

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

GEORGE NUNEZ

A Member of the State Bar

No. 89-O-10972

Filed August 24, 1992

SUMMARY

Respondent entered into a written contingent fee agreement to represent a client in an action against the client's former employer, a school district. Although the fee agreement provided that respondent would advance costs, respondent received \$2,000 from the client to cover part of the cost of a transcript of her administrative hearing, a sum which respondent later contended was for advanced fees, not costs. After rendering some services, respondent took no further action, insisting that his client first had to advance him the balance of the cost of securing transcripts.

The hearing judge found that respondent failed to communicate effectively with his client, did not provide competent legal services to her, failed to keep the advanced costs in a trust account, did not return the client's file promptly upon demand, and withdrew from representation without safeguarding his client's interests. The judge dismissed a separate count of the notice charging respondent with failing to pay a medical lien, on the grounds that the lien had been discharged by the client's bankruptcy, and respondent did not have a duty to communicate with the medical lienholder. The judge recommended that respondent be suspended for six months, stayed, on conditions including a one-year probation, actual suspension for 60 days and restitution to the client. (Arthur H. Bernstein, Judge Pro Tempore.)

On respondent's request for review, the review department on its own motion modified the hearing judge's decision with respect to the dismissal of the medical lien count. The review department held that respondent did have a duty to communicate with the medical provider, arising from the fiduciary obligation of the medical lien. However, it upheld the dismissal because the notice to show cause did not charge a failure to communicate.

As to the wrongful termination count, the review department sustained the hearing judge's essential findings and conclusions, and rejected respondent's contention that as a matter of law, he could not be found culpable of failing to communicate with a client after he had effectively abandoned the client. After considering respondent's serious misconduct and harm to the client, tempered by respondent's impressive evidence of mitigation, and in light of comparable case law, the review department adopted the hearing judge's recommended discipline as to stayed suspension and probation, but reduced the recommended actual suspension to 30 days.

COUNSEL FOR PARTIES

For Office of Trials: Julie W. Stainfield

For Respondent: Tom Low

HEADNOTES

[1 a, b] **166 Independent Review of Record**

Where review is sought, the review department must independently review the entire record. Accordingly, the review department reviewed propriety of hearing judge's dismissal of one count even though examiner did not request such review.

[2] **106.20 Procedure—Pleadings—Notice of Charges**

410.00 Failure to Communicate

430.00 Breach of Fiduciary Duty

An attorney has a fiduciary obligation toward a medical provider which holds a medical lien arising from advancement of funds to the attorney's client, and the attorney therefore has a duty to communicate with the provider as to the subject of the fiduciary obligation. However, where respondent was not charged in the notice to show cause with failing to communicate with the medical provider, respondent could not be found culpable on that basis.

[3] **163 Proof of Wilfulness**

165 Adequacy of Hearing Decision

204.10 Culpability—Wilfulness Requirement

In order to find an attorney culpable of a rule violation, the attorney's misconduct must be found to have been wilful. Where no such finding was expressly set forth in hearing judge's decision, review department deemed it to have been made based on hearing judge's conclusions.

[4 a, b] **165 Adequacy of Hearing Decision**

166 Independent Review of Record

Where, in weighing conflicting evidence, hearing judge gave greater credence to complaining witness than to respondent based on witness's better record keeping and trustworthiness and on lack of documents to support respondent's decisions, review department was required to accord great weight to hearing judge's credibility assessments, and would not disregard hearing judge's findings without sufficient reason.

[5] **213.10 State Bar Act—Section 6068(a)**

214.30 State Bar Act—Section 6068(m)

410.00 Failure to Communicate

Where respondent did not respond to client's reasonable inquiries and missed appointments with client both before and after effective date of statute regarding duty to communicate with clients, respondent was culpable of violating attorney's oath and duties, as to conduct before such effective date, and of violating statutory duty to communicate, after such effective date.

