STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT G

A Member of the State Bar

No. 89-O-12350

Filed August 18, 1992

Reconsideration denied, September 22, 1992 (see separate opinion, *post*, p. 181)

SUMMARY

Respondent wilfully failed to perform legal services competently in a probate case by failing to ensure that his client knew the amount of state inheritance tax assessed against the client. Respondent's misconduct resulted in the client suffering three years accumulated interest and penalties on unpaid inheritance taxes. Finding several mitigating circumstances and no aggravating circumstances, the hearing judge ordered that respondent be privately reproved with conditions, including restitution to the client and passage of the California Professional Responsibility Examination. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review, contending that his neglect, although regrettable, was not a wilful violation of the Rules of Professional Conduct. The review department concluded that respondent's repeated failure to inform his client regarding the inheritance tax obligation constituted a wilful violation of the rule of professional conduct regarding attorney competence. The review department agreed with the hearing judge that a private reproval, with a requirement of restitution, was the appropriate discipline in light of the misconduct and the surrounding circumstances. However, the review department declined to require respondent to pass the professional responsibility examination.

COUNSEL FOR PARTIES

For Office of Trials: Bruce H. Robinson

For Respondent: Donald Masuda

HEADNOTES

[1 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
410.00 Failure to Communicate

An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. Such misconduct need not involve deliberate

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

wrongdoing or a purposeful failure to attend to the duties due to a client, and the attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. Where respondent received several notices regarding the inheritance taxes owed by his client in a probate matter, and did not notify his client of any of them, and the client was reasonably relying on respondent to provide her with such notice, respondent failed to perform legal services competently in wilful violation of the applicable Rule of Professional Conduct.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
844.31 Standards—Failure to Communicate/Perform—No Pattern—Reproval
844.33 Standards—Failure to Communicate/Perform—No Pattern—Reproval
Private reproval was appropriate discipline for isolated and relatively minor incident of failure to perform services competently which occurred early in respondent's career and was followed by respondent's candor and cooperation, improvement in office procedures, and voluntary participation in State Bar's ethics course.

[3] **171 Discipline—Restitution**
Most Supreme Court cases requiring restitution have involved misuse of client funds or unearned fees. Nevertheless, where client owed interest on inheritance taxes which were not timely paid due to attorney's failure to perform services competently, and attorney offered to make restitution in amount of such interest as condition of discipline, restitution requirement was appropriate in light of the rehabilitative purposes that it would serve.

[4 a, b] **173 Discipline—Ethics Exam/Ethics School**
Since 1976 the Supreme Court has required that all attorneys who are suspended from the practice of law in a disciplinary proceeding take and pass the Professional Responsibility Examination. In the case of reprovals, however, an order that the reproved attorney take and pass the examination should not be imposed automatically. Conditions attached to a reproval may only be imposed based on a finding that protection of the public and the interests of the attorney will be served thereby. Where a reproved respondent had already taken steps to insure that his misdeeds would not reoccur, and taking the examination would not further assist him in recognizing his failings and preventing future misconduct, the examination requirement was not an appropriate condition of the reproval.

ADDITIONAL ANALYSIS

Culpability

Found

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

Mitigation

Found

735.10 Candor—Bar
745.10 Remorse/Restitution
750.10 Rehabilitation
791 Other

Discipline

1051 Private Reproval—With Conditions

Probation Conditions

1021 Restitution

OPINION

NORIAN, J.:

Respondent[1] in this matter has requested that we review a hearing judge's decision that found that he had neglected a client in a probate case, which resulted in the client suffering three years accumulated interest and penalties on unpaid inheritance taxes. Finding several mitigating circumstances and no aggravating circumstances, the hearing judge ordered that respondent be privately reproved with conditions.

Respondent contends his neglect was regrettable, but was not a wilful violation of the Rules of Professional Conduct. The hearing judge concluded that in failing to ensure that his client knew of a state inheritance tax assessed against the client, respondent recklessly failed to perform legal services competently and therefore wilfully violated former rule 6-101(A)(2) of the Rules of Professional Conduct.[2] We have independently reviewed the record and conclude, for the reasons which follow, that respondent repeatedly failed to perform legal services competently in wilful violation of rule 6-101(A)(2) and that a private reproval, with the added duty of restitution, is the appropriate discipline in light of the misconduct and the surrounding circumstances.

FACTS AND CONCLUSIONS

Findings of Fact

We adopt the facts as found by the hearing judge and briefly summarize them here. Alice B.'s mother died on May 28, 1982, and, as sole beneficiary and executor, Alice B. retained respondent in June 1982 to assist in the probate of the estate.[3] Alice B. was distraught over her mother's death and relied on respondent regarding all matters arising from the probate of the estate. Respondent prepared all the documents for processing the estate, including those filed over the signature of Alice B. as executor.

