. 306-307.)

The judge concluded that respondent failed to respond to West's reasonable status inquiries and to keep West reasonably informed, contrary to section 6068 (m), and recklessly failed to perform legal services promptly by not bringing the West lawsuit to trial within the statutory period, in violation of rule 6-101(A)(2). The judge did not find a violation of section 6106 as urged by the examiner because the notice did not include the charge, nor was any motion made to add it.

[4a] Upon our independent review of the record, it is clear that respondent expended substantial efforts for West between the time he was retained in 1982 and 1986. Respondent had built up nearly a 300-page file concerning West's case which included six letters he had written to West and extensive evidence concerning West's previous employment

and medical condition. Until 1985, West was satisfied with respondent's efforts and the evidence shows that even after that time, respondent was attempting to settle this case within the requirements laid down by West and in light of the continued change of insurance adjusters. There is no dispute that respondent miscalculated the five-year period for bringing the matter to trial and there is no evidence that this miscalculation was other than a simple error.

[5] On the other hand, we do find clear and convincing evidence to support the conclusion that respondent failed over about an eight-month period from October 1986 to June 1987 to respond to West's attempts to contact him about the status of his case. Even if respondent did not wilfully fail to return several phone messages which West left with respondent's office staff, respondent did have a duty to answer West's reasonable status inquiries. In the spring of 1987, West learned on his own by direct contact with the insurer that that insurer saw a five-year statute problem. West's inquiry directed to respondent's office about that problem was clearly reasonable under the circumstances and respondent breached his duty under section 6068 (m) by not having in place a system which would bring to his attention such repeated calls to his office so that he could return them.

[4b] Rule 6-101(A)(2) provided that "[a] member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." We find the evidence short of clear and convincing to uphold a violation of this rule based either on any lack of effort by respondent toward West's matter or on account of respondent's miscalendaring of the five-year limitation period. [6] In the recent case of *Calvert v. State Bar* (1991) 54 Cal.3d 765 the Supreme Court held that rule 6-101(A)(2) was breached by the attorney's lack of adequate communication with the client. While we could, under *Calvert*, conclude that respondent's lack of adequate communication with West violated rule 6-101(A)(2), such a conclusion would essentially be duplicative in light of our conclusion that respondent violated his statutory obligation found in section 6068 (m). (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

## II. DISCIPLINE

Respondent was admitted to practice law in Illinois in 1963 and California in 1971. He has no prior discipline. After his admission to practice in California, he had a sole practice except for a brief time during which his son was involved. Respondent's practice has been devoted largely to business litigation and personal injury matters. For one year he taught legal subjects at the University of San Fernando Valley College of Law. He has done a substantial amount of arbitration work for the superior court and the American Arbitration Association. (R.T. pp. 611-612.) Respondent testified that as a result of his experiences with these proceedings he had better insight into his conduct in the Kranjc and West matters. In the Kranjc matter, while stating emphatically that it was his understanding that he had Kranjc's permission to use her funds, he realized that he bore the responsibility for having not documented his file in order to resolve any dispute at the very outset. In retrospect he realized he could have done a number of things differently in that matter such as having immediately sent Kranjc those funds which were not in dispute and placing the entire amount or a portion of it in a trust account pending the outcome of any dispute. He testified that as time went by, he probably got more neglectful about the balance of funds in the Kranjc matter in his trust account, believing that he really did not make the mistake he was charged with because he expected to receive advice from someone at the State Bar as a result of his 1986 exchange of correspondence with the State Bar investigator. (See *ante*.) Respondent stressed his solvent financial condition at the time to make the point that he did not need the money and that none of the Kranjc funds made any difference in his standard of living or his expenses. (R.T. pp. 612-615.)

From the West matter, respondent testified he has learned to be more careful with calendaring. As far as the lack of communication with West, he testified that in 1987, when his father-in-law was ill and died, he was not returning all of the calls from clients that he normally returned prior to that time. He apologized for any calls from clients that he did not return. Respondent closed his testimony in mitigation with the following statement: "I apologize to the Court for anything I did that the Court feels was

wrong. It's not my style. I don't need this. It's something that's extremely embarrassing to me, my family, my friends, particularly after having practiced, I felt, very carefully and very diligently for so many years, as I have. It's something I'll never live down." (R.T. pp. 616-617.)