- [6 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where hearing judge properly accepted client's testimony that advanced funds were for transcript costs and not for respondent's fees, and where applicable written fee agreement provided for respondent to advance costs, respondent's failure to pursue litigation because of client's failure to advance cost of transcripts constituted both a wrongful withdrawal from employment and a wilful violation of duty to perform legal services competently. Respondent was also culpable for failing to deposit the advanced funds in a trust account and for failing to return the client's file promptly upon demand.

- [7] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
410.00 Failure to Communicate

It is not inherently inconsistent to conclude that an attorney who withdrew from employment and failed to perform legal services competently is also culpable of failing to communicate with the client thereafter.

- [8 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
120 Procedure—Conduct of Trial
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights

Where notice to show cause could have been more clearly phrased with respect to duration of respondent's alleged misconduct, but hearing judge correctly concluded after colloquy at trial that it encompassed misconduct prior to as well as after a certain date, and where hearing judge prohibited introduction of evidence as to respondent's conduct prior to such date only after respondent had had ample time to present such evidence, and where respondent gave no offer of proof or explanation regarding any additional evidence on such issue, respondent's claims of denial of adequate notice of charges and fair opportunity to present evidence were without merit.

- [9a-c] **214.30 State Bar Act—Section 6068(m)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
710.10 Mitigation—No Prior Record—Found
745.10 Mitigation—Remorse/Restitution—Found
765.10 Mitigation—Pro Bono Work—Found
844.12 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension

In matters involving abandonment of a single client by an attorney with no prior record of discipline, discipline imposed by Supreme Court has ranged from no actual suspension to 90 days of actual suspension. Where respondent's misconduct was serious, harmed client, and included trust account violation as well as abandonment and failure to communicate, but respondent presented impressive mitigating evidence, including services to disadvantaged clients and to minority community, and respondent expressed sincere aspiration not to be involved in disciplinary proceedings again, review department recommended actual suspension of 30 days, with stayed suspension of six months and one year of probation.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
- 214.31 Section 6068(m)
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 410.01 Failure to Communicate

Not Found

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

Aggravation

Found

- 582.10 Harm to Client
- 691 Other

Mitigation

Found

- 740.10 Good Character

Discipline

- 1013.04 Stayed Suspension—6 Months
- 1015.01 Actual Suspension—1 Month
- 1017.06 Probation—1 Year

Probation Conditions

- 1021 Restitution
- 1024 Ethics Exam/School

Other

- 1091 Substantive Issues re Discipline—Proportionality
- 1092 Substantive Issues re Discipline—Excessiveness

OPINION

STOVITZ, J.:

This case illustrates the need for attorneys to insure that all aspects of an attorney-client fee agreement are integrated into a single writing, that the attorney handles client payments consistently with the agreement, that the attorney responds in a timely manner to the client's reasonable status inquiries and that the attorney does not improperly cease work for the client. Respondent, George Nunez, admitted to practice law in California in 1976 and with no prior record of discipline, has requested our review of a decision of a hearing judge pro tempore of the State Bar Court finding him culpable of several acts of professional misconduct toward a client involving failure to deposit in a trust account funds advanced for purchase of a hearing transcript, failure to communicate with his client and ultimate abandonment of her case and failure to return promptly his client's file. The judge recommended that respondent be suspended for six months, stayed on conditions including a one-year probation, actual suspension for sixty days and restitution to his client.

Respondent contends that two findings of the hearing judge are not supported by the evidence, that the judge committed procedural error and that the discipline is excessive. Respondent urges that, at most, we impose a public reproof. The State Bar examiner urges us to adopt the hearing judge's decision and suspension recommendation, noting her agreement with respondent's position as to the lack of support for two of the hearing judge's findings. On our independent review of the record, we agree with respondent that the record does not support the two disputed findings below but we conclude that those findings are not significant to the issues of culpability. We do find clear and convincing evidence of culpability of ethical violations found by the hearing judge and we find those violations to be serious, but tempered by impressive evidence of mitigation. Guided by comparable decisions of the Supreme Court and this department, we adopt the hearing judge's recommendation of stayed suspension and probation, but we believe that a 30-day actual suspension rather than one of 60 days is sufficient discipline.

