

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GILBERT WENTWORTH BOYNE

A Member of the State Bar

Nos. 89-O-12142, 91-O-00376

Filed April 13, 1993

SUMMARY

In two separate proceedings before the same hearing judge, respondent was found culpable of multiple acts of misconduct, including obtaining a large loan from a client without proper disclosure and advice, abandoning several clients' causes of action, failing to communicate with clients, retaining unearned fees, and failing to cooperate with the State Bar's investigation of his misconduct. The hearing judge dismissed charges that respondent had demonstrated disrespect for the court and wilfully disobeyed court orders when he failed to pay court-ordered sanctions. The judge also declined to find culpability of additional charges of client abandonment, finding that respondent's admissions in discovery were insufficient to constitute clear and convincing evidence that he had agreed to represent the clients in the matters involved. In the first of the two proceedings, the hearing judge excluded evidence offered by the Office of Trials regarding the misconduct which subsequently formed the basis for the charges in the second proceeding. In the first proceeding, the hearing judge recommended a one-year stayed suspension, five years of probation, and a 30-day actual suspension. In the second proceeding, the hearing judge recommended a one-year stayed suspension, two years of probation, and 90 days actual suspension, to run concurrently with the discipline recommended in the first proceeding. (Hon. Alan K. Goldhammer, Hearing Judge.)

The Office of Trials sought review in both proceedings. Among other issues, it argued that the degree of discipline was inadequate, and challenged the hearing judge's decision in the first proceeding to exclude evidence of uncharged misconduct which was offered as evidence in aggravation and to impeach respondent's testimony regarding his rehabilitation. The two matters were consolidated before the review department.

The Review Department determined, on independent review, that respondent's discovery admissions and supporting testimony from the client were sufficient to constitute clear and convincing evidence of culpability based on respondent's abandonment of two lawsuits which he had agreed to prosecute. It also concluded that the loan transaction between respondent and a client was unfair to the client because, among other reasons, the terms were not in writing and the interest rate was usurious. Respondent's failure to pay court-ordered sanctions was found to violate sections 6068 (b) and 6103, despite respondent's impecunious state, where he had knowledge of the court order and made no attempt either to comply or to seek relief from its dictates. The hearing judge's determination that evidence of uncharged misconduct should not be admitted as evidence in aggravation or for impeachment in the first proceeding was sustained as properly within the discretion of the

hearing judge, in light of the marginal relevance of the evidence, the delay that would have resulted from its introduction, and the ability of the Office of Trials to pursue the misconduct in a separate proceeding.

Based on its additional findings of culpability, the evidence in mitigation and aggravation, and respondent's intermittent participation in the discipline proceedings, the review department determined that additional discipline was warranted to protect the public and to underscore to respondent the seriousness of his misconduct and the need to conform his conduct to professional standards. The review department recommended five years stayed suspension, five years probation, and actual suspension for two years and until respondent completed certain restitution and established his rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Jill A. Sperber

For Respondent: No appearance

HEADNOTES

- [1] **113 Procedure—Discovery**
162.19 Proof—State Bar's Burden—Other/General
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
 Where both respondent's admission in discovery and client's testimony supported finding that respondent accepted responsibility for proceeding with lawsuit on client's behalf, and there was no evidence that contradicted or undercut respondent's admission, no additional corroboration was necessary to find that respondent agreed to prosecute case, and respondent could therefore be found culpable of misconduct based on failure to perform legal services requested by client.
- [2 a, b] **106.10 Procedure—Pleadings—Sufficiency**
162.19 Proof—State Bar's Burden—Other/General
204.90 Culpability—General Substantive Issues
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
 Where record established that respondent agreed to handle litigation and thereafter abandoned case; former and current Rules of Professional Conduct were virtually identical regarding duties imposed on an attorney who wishes to withdraw from employment; both rules were charged in notice to show cause, and violation clearly occurred during period when either one rule or the other was in effect, review department found respondent culpable of improper withdrawal despite lack of evidence regarding exactly when relevant events occurred.
- [3] **273.00 Rule 3-300 [former 5-101]**
 In a loan transaction between an attorney and a client, the facts that the loan is unsecured and its terms are not in writing are sufficient to place the fairness of the transaction in doubt.
- [4] **273.00 Rule 3-300 [former 5-101]**
 Where an attorney offered to pay a usurious interest rate in order to induce a reluctant client to make the attorney a loan, without advising the client that the high interest rate could render the interest on the loan uncollectible, and the attorney's financial condition was not disclosed to the client, the resulting unsecured transaction was not fair and reasonable to the client.

- [5] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
 110 Procedure—Consolidation/Severance
 111 Procedure—Abatement
 130 Procedure—Procedure on Review
 139 Procedure—Miscellaneous
 146 Evidence—Judicial Notice

It is not improper for the Office of Trials to pursue on review a challenge to the exclusion of evidence of uncharged misconduct in one proceeding while simultaneously prosecuting a second proceeding based on the same misconduct, so long as both courts are made aware of the pendency of the other proceeding. The second proceeding could be abated until resolution of the first case. Where this did not occur, it was proper for the hearing judge to adjudicate the second case promptly and then request that the review department take judicial notice of the decision in the second case, thus permitting the review department to consolidate the cases on review.

- [6] **106.20 Procedure—Pleadings—Notice of Charges**
 563.10 Aggravation—Uncharged Violations—Found but Discounted
 750.52 Mitigation—Rehabilitation—Declined to Find

Evidence of uncharged misconduct may not be used as an independent basis for discipline, but may be used in a contested proceeding for purposes such as impeaching the credibility of the respondent's testimony regarding rehabilitation, or establishing evidence of aggravating circumstances.