On or about March 18, 1983, respondent met with Alice B. regarding the distribution of the estate and she paid respondent his fees. Respondent had orally advised Alice B. that she would owe inheritance taxes to the state, but did not confirm this advice in writing. The inheritance tax referee filed his report on the estate with the superior court on October 12, 1983, and copies for Alice B. and respondent were sent to respondent's office. Respondent neither contacted Alice B. nor delivered a copy of the report to her. No objection was filed to the report within the required ten days and the superior court issued an order on October 27, 1983, fixing the inheritance tax owed by Alice B. at $818. This order was served on respondent, with Alice B.'s copy likewise sent to respondent's address. Respondent did not contact Alice B. concerning the order or send her a copy of it.

The Controller of the State of California (Controller) wrote to respondent on January 9, 1987, concerning the unpaid inheritance tax, indicating the tax and interest then due. Respondent did not contact Alice B. at this point. The Controller's office wrote to respondent again on October 7, 1987, indicating that the balance due was $1,273.57 and that the matter would be sent to collection. A copy of this letter was sent to Alice B. at her home address. This was the first indication to Alice B. that she owed a settled amount of inheritance tax to the state. By 1987, Alice B. was suffering financial difficulties due to her husband's catastrophic illness and was unable to pay the tax. The Controller's office recorded an abstract of judgment against Alice B.'s property in October 1989. Alice B. paid the amount

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1. In light of our disposition of this matter as a private reproval, we omit respondent's name from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

2. All further references to rule 6-101(A)(2) are to the former rule in effect from October 23, 1983, until May 26, 1989, which provided: "A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently."

3. Respondent was admitted to practice law in California in 1981. He testified that this was his first probate case as an attorney, although he had assisted other attorneys in probate matters as a legal assistant after graduating from law school.

of the unpaid tax ($818) in January 1990, but has not paid any of the interest due and the judgment lien remains against her property.

After being contacted by Alice B., respondent agreed to pay the accrued interest attributable to his oversight. Alice B. retained another attorney and the matter remains in dispute. Respondent has not paid any of the interest to date.

The Hearing Judge's Conclusions and Disposition

The notice to show cause in this matter charged that respondent misrepresented to Alice B. that all taxes on the estate had been paid and that respondent thereafter failed to competently complete the legal services for which he was hired.[4] The hearing judge concluded that respondent had not misled his client, but had failed to perform competently.

The hearing judge found that Alice B.'s testimony and actions were consistent with the findings that she relied on respondent's advice as to her legal obligations, was unaware of the tax assessment and first learned of her delinquent tax bill in October 1987. The judge found that respondent was obligated to advise Alice B. of the tax assessment, particularly given respondent's knowledge that Alice B. remained emotionally distraught over her mother's death and relied on respondent's assistance regarding the estate. The hearing judge concluded that respondent's failure to ensure that his client received this essential information was a reckless failure to perform services competently and violated rule 6-101(A)(2). The judge did not find that there was a failure to communicate after October 1987, concluding that Alice B.'s testimony was not reliable on that point.[5]

The hearing judge found as mitigating factors respondent's lack of prior discipline since his admission to practice law in California in 1981, his candor and cooperation, the isolated nature of respondent's misconduct, his recent voluntary participation in the State Bar's course on ethics (Attorney Remedial Training School), and respondent's improvement in his office procedures to prevent recurrence of the misconduct. No aggravating factors were found. The hearing judge ordered that respondent be privately reproved with two conditions: passage of the California Professional Responsibility Examination (CPRE) and restitution of $455.57 plus interest from date of the hearing judge's decision, to repay the interest on inheritance tax owed by client attributable to respondent's misconduct.

DISCUSSION

Failure to Perform Legal Services Competently

Respondent argues that his conduct was not wilful misconduct. His contention is that he told Alice B. that she would owe inheritance tax, that she signed the inheritance tax declaration form, and that she received a copy of the judgment of final distribution on waiver of accounting, all of which gave her fair warning that she owed inheritance tax of an undetermined amount sometime in the future. Respondent's "omission" in giving his client notice of the tax assessment was admittedly faulty but not, in respondent's view, a wilful violation of his duty to provide Alice B. with competent representation.

The examiner responds that the standard for a wilful violation of the Rules of Professional Conduct is as follows: "the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." (*King* v. *State Bar* (1990) 52 Cal.3d 307, 313-314, citing *Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 792.) He underlines

4. The first count of the two-count notice to show cause, and the allegation in the Alice B. matter that respondent misrepresented to the superior court that all taxes had been paid, were dismissed prior to trial on the examiner's motion due to insufficient evidence to support those charges.

5. The hearing judge found that respondent ceased to communicate further with Alice B. after he was contacted by an attorney who was representing Alice B. However, the exhibits on which the judge relied for this finding (finding number 18) were not offered into evidence by the examiner and thus are not part of the record. Nevertheless, we adopt the finding because respondent's testimony on this point supports the finding.

the three instances (the tax referee's report, the superior court order and the January 1987 letter from the Controller's office concerning the delinquent account) on which respondent was given notice of the taxes owed while his client remained in the dark. The examiner contends that given these reminders, respondent's failure to inform Alice B. of the tax assessment was a wilful breach of rule 6-101(A)(2). The examiner does not assert that culpability exists for any of the charges that were dismissed by the hearing judge and after independently reviewing the record, we adopt those conclusions.