I. THE DISMISSED HENDERSON COUNT.

We deal first with a charge of the notice to show cause dismissed by the hearing judge, involving a client named Henderson. Another lawyer represented Henderson and filed a personal injury suit on her behalf. Henderson changed attorneys and hired respondent in 1984. Respondent was notified no later than 1984 that the California Department of Health Services Medi-Cal program ("Medi-Cal") held a lien for about \$3,020. Respondent answered Medi-Cal's periodic pre-settlement status inquiries. When the case settled, a dispute arose as to the first lawyer's fee. At about this time, Henderson and her husband suffered financial difficulties and filed a bankruptcy petition. Respondent understood that the bankruptcy would "wipe out" the Medi-Cal lien. He placed all settlement funds in a trust account and after the dispute with the first attorney was resolved, he distributed all funds to Henderson and she was ultimately satisfied with the distribution. Believing that all had been taken care of and since he was holding no funds, respondent failed to answer two certified mail letters in 1989 from Medi-Cal concerning the personal injury case proceeds. Medi-Cal did not pursue the matter and the hearing judge found no clear and convincing evidence of culpability of the charges of failure to pay promptly the funds Henderson was entitled to receive or of failure to pay the Medi-Cal lien.

Labeling respondent's failure to answer the Medi-Cal letters "inconsiderate," the judge correctly found no attorney-client relationship between respondent and Medi-Cal. However, the judge therefore concluded that respondent had no duty to have communicated with Medi-Cal. [1a] We must independently review the entire record of State Bar proceedings in which our review is sought. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638, fn. 1.) [2] While we believe that respondent occupied a fiduciary obligation toward Medi-Cal as to its advancement of funds to Henderson and its lien (see *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156) and therefore had a reasonable duty to communicate with Medi-Cal as to the subject of the fiduciary obligation, we uphold the hearing judge's finding solely on the ground that the notice to show cause did not charge respondent with

a failure to communicate with Medi-Cal. No culpability could be assigned therefore to this aspect of respondent's conduct. (See, e.g., *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 925-926.) [1b] We note also that the examiner has not sought review of the hearing judge's decision of dismissal in the Henderson matter. Accordingly, we adopt such dismissal.

II. THE MYERS COUNT.

A. Essential Charges and Facts.

We now address the one disputed count in this proceeding. Respondent was charged with having failed to: complete legal services for his client, communicate with her, deliver her papers and property and comply with the trust account rules as to \$2,000 in funds he received from his client for transcripts. The notice to show cause also charged respondent with misappropriation of those funds.

Although the hearing judge's findings are lengthy and detailed, the essential facts are not complex. Ms. Lydia Myers was a bus driver for the Kings Canyon Unified School District (District) in rural Fresno County and a permanent, classified, District employee. In November 1983, the District suspended Myers interimly (with pay) from her position and charged her with careless bus operation and other inappropriate conduct.

Myers had been referred to respondent by a mutual friend. Myers and respondent discussed his representing her at the upcoming District disciplinary hearing, but they decided that Myers could be represented at that hearing by her employee organization, California School Employees Association (CSEA).

In February 1984, after conducting its hearing, the District found Myers culpable of grounds for discipline, suspended her without pay for a month, reprimanded her and demoted her to a part-time

employee. She later resigned from the District deeming the few hours per day of low-level work offered her as uneconomic given the commuting time and expense.