- [7] **106.30 Procedure—Pleadings—Duplicative Charges**
 204.90 Culpability—General Substantive Issues
 561 Aggravation—Uncharged Violations—Found
 1099 Substantive Issues re Discipline—Miscellaneous

Uncharged misconduct relied upon to enhance discipline in one proceeding cannot later constitute grounds for additional discipline in an independent disciplinary proceeding.

- [8 a, b] **159 Evidence—Miscellaneous**
 166 Independent Review of Record
 167 Abuse of Discretion

The standard of review on the issue of exclusion of evidence depends on the basis for the hearing judge's action. If the proffered evidence was inadmissible as a matter of law, then the standard is independent de novo review. If not, the review department must consider whether the hearing judge had discretion to exclude the evidence, and if so, whether that discretion was properly exercised.

- [9] **135 Procedure—Rules of Procedure**
 141 Evidence—Relevance
 159 Evidence—Miscellaneous

Underlying evidence of uncharged misconduct was not made inadmissible by rule prohibiting admission in evidence, except in rebuttal, of records of complaints or charges, where such evidence was offered in aggravation and impeachment in a contested proceeding after respondent testified regarding rehabilitation. (Rule 573, Trans. Rules Proc. of State Bar.)

- [10 a-c] **115 Procedure—Continuances**
120 Procedure—Conduct of Trial
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act

Under California civil evidence rules, which apply generally in State Bar proceedings, a hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice. Undue consumption of time alone is not in itself grounds for exclusion. Nor is unfair surprise, where the fairness of the trial may otherwise be ensured, if necessary by a continuance. Where evidence is cumulative or remote, however, there is discretion to exclude it.

- [11 a, b] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
167 Abuse of Discretion
565 Aggravation—Uncharged Violations—Declined to Find

Where hearing judge determined that proffered evidence of additional uncharged misconduct was of marginal relevance; that it could be fully examined and made the basis of separate discipline, if appropriate, in a separate proceeding, and that its admission would involve a delay to permit respondent time to address the issues it raised, the exclusion of the evidence was not an abuse of discretion.

- [12 a-c] **213.20 State Bar Act—Section 6068(b)**
220.00 State Bar Act—Section 6103, clause 1

When payment of sanctions is ordered by a court, an attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed; the attorney cannot sit back and await contempt proceedings before either complying or explaining his or her noncompliance. Where respondent had personal knowledge of the entry of two orders awarding sanctions against him, but ignored opposing counsel's efforts to secure compliance and failed to take any action to seek relief from the orders, respondent's failure to comply was not excused by his impecunious status, and constituted a violation of the statutes requiring attorneys to maintain respect for the courts and to obey court orders.

- [13 a, b] **162.90 Quantum of Proof—Miscellaneous**
204.90 Culpability—General Substantive Issues
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Evidence that respondent paid court-ordered sanctions with a trust account check, and that the client had not provided the funds, established respondent's improper use of the trust account, either by commingling trust and personal funds or by misappropriating funds belonging to other clients. Weighing all reasonable doubts in respondent's favor, a finding of commingling, the less serious offense, was appropriate.

- [14] **213.20 State Bar Act—Section 6068(b)**
220.00 State Bar Act—Section 6103, clause 1

Because respondent made a good faith effort to pay court-awarded sanctions so that his client would not be adversely affected by his neglect of the case, and respondent did ultimately pay the sanctions, albeit after a complaint to the State Bar, respondent's initial attempt to pay the sanctions with a trust account check which was valid when written, but which failed to clear due to subsequent closure of the trust account by the bank, did not constitute a violation of statutes requiring attorneys to maintain respect for the courts and to obey court orders.

- [15] **611 Aggravation—Lack of Candor—Bar—Found**
 750.52 Mitigation—Rehabilitation—Declined to Find
Additional misconduct which occurred after respondent's claimed rehabilitation, and respondent's subsequent failure to participate fully in disciplinary proceedings, were cogent evidence that respondent had not yet dealt effectively with the problems underlying his misconduct.
- [16] **760.39 Mitigation—Personal/Financial Problems—Found but Discounted**
While financial stress may be a factor in mitigation, neither an attorney's lack of management skills necessary to succeed in private practice nor the difficulties inherent in solo practice are ordinarily considered mitigating.
- [17] **591 Aggravation—Indifference—Found**
 611 Aggravation—Lack of Candor—Bar—Found
 621 Aggravation—Lack of Remorse—Found
 750.52 Mitigation—Rehabilitation—Declined to Find
Respondent's sporadic participation in disciplinary proceedings, despite warning from hearing judge regarding consequences of continuing to be derelict in duty to State Bar, demonstrated both respondent's indifference to his professional obligations and a substantial risk to the public.
- [18] **110 Procedure—Consolidation/Severance**
 515 Aggravation—Prior Record—Declined to Find
 621 Aggravation—Lack of Remorse—Found
 750.52 Mitigation—Rehabilitation—Declined to Find
 802.21 Standards—Definitions—Prior Record
Where two separate disciplinary proceedings were consolidated on review, the first proceeding did not constitute prior discipline for the purpose of enhanced discipline in the consolidated matter. Nonetheless, where the misconduct involved in the second proceeding had continued during the period that the first proceeding was pending in hearing department, the fact that respondent engaged in additional misconduct while he was aware that his conduct was being scrutinized in a pending disciplinary proceeding was significant.
- [19 a, b] **521 Aggravation—Multiple Acts—Found**
 710.10 Mitigation—No Prior Record—Found
 807 Standards—Prior Record Not Required
 822.31 Standards—Misappropriation—One Year Minimum
 844.11 Standards—Failure to Communicate/Perform—No Pattern—Suspension
 844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Where respondent's misconduct involved eight instances of abandonment or failure to provide services, three instances of failure to return unearned fees, lack of communication with three clients, failure to pay court-ordered sanctions in two cases, misappropriation of a small amount of advanced costs, improper securing of a large loan from a client, and failure to cooperate with the State Bar investigation, and respondent did not fully participate in the disciplinary proceedings, then despite respondent's lengthy unblemished record and public sector service, the appropriate discipline included a lengthy period of actual suspension and probation, and a requirement that respondent prove rehabilitation, fitness to practice, and learning and ability in the law prior to returning to active practice.