In mitigation, respondent presented the very impressive testimony of 13 character witnesses. Two of these witnesses were attorneys, seven were clients and four were family members or social acquaintances. Apart from the family members, the witnesses knew respondent for from three to thirty-seven years. Most witnesses were generally familiar with the charges against respondent and the essence of findings of his culpability but did not change their uniformly excellent view of respondent's moral character. Several of the witnesses testified collectively they observed respondent go through a very difficult experience in coping with the serious illness and ultimate death in late 1986 of respondent's father-in-law, to whom he was very devoted; and, at about the same period, an estrangement from his son who refused to let him see or have any contact with his grandchild. (R.T. pp. 471-472, 508, 523, 534, 545, 572-574, 603-604.) However, respondent's character witnesses also testified that he was very responsive to their client needs during that same period. (R.T. pp. 483-484, 501-503, 520, 530-531, 541-542, 595-596.) Indeed respondent's clients testified about a person who was completely devoted to their legal needs, who always communicated with them and who was scrupulous about handling their funds and property.

The judge recommended as appropriate discipline a three-year suspension, stayed and a four-year probation term with conditions, including 60 days on actual suspension. Upon reconsideration, the judge added as a condition that the Kranjc matter be submitted to fee arbitration for a determination of whether restitution is owed to Kranjc and if so, the amount owed.

[1b] In assessing independently the discipline to recommend in this matter, we start with the offenses of which we have found respondent culpable. Respondent's violations of section 6106 and rule 8-101(B)(4) were serious and involved a significant

sum of money. They involved not only his misappropriation of Kranjc's trust funds to satisfy his fee but also his disregard of his trust account responsibilities. This was no technical or merely inadvertent violation of these most important provisions designed to safeguard a client's funds against intentional loss. Indeed, respondent's disregard of his duties to Kranjc started even before he invaded the trust funds for he never sent her periodic billings to show that his fees were increasing over his earlier estimates. When he finally did bill Kranjc, it was after he had performed almost all services and after he invaded the trust funds—an invasion he never revealed on that bill or any other document. Looking to the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds."), as guidelines (see, e.g., *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 233), respondent's culpability of violation of rule 8-101(B)(4) alone would warrant at least a three-month actual suspension from the practice of law irrespective of mitigating circumstances. Concerning the West matter, the standards provide that respondent's violation of section 6068 (m) could, by itself, result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. Under the standards, the specific discipline to recommend is necessarily affected by the presence of and the balance of aggravating and mitigating circumstances. (Std. 1.6.)

In aggravation, the judge found that respondent's misconduct evidenced multiple acts of misconduct, citing standard 1.2(b)(ii). We agree. As the second instance of aggravation, the judge cited significant harm to respondent's clients caused by his misconduct. The judge determined that Kranjc had to retain an attorney and file a complaint against respondent to recover her funds and West's cause of action was lost. (See std. 1.2(b)(iv).) We do not view all of the harm to the clients as having been caused by respondent for the following reasons. First, the record shows that Kranjc retained her subsequent counsel to appeal from the adverse judgment against her. She needed to do this whether or not respondent committed any ethical violations. However, Kranjc's new counsel had to devote considerable effort to attempting to obtain Kranjc's file and funds. [7a] We do not agree with the examiner's urging us to find that respondent misled the hearing judge. Persisting in

his belief, in the circumstances of this record, does not show that respondent should be found to be deceitful. (See *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

[8] In the West matter, the client's cause of action appears to have been lost by respondent's miscalendaring. However, it is possible that respondent's failure to communicate with West in late 1986 and 1987 prevented respondent from earlier discovering his calendaring mistake. The judge implicitly recognized this in his decision and we are given no good reason to disregard this aspect of harm to West.

The hearing judge correctly recognized the many factors in mitigation. Respondent had an extensive period in practice with no prior record of discipline. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259.) In addition, respondent presented "an extraordinary demonstration of good character" attested to by a wide range of persons, most of whom were generally aware of the extent of respondent's misconduct. (Std. 1.2(e)(vi).) [7b] While respondent persisted in asserting his belief of innocence of fundamental misconduct, he nevertheless showed in his testimony recognition of several ways in which he could have and would handle client matters more professionally in the future. [9] However, respondent's restitution to Kranjc was most belated and occurred after the start of these disciplinary proceedings, and was not itself entitled to any significant weight in mitigation. (*In re Billings* (1990) 50 Cal.3d 358, 368.)