Myers felt that she did not have a fair District hearing and she wanted respondent to represent her "in court to go against the school board decision." In about March 1984, after several meetings, respondent agreed to take Myers's case. Respondent was aware of Myers's limited education and strained finances. On March 21, 1984, he presented her with a retainer agreement which she signed. It described the subject matter of respondent's representation of Myers simply as "dismissal of employment." It called for a 50 percent contingent attorney fee, i.e., only if Myers recovered would respondent get a fee which would be 50 percent of the recovery amount.¹ Moreover, the agreement required respondent to advance all costs of litigation deemed "reasonably necessary." Only if there was a "recovery or judgment" did Myers have to reimburse respondent advanced costs.

Myers told respondent that her District hearing had been reported. She testified that respondent agreed that it would be a good idea to get the transcript which would cost about \$2,000. Respondent asked Myers for that sum which she borrowed from friends and paid him. Tina Long, Myers's half-sister, testified that she overheard a conversation between Myers and respondent at a restaurant when respondent was discussing the fee and costs arrangement for Myers's representation. Long heard respondent state that he needed Myers to advance money. Long asked respondent why, since she understood respondent was taking the case on a contingent fee basis. Long testified that respondent told Long that the advanced sums were for the transcript of the District hearing.

On March 20, 1984, respondent gave Myers a receipt for the \$2,000, stating it was for "fees received."² Respondent placed these funds in his

1. Myers testified that respondent earlier proposed a 40 percent contingent fee. She signed the agreement for the higher fee considering that it was still "worth it." At the time of this agreement, state law required attorney-client contingent fee contracts to be in writing. (Bus. & Prof. Code, § 6147.)

2. Respondent used a form of receipt with pre-printed categories. The only choices were "trust funds received," "costs recovered" or "fees received." A space for a memorandum was blank. (Exh. D.)

general, non-trust bank account. At the State Bar Court trial, he testified that Myers's \$2,000 was for fees, as he had agreed with Myers to a fee of \$5,000 before the written contingent fee agreement was signed and he testified that the written agreement did not change that.³ Admittedly respondent had nothing in writing supporting his claim to a fixed fee and he never billed Myers for the \$3,000 difference after she advanced \$2,000 which she had testified was for the reporter's transcript, not fees. Respondent testified that he was not asked by Myers in 1984 to get the reporter's transcript, but his testimony was equivocal on whether or not the transcript would have been useful to him at that time. It is undisputed that respondent did not ever order the transcript. Respondent denied that he had spoken to Long about requesting money for the District hearing transcript.

There is no dispute that early in his handling of the case, respondent performed considerable services for Myers. He estimated that he had invested about \$1,500 in investigator fees and filing and service costs. He filed a tort claim with the District and after it was denied, on October 30, 1984, he filed an action for wrongful termination against the District in Fresno County Superior Court. This suit prayed for Myers's reinstatement and damages exceeding \$45,000. In 1985, the District answered the suit and respondent prepared responses to discovery which the District had propounded to Myers.

In December 1985, the District moved for summary judgment on the ground that Myers failed to seek judicial review of the District's personnel action under section 1094.5 of the Code of Civil Procedure (administrative mandamus) and mandamus review was a jurisdictional prerequisite to pursuing the wrongful termination action. The District was correct insofar as Myers's failure to pursue administrative mandamus prevented a cause of action from surviving as to issues bound up in the

District's administrative proceeding.⁴ Rather than have a summary judgment hearing, respondent stipulated with the District's lawyer that respondent would dismiss Myers's suit without prejudice and Myers would seek administrative mandamus before proceeding with any other action.

The respective testimony of Myers and respondent was in conflict as to what respondent told Myers about her case. Although Myers testified that she received a few contacts from respondent during the years 1985 to 1988, some of which she could not understand, her regular phone calls during those years seeking progress and status information went unreturned and a number of appointments Myers set up with respondent's office staff were canceled or respondent did not show up for them. According to Myers, in 1988, she learned from the State Bar, not respondent, of the 1986 dismissal of her wrongful termination action. In August 1988, she was able to meet with respondent. He told her that the judge ruled that she did not have a case, but she should not worry as respondent could go against the CSEA; however, it would take several more years.