- [20] **174 Discipline—Office Management/Trust Account Auditing**
 176 Discipline—Standard 1.4(c)(ii)
 177 Discipline—Limitations on Practice

Where review department recommended actual suspension for two years and until respondent proved his rehabilitation, fitness to practice law, and learning and ability in the general law, probation conditions requiring respondent to submit list of open files to probation monitor, draw up law office plan, and take law office management courses were unnecessary.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.21 Section 6068(b)
- 213.91 Section 6068(i)
- 214.31 Section 6068(m)
- 220.01 Section 6103, clause 1
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 273.01 Rule 3-300 [former 5-101]
- 275.01 Rule 3-500 [no former rule]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.19 Misappropriation—Other Fact Patterns

Not Found

- 213.15 Section 6068(a)
- 213.25 Section 6068(b)
- 214.35 Section 6068(m)
- 220.05 Section 6103, clause 1
- 220.15 Section 6103, clause 2
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 420.59 Misappropriation—Other

Aggravation

Found

- 582.10 Harm to Client

Mitigation

Found

- 791 Other

Found but Discounted

- 725.32 Disability/Illness
- 725.36 Disability/Illness
- 760.32 Personal/Financial Problems
- 760.34 Personal/Financial Problems

Standards

- 801.30 Effect as Guidelines
- 824.10 Commingling/Trust Account Violations
- 844.12 Failure to Communicate/Perform
- 844.13 Failure to Communicate/Perform
- 863.90 Standard 2.6—Suspension
- 901.10 Miscellaneous Violations—Suspension
- 901.20 Miscellaneous Violations—Suspension
- 901.30 Miscellaneous Violations—Suspension
- 901.40 Miscellaneous Violations—Suspension

Discipline

- 1013.11 Stayed Suspension—5 Years
- 1015.08 Actual Suspension—2 Years
- 1017.11 Probation—5 Years

Probation Conditions

- 1021 Restitution
- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1030 Standard 1.4(c)(ii)

Other

- 1091 Substantive Issues re Discipline—Proportionality
- 1093 Substantive Issues re Discipline—Inadequacy

OPINION

PEARLMAN, P.J.:

In these consolidated cases, the Office of Trials requests review of two hearing department decisions finding that the respondent obtained a loan from a client without proper disclosure and advice, abandoned his clients' causes of action, failed to communicate with clients and retained unearned fees. The examiner argues that the record supports additional findings of misconduct and aggravating circumstances which undermine respondent's showing of rehabilitation, and warrant a much lengthier period of actual discipline and supervised probation than the one-year stayed suspension, two years of probation and ninety days actual suspension recommended.¹ Respondent failed to file a responsive brief before us and defaulted in the second case in the hearing department.² We find upon our independent review of the record convincing support for the contentions of the Office of Trials, modify the findings below accordingly and, in light of the record and respondent's failure to participate in these proceedings, conclude that the degree of discipline sought by the Office of Trials is necessary both to protect the public and to underscore to respondent the seriousness of his misconduct and the need to conform his actions to the strictures of professional ethics. We will therefore recommend that respondent be suspended from the practice of law for five years, that execution of the order be stayed, and that respondent be placed on probation for five years and, among other conditions, serve an actual suspension of two years and until he completes restitution and shows his rehabilitation, fitness to practice, and learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct ("standards"). (Trans. Rules Proc. of State Bar, div. V.)

I. MISCONDUCT ALLEGED IN NOTICES TO SHOW CAUSE

The charges set forth in the initial case heard were a consolidation of case numbers 89-O-12142 (five counts) and 90-O-12228 (one count). Additional misconduct, raised by the examiner in aggravation, but excluded at trial by the hearing judge, was incorporated with an additional charge of failure to cooperate under section 6068 (i)³ in a three-count notice to show cause, case number 91-O-00376. The consolidated charges, the hearing judge's culpability findings, and our modifications to those findings will be briefly summarized under the names of the clients or litigants involved.

A. Cain Matter

Thomas Cain employed respondent on April 8, 1988, to represent him in seeking protection for his trucking business, Thomas Cain and Sons, by filing a chapter 11 bankruptcy petition within 10 days. Cain paid respondent \$3,500 by April 22, 1988. Thereafter, Cain advised representatives of the two companies who had leased him trucks and trailers to discuss any plans to repossess their equipment with respondent. By July 1988, when no bankruptcy petition had yet been filed, Cain met with respondent to discharge him and get a refund. Respondent convinced Cain that he would file the bankruptcy petition within one week and Cain then agreed to continue his employment.

During the first week in August, one of the two trucks Cain was purchasing was repossessed by its seller for Cain's failure to make the payments. Cain informed respondent, who told him the bankruptcy petition would be filed immediately. By the end of August, the other truck Cain was purchasing and all

1. The hearing judge urged that this recommended discipline from the second case run concurrent with the discipline he recommended in the first case, which was one year stayed suspension and five years of probation on conditions including thirty days actual suspension and restitution.

2. In the first case, respondent filed an answer to the notice to show cause but did not participate in any pre-hearing proceedings. Neither he nor his then counsel appeared at the hearing on January 18, 1991, and respondent's default was entered.

Respondent's counsel moved for relief from the default and the motion was partially granted, permitting respondent to present evidence as to mitigation and argument as to the appropriate level of discipline. That hearing was held on June 18, 1991.