[10] There is no doubt that the illness and ultimate passing of respondent's father-in-law and his estrangement from his son and grandchild had very strong effects on him, but we agree with the hearing judge that the evidence is not clear that it had a noticeable effect on his handling of the Kranjc and West matters, particularly in light of the testimony of his character witnesses who described the very responsive service they received from respondent throughout, including at the time he was suffering stress. Moreover, respondent's own testimony did not convincingly show what role these stress factors played; for at one point, he did not know whether

these factors affected him and could only "surmise" that they did based on their timing. (R.T. pp. 612-613.) Further, these factors could never satisfactorily explain respondent's long delay either in recognizing Kranjc's overpayment nor in refunding it to her. Therefore, we agree with the hearing judge's assessment in assigning some mitigating weight to these personal stress factors but not giving them greater weight which would have been appropriate had expert testimony been presented to show clearly the nexus between these difficulties and respondent's disregard of his duties to Kranjc and West. (See decision pp. 19-20.)

In arriving at his recommendation of a three-year stayed suspension and sixty days actual suspension, the judge looked at a number of cases in which the discipline has ranged widely for a wide variety of acts of misappropriation of funds. As we discussed earlier, although respondent's misdeeds were more serious than those found in *Sternlieb v. State Bar*, *supra*, 52 Cal.3d 317, we find some of the factors in mitigation in this case similar to those in *Sternlieb* where the court ordered a 30-day actual suspension as a condition of a one-year stayed suspension. For example, both attorneys had excellent character references and respondent had practiced for several years longer without prior discipline than had Sternlieb. In *Sternlieb*, however, the attorney's mishandling of trust funds was the only violation and that mishandling amounted only to a violation of rule 8-101. Here, respondent also violated section 6106 in the Kranjc matter and failed to communicate reasonably in the West matter.

In another recent case, *Kelly v. State Bar* (1991) 53 Cal.3d 509, the Supreme Court ordered a three-year stayed suspension on condition of a 120-day actual suspension for two matters of misconduct. In one matter, Kelly had placed \$2,000 of trust funds in a personal account and had written two insufficiently funded checks on that account. In the other matter, Kelly had also committed a trust account violation and had wilfully, but not dishonestly, misappropriated \$750. In reducing the former review department's one-year actual suspension recommendation, the

Supreme Court took into account circumstances similar to the case before us: Kelly's lack of acts of deceit, that his failure to remit the \$750 promptly was likely the result of negligent acts and misunderstanding of his duties to his client rather than an intent to cause client harm, and his 13-year unblemished record of law practice. Here, respondent's trust account violation and misappropriation affected only one client, albeit more seriously than in *Kelly*, but respondent appears to have presented slightly more mitigating circumstances.

[1c] Considering the guidance of both *Sternlieb* and *Kelly*, we believe that the appropriate discipline is that recommended by the judge with two exceptions: 1) that we deem a three-year probation period rather than a four-year period to be sufficient and 2) we have concluded that a 90-day actual suspension is warranted together with the usual requirement for such a recommendation that respondent be directed to comply with rule 955, California Rules of Court.

### III. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent, Joel M. Ward, be suspended from the practice of law in this state for a period of three (3) years; that execution of said suspension be stayed; and that respondent be placed on probation for said period of three (3) years on the following conditions:

- 1) that during the first ninety (90) days of the period of probation, respondent shall be actually suspended from the practice of law in this state; and
- 2) that during the period of probation, respondent shall comply with paragraphs 2 through 12 of the conditions of probation recommended by the hearing judge in his amended decision filed December 31, 1990.

We further recommend that within a period of one year of the effective date of the Supreme Court's order, respondent be required to take and pass the California Professional Responsibility Examination

administered by the Committee of Bar Examiners of the State Bar of California. We also recommend that costs of this proceeding be awarded the State Bar.

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

We concur:

PEARLMAN, P.J.

NORIAN, J.