Respondent testified: he was aware that Myers's education was limited and he tried to keep his explanations simple. He kept Myers adequately and clearly informed of all major steps in her case. Early on he advised her that her damages claim was weak and told her so in advance of the summary judgment motion, explaining that the judge was going to determine if "she had a case." He first did research in January 1986 on the jurisdictional issue of failure to pursue administrative mandamus. Soon thereafter, he realized that the District's counsel had a good legal position. Respondent told Myers later in 1986 that her case would be dismissed because, in essence, the type of suit he brought was wrong. He offered to pursue the administrative mandamus petition promptly, but told Myers that he would need \$2,800

3. Respondent believed that he could get some or all of these fees from CSEA since he understood there was an attorney fee benefit in Myers's CSEA benefits package. The record is unclear whether respondent or Myers ever applied to CSEA for any attorney's fees for this matter but there is no evidence that respondent or Myers ever received any such benefit from CSEA.

4. E.g., *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 637. More recently see *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243-245 ("Unless the administrative decision is challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action.").

to order the transcript of the District hearing. Since Myers did not give him the money, he considered the case closed. He did not know how many appointments with Myers were broken, but he knew that he missed a couple of appointments with her.

Respondent admitted that he did not return Myers's file promptly but that was due to his inability to locate it until February 1989, a year after Myers had requested. He admitted that he did not let Myers know of his inability to locate the file. Respondent had no documentation as to Myers's file being closed and was not sure exactly when it went to a closed case status. He did not offer to return Myers's \$2,000 but he did offer to give the \$2,000 to the State Bar to hold. He felt that since he had quoted that sum as part of his fees, he had earned it for fees.

B. Findings Regarding Culpability.

On the significant aspects of this count, the hearing judge found in substance that in 1984, Myers retained respondent on a contingent fee agreement. She advanced him \$2,000 for transcripts but he considered the advance to be for legal fees. Between about January 1985 and June 1986, a year passed without direct contact between Myers and respondent. During this time she received one letter from respondent in April 1986 regarding an upcoming court determination of whether she had a case against the District. She received no other written communication from respondent after this time and learned only from the State Bar that her suit had been dismissed. In February 1989, Myers requested her file and refund of the \$2,000. Respondent did not return her file or her \$2,000.

From the above findings, the hearing judge concluded that respondent's failure to communicate with Myers prior to January 1, 1987, violated Business and Professions Code section 6068 (a)⁵. Respondent's failure to respond to most of Myers's

attempts to communicate with him after January 1, 1987, violated section 6068 (m). After June 1986, when Myers's suit was dismissed, respondent violated former rule 2-111(A)(2), Rules of Professional Conduct.⁶ [3 - see fn. 6] Respondent's intentional failure to perform services after Myers's suit was dismissed violated rule 6-101(A)(2). Finally, by failing to keep Myers's costs advance in a proper trust account, respondent violated rule 8-101(A) and also violated rule 8-101(B)(4) by failing to return promptly Myers's file. The hearing judge concluded that there was no clear and convincing evidence that respondent violated rule 8-101(B)(3) in not giving Myers an accounting.

[4a] In weighing conflicting evidence, the hearing judge gave reasons for preferring Myers's testimony over respondent's. These included Myers's better record keeping, her better trustworthiness and the lack of any documentation on respondent's part to reflect the critical decisions he made about the handling of Myers's case.

C. Discussion of Findings Regarding Culpability.

On the significant findings and conclusions, we adopt those contained in the hearing judge's decision. While we agree with respondent and the examiner that individual portions of two findings do not appear supported by clear and convincing evidence—the second and third sentences of finding one and the use of the term “Thereafter” in the first sentence of finding seven—those portions of the findings are not critical to the principal charges of culpability facing respondent.