3. Unless otherwise indicated, all references to sections are to the provisions of the California Business and Professions Code.

but one of the leased trucks and trailers were repossessed. Respondent assured Cain that a motion could be filed in bankruptcy court for the return of the repossessed equipment. A chapter 11 bankruptcy petition on Cain's behalf was filed by respondent on September 2, 1988. No further action was taken by respondent on the bankruptcy petition. From September 1988 until January 1989, Cain and the equipment lessors were unable to communicate with respondent. Since respondent did not answer any of their invitations to discuss the possible sale of the repossessed trucks, the lessors moved for relief from the bankruptcy automatic stay. Respondent did not file an answer to the motion or advise his client of it. Cain discharged respondent in January 1989, asked for an accounting of respondent's time, and requested a refund of unearned fees so that Cain could afford to retain another attorney. Cain reiterated his requests for an accounting and refund in May 1989, neither of which were ever supplied by respondent. Because he could not re-establish his business due to the passage of time from the repossession, Cain's business was liquidated under a chapter 7 bankruptcy. Respondent filed his own bankruptcy petition in May 1990 and listed Cain as a creditor.

The hearing judge found respondent failed to complete the performance of legal services in the bankruptcy case in violation of former rule 6-101(A)(2),⁴ by taking no action between the time he filed the bankruptcy petition and the time he was discharged. Respondent was also found to have acted in violation of section 6068 (m) by failing to notify his client of the petition for relief from the automatic stay and of the efforts of the lessors to arrange a sale to minimize the mounting storage costs for the trucks. The judge dismissed the charge of improper withdrawal as inconsistent with the finding that he had provided incompetent legal services, but found improper retention of unearned advanced fees. Since the misconduct predated the effective date of the

current Rules of Professional Conduct, charges under those rules were dismissed.⁵

B. Sanchez Matter

On May 16, 1989, Julie Sanchez retained respondent to file and pursue a dissolution of her marriage, including a restraining order against her estranged spouse and child and spousal support orders, and paid him \$600 in advanced payment against a total agreed fee of \$663. Respondent promised to secure a court date for Sanchez within two weeks. After being unable to contact respondent for over two weeks, she visited his office in June 1989 and found it closed and locked under the authority of the Internal Revenue Service. Several months thereafter, Sanchez met respondent in their community and refused his offer to continue with her case. She demanded return of her money, to which he acquiesced. However, Sanchez never received any refund nor was she able to contact respondent thereafter.

Respondent was found culpable of failing to respond to client inquiries, in violation of section 6068 (m) and rule 3-500; recklessly failing to perform legal services promised, in violation of rule 3-110(A), and not refunding unearned advanced fees, as required by rule 3-700(D)(2). The judge rejected the charge that respondent had abandoned his client, finding that Sanchez had dismissed respondent after he indicated his willingness to continue to work on her case.

C. McKechnie Matter

Jean McKechnie employed respondent on December 13, 1989, to assist her in obtaining custody of her granddaughter and paid him \$453, \$153 of which was to cover the filing fees and the remainder constituted advanced legal fees. McKechnie had her granddaughter's mother execute a consent form

4. References to rules are to the current Rules of Professional Conduct effective May 26, 1989. Where, as here, the former rules are invoked, the reference is to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

5. The judge also dismissed all charges of violations of section 6068 (a), citing *Sugarman v. State Bar* (1990) 51 Cal.3d 609,

617-618, as well as our decision in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1. He also dismissed the charges of violation of section 6103 in the first case, based on the Supreme Court's ruling in *Baker v. State Bar* (1989) 49 Cal.3d 804, 815. However, the alleged violations of court orders in the second case were not encompassed in the dismissed charges.

provided by respondent and returned it to him on December 16, 1989.

By January 31, 1990, respondent had not done any work on McKechnie's case, nor had he advanced any costs in connection with it. However, he had already deposited her check, which included funds for costs, in his operating account. On February 1, 1990, McKechnie left a message with respondent's secretary in which she discharged respondent and asked for a full refund. This request was reiterated in telephone messages left with respondent's answering service. McKechnie visited respondent's office in early March and found he had moved with no forwarding address. She has not received a refund and has been unable to afford another attorney to seek custody of her granddaughter.

The hearing judge concluded that there was a failure to perform services for McKechnie, but not an abandonment due to McKechnie's discharge of respondent. The judge also found adequate communications between respondent and McKechnie until the point she discharged him, thereby concluding that no section 6068 (m) violation occurred. Regarding the advanced fees and costs, the judge found a failure to refund unearned fees and, because no funds for costs had been advanced by respondent, a commingling of entrusted funds in respondent's personal account and a misappropriation of those funds after those funds were not returned upon demand, in violation of rule 4-100(A).

D. Niemeyer Matters

Beginning in May 1984, Jack Niemeyer employed respondent on a continuing basis to represent Niemeyer individually and his family-owned corporation, Niemeyer Farms. Respondent submitted his bills monthly, and was paid on an hourly basis. Niemeyer paid respondent's billings regularly until he stopped payments in September 1985. At that time, respondent had \$1,500 in outstanding billings, and respondent also had not repaid a large loan Niemeyer had made to him. This loan became the subject of additional disciplinary charges, to be discussed *post*. Niemeyer contended that respondent agreed to initiate or continue litigation in five matters.

i. Niemeyer v. White

In January 1985, respondent filed an action for damages on behalf of Niemeyer in Stanislaus County Superior Court. Respondent stipulated with opposing counsel to transfer the case to superior court in Alameda County in October 1985. Thereafter, respondent appeared and successfully opposed the defendant's demurrer in April 1986, filed an at-issue memorandum with the court in February 1988, and appeared at a trial setting conference in June 1988. The case was ordered to arbitration and an arbitrator was appointed in December 1988. No further action was taken to prosecute the case and, as a result, the matter was removed from the civil active list. Respondent did not withdraw from the case, advise Niemeyer that an arbitrator had been assigned or notify him that the case had been removed for failure to prosecute the case.