[1a] An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. (*McMorris* v. *State Bar* (1981) 29 Cal.3d 96, 99; *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 932.) Such misconduct need not involve deliberate wrongdoing (*ibid.*) or a purposeful failure to attend to the duties due to a client. (*King* v. *State Bar, supra*, 52 Cal.3d at p. 314.) Contrary to the contentions of respondent, an attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. (*Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 188; *Van Sloten* v. *State Bar, supra*, 48 Cal.3d at p. 932.)

An attorney's duty to the client can extend beyond the closing of the file. In *Kapelus* v. *State Bar, supra*, 44 Cal.3d 179, 187-188, the attorney failed to provide his client with a copy of an appeals board decision, which the attorney contended ended his participation in the case, did not respond to the client's subsequent calls and letter regarding the case and did not cooperate with the client's new counsel. The attorney contended that his acts were the result of mere negligence. That assertion was rejected by the Court, which held that the numerous opportunities for Kapelus to respond to his former client and his new attorney demonstrated Kapelus's wilful violation of his professional duties. (*Ibid.*) Further, the Court found that such repeated misconduct, even if not found to be wilful, still constituted grounds for discipline. (*Id.* at p. 188.)

[1b] In this case, there is sufficient evidence to show wilfulness similar to that present in the *Kapelus* case. Respondent received three notices and did not act.[6] As the hearing judge found, Alice B. reasonably relied on respondent to safeguard her interests and to advise her regarding the probate of her mother's estate. Respondent's obligation included providing her with notice of the determination of the taxes she owed. The fact that all notices addressed to Alice B. regarding the inheritance taxes were sent only to respondent itself proves the obligation he undertook. Respondent was reminded on repeated occasions of the inheritance taxes owed and he repeatedly failed to advise his client of them. As a result, respondent failed to perform legal services competently in wilful violation of rule 6-101(A)(2).

Discipline

[2] As noted above, the hearing judge concluded a private reproval was the appropriate discipline based on the misconduct and the mitigating circumstances. We agree. As the hearing judge found, the misconduct was an isolated and relatively minor incident early in respondent's career. Respondent's candor and cooperation, improvement in his office procedures, and voluntary participation in the State Bar's course on ethics indicate that he has recognized his misconduct and has taken steps to insure that it does not reoccur.

[3] The hearing judge also concluded that it was appropriate to require, as conditions attached to the reproval, that respondent make restitution to Alice B. of the unpaid interest that had accrued up to the time she became aware of the amount (October 1987), and take and pass the CPRE. Most Supreme Court cases requiring restitution have involved misuse of client funds or unearned fees. (*Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1044.) Nevertheless, respondent

6. Presumably respondent closed Alice B.'s file sometime after he was paid in March 1983. That activity could have served to remind respondent of the tax assessment as well. However, the record below is not clear concerning respondent's office practice in this regard.

offered to pay the interest to Alice B. and indicated to us at oral argument that he "is and always has been willing to pay" restitution and, indeed, would stipulate to a restitution order. In light of respondent's position and in light of the rehabilitative purposes that will be served by requiring restitution, we conclude that restitution is appropriate in this case.

[4a] We do not, however, find the requirement that respondent pass the CPRE to be a necessary condition of his reproval. Since 1976 the Supreme Court has required that all attorneys whose conduct so far deviates from the ethical norms as to warrant the serious step of suspension from the practice of law, take and pass the Professional Responsibility Examination as a condition of resuming or continuing practice. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891 ["[T]he examination will cause the erring member of the bar to reevaluate and reflect upon the moral standards of the profession, and thereby more deeply appreciate his responsibilities to society as a whole. In short, although we cannot insure that any attorney will in fact behave ethically, we can at least be certain that he is fully aware of what his ethical duties are."].)

[4b] In the case of reprovals, which do not involve suspension from practice, an order that the reproved attorney take and pass the examination should not be imposed automatically. In fact, the requirement of taking the examination, as with any condition attached to a reproval, may only be imposed based on a finding "that protection of the public and the interests of the attorney will be served thereby." (Cal. Rules of Court, rule 956(a).) The protection of the public and the interests of the attorney are served when the examination will further the purpose of a disciplinary proceeding, which, as articulated in *Segretti*, is designed to rehabilitate rather than penalize. (*Segretti* v. *State Bar*, *supra*, 15 Cal.3d at pp. 890-891.) In the present case, respondent has taken steps to insure that his misdeeds will not reoccur. Given his efforts, taking the CPRE or PRE would not further assist respondent in recognizing his failings and preventing future misconduct.

DISPOSITION

For the foregoing reasons, it is hereby ORDERED that respondent be privately reproved. As a condition of his reproval, imposed pursuant to rule 956(a), California Rules of Court, respondent is ORDERED to make restitution within three (3) months of the effective date of this reproval to Alice B., or to the Client Security Fund to the extent it has paid Alice B., in the amount of $455.57, plus interest at the rate of ten (10) percent per year from the effective date of this reproval until paid, and to furnish satisfactory proof of restitution to the Probation Department of the State Bar Court in Los Angeles within thirty (30) days after making the restitution.

We concur:

PEARLMAN, P.J.
STOVITZ, J.