[4b] Respondent would have us disregard the hearing judge's weighing of evidence and assessment of credibility and adopt contrary findings. While our power of independent record review has caused us to examine the evidence anew, we must give great weight to the hearing judge's findings

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

6. [3] Unless noted otherwise, all references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989. To be disciplinable, a rule violation

must have been found to have been “wilful.” (E.g., section 6077; rule 1-100.) The hearing judge's decision is silent on this question of wilfulness; however from a reading of his conclusions, we deem that the judge intended to draw the conclusion that respondent's violation of the respective rules was wilful.

resolving issues pertaining to testimony. On the significant findings, we are not given any sufficient reason to upset the hearing judge's assessment of credibility and we therefore decline to do so. (See *In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 638, 640.)

[5] Although respondent and Myers were able to communicate a few times over the years, the record contains clear and convincing evidence that respondent did not respond to several of Myers's reasonable inquiries before and after January 1, 1987, when section 6068 (m) became part of an attorney's duties.⁷ Accordingly, respondent was culpable of violating section 6068 (a) for failure to communicate adequately with Myers before 1987 and of violating section 6068 (m) for such failure after the start of 1987. (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486-487.)

[6a] The record yields clear and convincing evidence that respondent both failed to perform legal services in wilful violation of rule 6-101(A)(2) and withdrew from employment without avoiding prejudice in wilful violation of rule 2-111(A)(2), after he agreed to dismiss his client's wrongful termination suit in order to permit him to pursue administrative mandamus. Indeed, there is no dispute that respondent failed to proceed for Myers. He sought to justify his inaction only by Myers's failure to provide funds to order the administrative hearing transcript. However, the hearing judge found that Myers had given respondent \$2,000 for this transcript and her testimony was corroborated by her half-sister, Long. In any event, respondent's written fee agreement required him to advance all reasonably necessary costs and did not require the payment of any attorney fees in advance. Although respondent was free to alter the agreement in 1986 when he agreed to dismiss Myers's suit, he did not do so and claimed instead, without documentary proof, that he had made a fee agreement with Myers prior to their written agreement which survived that writing. As to the \$2,000 sum, the record shows that neither respondent nor Myers acted strictly by the terms of the written contingent

fee agreement. Neither has asserted that that agreement was the sole repository of all terms regarding fees and costs.

[6b] Given the state of the evidence, the hearing judge properly chose to weigh Myers's testimony about the fee agreement greater than respondent's and appropriately determined that Myers's \$2,000 advanced to respondent in 1984 was for costs, not fees; and that therefore respondent wilfully violated rule 8-101(A) by not depositing that sum in a trust account. Equally well supported is the conclusion that respondent wilfully violated rule 8-101(B)(4) by not returning Myers's file promptly.

D. Procedural Issues.

Before turning to the issue of degree of discipline, we address two points asserted by respondent relating to the findings of culpability.

[7] Respondent contends first that "having found an abandonment of the case" prior to 1987, the hearing judge could not have found that respondent violated section 6068 (m). Respondent cites no authority for his claim. Contrary to respondent's view, on this record there is nothing inherently inconsistent in concluding that respondent failed to communicate reasonably with Myers and that he also effectively withdrew from employment (rule 2-111(A)(2)) and failed to perform services (rule 6-101(A)(2)). In *Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, the Supreme Court opined in footnote five that the record might suggest more of a rule 6-101 competency violation than a rule 2-111(A) withdrawal one. The Court nevertheless concluded that once Baker stopped coming to the office and could not be contacted by his clients, he effectively withdrew his services. Nowhere in *Baker* does the Court suggest that discipline for failure to communicate is inconsistent with violation of the withdrawal rule and several of the counts in *Baker* involved a finding of both types of violations. Additionally, we recently found an attorney culpable of failing to communicate in response to client concerns during a time period

7. Respondent's own testimony conceded that he did not keep all of his appointments with Myers.

after the completion of all substantive legal services. (See *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 146-147.)