The hearing judge found that respondent had failed to communicate important developments to his client in violation of section 6068 (m), and had abandoned the case and failed to return the case file, in violation of former rule 2-111(A)(2). He dismissed the charge of incompetent legal representation pursuant to former rule 6-101(A)(2) as inconsistent with the abandonment finding.

ii. Niemeyer v. City of Modesto

Respondent filed suit on May 1987 against the City of Modesto for damages which occurred to Niemeyer's airplane at the Modesto airport. The case went to arbitration and the arbitrator awarded Niemeyer \$7,000. After unsuccessfully attempting to locate respondent, Niemeyer learned of the arbitrator's decision in October 1989, after the deadline had passed to demand a trial de novo, by calling the city attorney's office, the opposing counsel in the case.

The hearing judge concluded that in failing to advise Niemeyer of the arbitrator's decision, respondent acted contrary to the requirements of section 6068 (m) and rule 3-500. The judge also found respondent withdrew from this matter improperly (rule 3-700(A)(2)), but did not engage in a reckless failure to perform legal services (rule 3-110(A)).

iii. Niemeyer Farms, Inc. v. Thayer

This lawsuit was originally filed by another attorney on behalf of Niemeyer Farms in May 1986 in Stanislaus County Superior Court. The complaint was never served and counsel moved to withdraw from the case in November 1987, citing his inability to garner Niemeyer's cooperation in the prosecution of the matter. Niemeyer contended that he turned the case over to respondent shortly before the three-year statute mandating service was due to run in May 1989, and instructed him to serve the complaint.

The examiner argues that respondent, through his admission⁶ in discovery, acknowledged accepting the case. When no efforts had been made by respondent to serve the complaint and Niemeyer was unable to contact respondent as the statute of limitations approached, Niemeyer retrieved the original summons and complaint from respondent's secretary and arranged for service of the complaint.

[1] In this instance, the hearing judge found the evidence that respondent had agreed to proceed on the *Thayer* case was inadequate, concluding that Niemeyer's testimony and respondent's admission were insufficient without additional corroboration. The judge cited to the Supreme Court's footnote in *Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fn. 5, holding that where evidence undercuts or negates facts which are deemed admitted through default, the evidence would control over the deemed admitted allegations. However, the judge did not specifically identify what evidence contradicted or undercut respondent's admission that he accepted responsibility for proceeding with the *Thayer* case and, upon our independent review of the record, we have not found any. Niemeyer's testimony, even if the hearing judge found it to be somewhat vague, confirmed rather than undercut respondent's admission. Therefore, we find that respondent agreed to prosecute the *Thayer* case, and failed to perform the legal services requested by his client, in violation of former rule 6-101(A)(2),

return the file to the client, in violation of former rule 2-111(A)(2), or communicate with his client, contrary to section 6068 (m).

iv. Niemeyer Farms, Inc. v. Hans Olson

Respondent filed the complaint in this breach of contract suit against Hans Olson in municipal court in Stanislaus County on May 26, 1986. Niemeyer testified that he initially did not want the complaint served on Hans Olson, but, as the three-year statute approached, Niemeyer asked respondent to serve the complaint. As with the *Thayer* matter, when no action was taken, Niemeyer requested return of the original complaint and summons, but he did not receive them from respondent. Thereafter, the statute ran before service could be made and the cause of action was lost.

As in the *Thayer* case, we find that respondent's admission and Niemeyer's testimony establish that respondent agreed to serve the Olson complaint, but did not do so. We also find that respondent failed to answer his client's inquiries concerning the case and the client's request to return the file.

v. General Motors lawsuit

Niemeyer testified that he had asked respondent to pursue a civil case against General Motors and Thompson Chevrolet for damages resulting from an allegedly defective truck transmission manufactured by the automaker. By his failure to respond to requests for admissions, respondent admitted that he agreed to handle the lawsuit, but took no action to advance the cause of action, including filing a complaint. Niemeyer also testified that to his knowledge, respondent did no work on this case.

[2a] We disagree with the hearing judge's conclusions of no culpability on this count and find sufficient evidence in the record that respondent abandoned the case he agreed to prosecute, in viola-

6. The examiner served requests for admissions on respondent in July 1990. After respondent failed to respond within the time period prescribed by law, the hearing judge ordered that

the matters in the requests for admissions be deemed admitted. (Order filed September 28, 1990.)

tion of either former rule 2-111(A)(2) or rule 3-700(A)(2),⁷ [2b - see fn. 7] and failed to advise Niemeyer that he had stopped work, in violation of section 6068 (m).

vi. Niemeyer loan to respondent

In March 1985, respondent solicited a loan from Niemeyer. Niemeyer was reluctant to put at risk his personal savings, but was persuaded to loan \$17,000 of his personal savings to respondent, upon a promise to be repaid \$18,500 in 90 days with interest and points. The loan was unsecured. Prior to the delivery of the funds on March 15, 1985, none of the loan terms were in writing, nor did respondent apprise Niemeyer of his financial condition or the purpose of the loan, or advise Niemeyer to seek the advice of independent counsel. Respondent did not explain the significance of the loan terms, such as the difference between a secured and unsecured loan, the possible effect of bankruptcy, or the enforceability of the agreed-upon points and interest rate in light of California usury laws. Sometime after the loan proceeds were given to respondent, he gave Niemeyer a promissory note dated March 15, 1985, for \$18,500, at 11 percent interest per annum, payable in 6 months, not the 90 days agreed upon orally. Respondent made one payment of \$2,057 on March 15, 1986, and has made no further payments to Niemeyer. In his bankruptcy petition filed in May 1989, respondent listed Niemeyer as an unsecured creditor with a \$25,000 claim.

The hearing judge concluded that respondent failed in his duty under former rule 5-101 to advise Niemeyer to seek the advice of independent counsel regarding the loan and to obtain Niemeyer's consent to the transaction in writing. As to the third requirement of the rule, mandating fair and reasonable terms fully disclosed in writing to the client in a manner and in terms designed to be understood by the client, the requisite writing was not produced and the promissory note thereafter prepared by respondent varied

significantly from the agreement of the parties concerning the time period of the loan. However, the hearing judge found the terms to be fair to Niemeyer.

[3] On this last point, we must disagree. The facts that the loan was unsecured and the terms were not in writing already place the fairness of the transaction in doubt. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314.) [4] As noted in the decision, Niemeyer was reluctant to loan the funds to respondent and put such a large portion of personal savings at risk. Respondent persisted, offering financial repayment at a very high rate of return, to induce Niemeyer to change his mind and make the loan. The usurious interest rate could have rendered any interest on the loan uncollectible, as well as having other adverse legal consequences to Niemeyer. (See *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 469 [attorney who failed to advise client of adverse legal consequences of loan to attorney at a usurious interest rate violated duties under former rule 5-101]; Cal. Const., art. XV, § 1; Usury Law, §§ 2, 3 [West's Ann. Civ. Code (1985 ed.) foll. § 1916.12 at pp. 173, 178].) The fact that the high interest rate was void and uncollectible was neither disclosed nor discussed with Niemeyer. Nor did respondent disclose his financial condition. We cannot conclude under these circumstances that the resulting unsecured transaction was fair and reasonable to Niemeyer. Indeed, Niemeyer would have been far better off not to have made the usurious loan upon which respondent immediately defaulted leaving Niemeyer to this date with a loss of nearly \$15,000 excluding any interest—exactly the risk that Niemeyer sought to avoid taking.

E. Review of Exclusion of Evidence of Uncharged Misconduct Offered in Impeachment

The C. & S. Enterprises matters, plus the following matter, *Keller v. Van Buren*, were initially raised by the examiner in the first proceeding during the mitigation/aggravation phase, to attack the credibil-

7. [2b] The record does not establish when respondent agreed to handle the possible litigation against General Motors and Thompson Chevrolet. However, former rule 2-111(A)(2) and current rule 3-700(A)(2) are virtually identical in the duties imposed on an attorney who wished to withdraw from em-

ployment; both rules were charged in the notice to show cause; and clear and convincing evidence establishes that the violation occurred during the period of time when either the former or current rule was in effect.

ity of respondent's claim of rehabilitation. The hearing judge at first admitted some of the evidence for the limited purpose of rebuttal of rehabilitation evidence offered by the respondent, but later reconsidered his prior ruling and excluded the evidence. In his decision, he stated that the offer of proof involved evidence which was unrelated to any of the charged acts of misconduct and would be improperly prejudicial, citing *Van Sloten v. State Bar* (1989) 48 Cal.3d 921. Thereafter, as noted above, the examiner filed an original disciplinary case incorporating these same matters, plus a charge of failure to cooperate. In that proceeding respondent's default was entered and a default hearing was held.⁸ [5 - see fn. 8]

The examiner argues on review that the hearing judge erred in excluding the proffered evidence from the first proceeding. [6] While uncharged conduct may not be used as an independent basis for discipline (*Van Sloten v. State Bar, supra*, 48 Cal.3d at pp. 928-929), it is established that in a contested proceeding, uncharged evidence may be used by the examiner for purposes such as impeaching the credibility of respondent's testimony regarding his rehabilitation if it is an issue in the proceeding, or in establishing evidence of aggravating circumstances. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 34; *Arm v. State Bar* (1990) 50 Cal.3d 763, 775; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

The Office of Trials seeks the same total discipline regardless of whether the second matter is considered separately as it was in fact ultimately presented below or considered as proper aggravation

evidence in the first matter. [7] As the Office of Trials recognizes, uncharged misconduct relied upon to enhance discipline in one proceeding cannot later constitute grounds for additional discipline in an independent disciplinary proceeding.

At oral argument, we requested the examiner to brief the issue of the standard of review with respect to the challenged exclusion of evidence offered for impeachment of the respondent. In its subsequently filed brief, the Office of Trials asserted that the standard of review should be independent de novo review, but acknowledged the general principle that the hearing judge has broad discretion in determining the admissibility and relevance of evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.)

[8a] The standard of review on this issue depends on the basis for the hearing judge's action. If the proffered evidence was inadmissible as a matter of law, we apply independent de novo review. As the examiner notes, in *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606, we applied de novo review in affirming the hearing judge's rejection of evidence of uncharged misconduct in a default proceeding because such evidence was inadmissible as a matter of law either to prove culpability of such charges (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 929) or in aggravation. (*In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213.)

[9] Rule 573 of the Transitional Rules of Procedure of the State Bar provides in pertinent part that:

8. [5] An issue has been raised as to the propriety of the Office of Trials pursuing its challenge to the exclusion of the proffered evidence on review in the first proceeding while simultaneously prosecuting the second proceeding based on the same alleged misconduct. So long as both courts are made aware of the pendency of the other proceeding, the Office of Trials may, under the current rules, simultaneously seek relief in alternative forums. If respondent had participated in the second proceeding, he could have sought abatement thereof if the hearing judge deemed it appropriate or the hearing judge could have done so on his own motion. Instead, the hearing judge took another equally viable approach. He promptly adjudicated the second proceeding and asked the review department to take judicial notice of his decision therein. As

a result, the review department was provided the opportunity of consolidating both cases on review. In the future, evidentiary rulings of the type made by the hearing judge would appear ideally suited to certification for interlocutory review by the review department prior to termination of the first proceeding in the hearing department. Federal procedure provides for such certification of discrete issues. (28 U.S.C. § 1292, subdivision (b).) We commend to the advisory committee which is now considering proposed revisions to the State Bar Rules of Procedure consideration of a similar rule in State Bar proceedings both to expedite review of discrete issues and to avoid the risk of duplication of effort in the hearing department and the review department which could have occurred here.