[8a] Respondent's second point is that he was denied adequate notice of the scope of the charges of failure to communicate with Myers and was not given a fair opportunity to present evidence when the judge determined that the time frame predated June 1986. Whether respondent did or did not communicate appropriately with his client before June of 1986 is not the most critical of the charges. Respondent's claims are without merit.

Paragraph four of the notice to show cause in this count alleged: "4. On or about June 2, 1986, you signed a Stipulation on behalf of Ms. Myers that the above-referenced matter be dismissed without prejudice. Said Stipulation was ordered by the Court on June 5, 1986, and filed on June 6, 1986."

The next paragraph of the notice alleged: "5. Thereafter, you failed to complete the performance of services for which you were employed. You failed to communicate with your client despite her attempts to communicate with you and you have failed to deliver to Ms. Myers her papers and property despite her requests that you do so. You failed to notify Ms. Myers of the stipulated dismissal of her matter."

Had paragraph five of the notice made it clear that the word "Thereafter" was a predicate to all charges ("Thereafter you failed: to complete . . . ; to communicate; etc.") respondent's argument about the time factor of the charges would be more persuasive. [8b] However, there was extensive colloquy at the trial about the scope of the notice. While the hearing judge acknowledged that the notice could have been more clearly phrased, he correctly concluded that it allowed for evidence of pre-1986 failure to communicate.

[8c] Respondent's complaint that he was foreclosed from presenting evidence regarding alleged pre-1986 failures to communicate is simply unmeritorious. On May 23, 1991, the judge did prohibit further evidence, but only because the taking of evidence from both parties had been closed. Respondent has failed to cite the early portion of the

transcript of the *previous* full-day evidentiary hearing (R.T. 5/9/91, pp. 38-39) in which the judge stated that he would rule that testimony "about failure to communicate at any time during the [attorney-client] relationship . . . is appropriate and admissible and is relevant . . ." At this May 9 hearing, respondent had ample time during his lengthy examination which followed to present whatever evidence he wanted to about this subject. He has given us no offer of proof of any additional evidence nor explained why he was unable to present it at the appropriate time.

E. Degree of Discipline.

Respondent has no record of prior discipline. He testified to an impressive success story: he was the son of field workers and he had also been one. He was always active in Chicano causes and 85 percent of his earlier practice involved the representation of persons of Mexican origin, especially persons such as immigrant farm workers, in a wide variety of matters, such as unlawful detainer, immigration and vehicle purchase. More recently, his law practice changed so that it is now much more concentrated in criminal defense. Respondent has always performed reduced fee or pro bono legal services. He presented no live character witnesses, but introduced 11 character reference letters. The character references consisted of a bank vice president, persons owning small businesses, one of respondent's former legal secretaries, a political consultant and a musician. The 11 letters were "form" in nature—they appeared to be prepared on the same word processor and most contained some text identical to other letters. Although the references professed awareness of the complaint against respondent, they gave no details of how it related to character assessment. Nevertheless, each witness gave a strong endorsement of respondent's character and integrity. Several references emphasized respondent's unselfish community and pro bono services.

In hindsight, respondent testified that he would have taken more time to make sure that Myers understood the steps he was taking on her behalf.

In reaching his recommendation of suspension, the hearing judge cited both mitigating and aggravating circumstances. He discussed the mitigating

evidence of respondent's free and reduced-fee legal services and community service. While concluding that respondent did not show "remorse as a reaction to a sense of guilt," the judge opined that respondent did express regret for involvement in the State Bar proceedings and sincerely expressed his desire to avoid any recurrence. As aggravating circumstances, the judge cited the loss of Myers's legal rights occasioned by respondent's misconduct; lack of communication with Myers, especially after the 1986 dismissal of her suit; and respondent's understanding about his fee arrangements with Myers, which were "guaranteed to cause confusion and lead to disputes." The judge concluded that respondent treated Myers in a "condescending, paternalistic and inconsiderate manner" which cost her time, money, her legal rights and emotional distress. In making his suspension recommendation, the judge did not discuss comparable cases and gave only a simple citation to the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.)

[9a] Concerning the balance of aggravating and mitigating circumstances, we agree that respondent did present impressive mitigating evidence as to his generous service to disadvantaged clients in his community as well as his community service. Nevertheless, his abandonment of Myers was serious and harmful to her. Despite getting an opportunity from opposing counsel to correct the legal mistake respondent made by failing to pursue administrative mandamus for Myers, he took no further action for her, thereby causing her to lose her cause of action. Even if respondent somehow believed that Myers's \$2,000 advance two years earlier was for fees, not costs, he was obligated to preserve Myers's legal rights. His lack of diligent representation was also echoed in his failure to document his file adequately as to steps he had taken for Myers in the critical year of 1986. Respondent admitted that he was unsure when he considered Myers's file to be in a closed status and he was unable to produce it for a year after Myers had requested its return. His failure to communicate with Myers after 1986 was also serious.

The parties' briefs on review do not call our attention to decisions of the Supreme Court or of this department on the issue of appropriate degree of

discipline for a case which is primarily one of client abandonment. Respondent cites the public reproof imposed in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092. While that case is helpful in viewing a situation of an attorney's wrongful but not dishonest claim of entitlement to trust funds, nothing in that case bears on respondent's abandonment of Myers.

[9b] In an opinion we filed earlier this year, *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 45-46, we discussed several past decisions of the Supreme Court revolving around an attorney's abandonment of a single client in situations where the attorney had no prior record of discipline. (*Harris v. State Bar* (1990) 51 Cal.3d 1082; *Layton v. State Bar* (1990) 50 Cal.3d 889; *Van Sloten v. State Bar*, *supra*, 48 Cal.3d 921; *Wren v. State Bar* (1983) 34 Cal.3d 81.) The discipline imposed in these cases ranged from no actual suspension to 90 days of actual suspension. In our *Aguiluz* decision, we recommended no actual suspension on a record involving no violation of rule 8-101, in which slightly more mitigating circumstances were present and in which the clients did not suffer loss of their cause of action. In *Van Sloten v. State Bar*, *supra*, the Supreme Court imposed no actual suspension on an attorney with five years of practice who had failed to perform services for a client without causing substantial harm, where the misconduct was aggravated by the attorney's lack of appreciation of the disciplinary process as well as the charges against him.

At the other end of the range, *Harris v. State Bar*, *supra*, imposed a 90-day actual suspension as a condition of probation for protracted inattention to a client's case resulting in a large financial loss to the client's estate. The Court considered Harris's debilitating illness to be of some weight in mitigation but also noted that she showed little, if any, recognition of wrongdoing and no remorse.

[9c] We see this case as warranting slightly more discipline than the *Van Sloten* or *Aguiluz* decisions but less discipline than the *Harris* decision. Considering all relevant circumstances, we believe that a stayed suspension on the conditions recommended by the hearing judge is appropriate in this case, except that we believe an actual suspension of

30 days rather than 60 days is sufficient. It will serve to remedy the seriousness of respondent's misconduct which involved not only abandonment of and failure to communicate with his client but also his trust account violation; and, at the same time it recognizes the mitigation present including respondent's sincerely-expressed aspiration not to be the subject of disciplinary proceedings again.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend to the Supreme Court that the respondent, George Nunez, be suspended from the practice of law in California for a period of six (6) months, that his suspension be stayed and that he be placed on probation for a period of one (1) year on conditions including that he be actually suspended from the practice of law for the first thirty (30) days of the period of probation and that he comply with the remaining conditions of probation numbered two through nine recommended by the hearing judge in his decision filed August 1, 1991.

We also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one (1) year of the effective date of the Supreme Court's order in this case. Finally, we adopt the hearing judge's recommendation that costs be awarded the State Bar, pursuant to section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.