“records of complaints or formal charges against the member are inadmissible on behalf of the State Bar, provided, if the member introduces evidence that no complaints or charges have been made, then the records are admissible in rebuttal.” Here the examiner did not seek to introduce the State Bar records of complaints or formal charges, but sought to introduce underlying evidence of uncharged misconduct. Such evidence was not inadmissible under rule 573 or the case law because it was offered in aggravation and impeachment in a contested proceeding after respondent testified that he was “back on the road to recovery” following the charged misconduct in this proceeding. (Cf. *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

[8b] Thus, the proffered evidence was not inadmissible as a matter of law. We must therefore consider whether the hearing judge had discretion to exclude it, and if so, whether that discretion was properly exercised. [10a] The same rules of evidence apply generally in State Bar proceedings as in civil cases in California. (See rule 556, Trans. Rules Proc. of State Bar.) Evidence Code section 352 provides, inter alia, that a judge may exercise discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice”

In *DePalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1538, a Court of Appeal restated the applicable standard of review as follows: “In determining the admissibility of evidence, a trial court starts with the proposition ‘all relevant evidence is admissible.’ (Evid. Code, § 351.) Relevant evidence is all evidence ‘including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ (Evid. Code, § 210.) In applying this standard, the court is given wide discretion to determine relevance under the code. [Citation.] The

appellate court should reverse only when a prejudicial abuse of discretion has occurred. [Citation.]”

[10b] In analyzing what constitutes abuse of discretion, Witkin notes that undue consumption of time is not in itself ground for exclusion. (1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 305, p. 276, and citations therein.) However, where the evidence is cumulative or remote, discretion to exclude it has long been recognized. (*Id.*, §§ 305, 306, pp. 276-277.) Witkin notes also that unfair surprise is not a good reason for excluding evidence as long as a fair trial may be otherwise ensured.⁹ [10c - see fn. 9] Similarly, in the State Bar Court, “no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error or errors complained of resulted in a denial of a fair hearing.” (Rule 556, Trans. Rules Proc. of State Bar.)

[11a] Here, the hearing judge determined that the proffered evidence was of marginal relevance and could be fully examined in a separate proceeding. Since the hearing judge was aware that he would have the opportunity to assess separate discipline therefor if culpability were subsequently determined and would be able to decide at that time whether to make any disciplinary recommendation therein consecutive or concurrent to the discipline recommended in the first proceeding, the State Bar was able to achieve the same discipline regardless of which way the court ruled. In fact, by excluding it, the hearing judge avoided delaying the first proceeding and thereby sought to make public protection more timely than would otherwise have been the case. His decision to exclude evidence of uncharged matters in aggravation balanced the efficiency of a single proceeding against the delay that would have been required in implementing the discipline to be imposed in the first proceeding to allow the respondent to address the collateral issues raised by the proffered evidence in aggravation. Where, as here, such evidence involves multiple documents and other evidence,

9. [10c] Discovery and pretrial conferences are designed to prevent such surprises, but if despite such procedures, “evidence is sought to be introduced at trial which is so important and so wholly outside reasonable anticipation that the other party is harmed by its sudden introduction, the appropriate

statutory remedy is a continuance.” (*Id.*, § 307, pp. 277-278.) As Witkin notes, for this reason, unfair surprise was eliminated as a separate ground for exclusion under Evidence Code section 352.

the hearing judge is essentially in a position to treat the prosecution's evidentiary offer as a variation on a belated motion to consolidate two disciplinary proceedings at different stages of development.

[11b] We find no abuse of discretion in the hearing judge's exclusion of the proffered evidence. In any event, since the two proceedings are now consolidated before us, we consider all of the evidence adduced in the second proceeding and reach the same result in recommended discipline for the consolidated cases as we would have reached if all of the evidence had been admitted in the first proceeding.

F. C. & S. Enterprises Matters

Respondent represented the defendants in two cases in the Orange County Superior Court, *C. & S. Enterprises v. Mac Ferguson and James A. Bishop* and *C. & S. Enterprises v. James A. Bishop, et al.* Default judgments were entered in each case, awarding plaintiffs \$550,000 in general damages in *C. & S. Enterprises v. Mac Ferguson and James A. Bishop* on March 23, 1990, and \$195,000 in general and punitive damages on April 25, 1990, in *C. & S. Enterprises v. James A. Bishop, et al.* Respondent moved under Code of Civil Procedure section 473 to set aside the defaults based on his own mistake, inadvertence, and excusable neglect. The motions were granted and, as provided in the statute,¹⁰ respondent was ordered to pay attorney's fees of \$1,500 and \$500, respectively. Despite numerous letters sent by opposing counsel requesting payment of the awarded attorney's fees, respondent had not complied with the court orders as of the date of the default hearing below.

The hearing judge concluded that respondent's notice of the sanctions and failure to pay them as ordered did not, apart from other factors, constitute a failure to maintain the respect due to judges and courts under section 6068 (b). At a minimum, in order to establish such a violation, the hearing judge required the examiner to meet the criteria necessary

to enforce the order in an indirect contempt proceeding: notice of the order, noncompliance, and ability to comply with or satisfy the order. (See, e.g., *Coursey v. Superior Court* (1987) 194 Cal.App.3d 147, 157.) The hearing judge indicated that an attorney who repeatedly failed to pay sanctions before different judges might demonstrate sufficient disrespect to warrant discipline, but that was not the state of the evidence before him. Also, since the examiner did not plead or otherwise present evidence concerning respondent's assets, liabilities, income, or expenses during the default hearing, the hearing judge concluded that there was no clear and convincing evidence in the record of respondent's ability to pay the ordered sanctions. He therefore dismissed the section 6068 (b) charge. On the same grounds, he dismissed the charge that respondent willfully violated court orders which is a disciplinable offense under section 6103. (See, e.g., *Read v. State Bar* (1991) 53 Cal.3d 394, 407, fn. 2; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.)

[12a] Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients. (See, e.g., *Arm v. State Bar, supra*, 50 Cal.3d at p. 776 [protection of client interest no justification for misleading court regarding upcoming suspension]; *In re Young* (1989) 49 Cal.3d 257, 265 [duty to maintain client confidences does not protect attorney's affirmative acts to conceal client's identity from court bail bondsman].) In the case of court-ordered sanctions, the attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed.

[12b] The question raised here is whether respondent's failure to obey the court orders constitutes a violation of section 6068 (b) or section 6103 or both. We have ruled in a past proceeding that an attorney who had no personal knowledge of the

10. Code of Civil Procedure section 473 provides in pertinent part as follows: "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to

pay reasonable compensatory legal fees and costs to opposing counsel or parties."

imposition of court-ordered sanctions or of the failure to pay them could not be held to have violated section 6068 (b). (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367.) Here, ignorance is not a defense, since respondent was present when the orders were issued and the record discloses that written requests by opposing counsel thereafter seeking respondent's compliance were sent to his then current address. Disregarding the orders, ignoring opposing counsel's efforts to secure compliance, and failing to take any action to seek relief from the order, as is the case here, is not excused by respondent's impecunious financial status. Sanctions for attorney's fees and costs have been ordered against an attorney who, at the time of the order, was in bankruptcy. (*Papdakis v. Zelis* (1991) 230 Cal.App.3d 1385, 1389.) An attorney with an affirmative duty to the courts and his clients whose interests were affected cannot sit back and await contempt proceedings before complying with or explaining why he or she cannot obey a court order. The Supreme Court, in *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952, rejected a similar argument of an attorney that he was relieved of the duty to comply with court orders because he believed them to be technically invalid. The Court found, "Such technical arguments are waived to the extent the orders became final without appropriate challenge. There can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid."

[12c] Therefore we find that given respondent's personal knowledge of the orders, his wilful, unexcused failure to comply with them constituted violations of both section 6068 (b) and section 6103.

G. Keller v. Van Buren Litigation

Respondent was hired by Barbara Van Buren in September 1990 to defend her in an unlawful detainer action. Neither respondent nor his client appeared at trial on January 28, 1991, and a default judgment was

entered against Van Buren for \$4,236 in rent, damages and costs. The court also ordered restitution of the premises to the Kellers. Respondent moved on February 7, 1991, to set aside the judgment pursuant to Code of Civil Procedure section 473. By minute order dated February 13, 1991, the motion was granted and the judgment set aside, conditioned upon payment to the plaintiffs of \$350 in sanctions by March 13, 1991.

A check written on respondent's trust account dated March 13, 1991, and made payable to Joseph Keller and his attorney was sent to Keller's attorney and thereafter forwarded to Keller on March 23, 1991. When he deposited the check in his account, it was dishonored and returned by respondent's bank with the notation, "account closed." Keller filed a complaint with the State Bar because of the dishonored check on May 27, 1991, and, a few weeks later, received payment of \$350 from respondent. After written notice to respondent, the Pacific Valley Bank closed respondent's trust account on March 26, 1991, because of his unsatisfactory banking practices, which included numerous overdrafts in his operating account. At the time respondent wrote the check, there were sufficient funds in the account to cover the check. His client had not provided the money to cover these costs, nor had she been asked to do so by respondent.

As in the *C. & S. Enterprises* matters, the hearing judge found there was no clear and convincing evidence that respondent's failure to pay court-ordered attorney's fees violated his duty to maintain the respect due to courts under section 6068 (b), nor that the failure constituted a wilful disobedience of a court order in violation of section 6103. [13a] However, respondent's payment of the sanction with a trust account check, with evidence that the client did not provide those funds, established an improper use of the trust account and commingling of trust and personal funds, in violation of rule 4-100(A).¹¹ [13b - see fn. 11]

11. [13b] The trust account check was written either on personal funds commingled in the account, or on trust funds of other clients, which use would constitute misappropriation. Weigh-

ing all reasonable doubts in respondent's favor (see, e.g., *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216), a finding of commingling, the less serious offense of the two, is appropriate.

[14] We find that respondent did make a good faith effort to comply with the court order so that his client would not be adversely affected by his neglect of the case. When the check was written, the account was active and there were sufficient funds in it to cover the check. The fact that he used a trust account check is misconduct already charged as a rule 4-100 violation. The sanction has been paid, albeit after a complaint to the State Bar. Therefore, we do not, under these facts, find clear and convincing evidence of violations of sections 6068 (b) and 6103.

H. Failure to Cooperate with State Bar Investigation

We affirm the hearing judge's finding that respondent failed to cooperate as charged due to his failure to answer correspondence from State Bar investigators sent to his membership records address regarding the Cain, Sanchez, Niemeyer, and Van Buren matters. None of the letters were returned as undeliverable. Respondent was called by one investigator after receiving the initial letter dated September 21, 1989, regarding the Sanchez complaint. He did not respond to investigator's correspondence sent to him thereafter.

II. DEGREE OF DISCIPLINE

A. Mitigation and Aggravation

Prior to these matters, respondent had an unblemished legal record since his admission to practice in California in 1962. His career included his service as director of the Stanislaus County Legal Assistance Program in 1968 for two years, five years with a partner in private practice, and his appointment as county counsel for Stanislaus County, serving from 1976 until 1984. He then entered solo private practice. During this time, he also served as the city attorney for Waterford, California, from 1988 until early 1989. Long practice without discipline is considered mitigating. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245.)

Respondent testified at the hearing concerning his community activities, including his service as a reader with his local Christian Science Church, and his involvement with the local chamber of commerce

and Lions Club. He also taught legally-related courses to real estate students at the community college.

The hearing judge found that respondent suffered from depression and other psychological and financial problems at the time of the misconduct which had since been overcome by respondent. The examiner challenges the weight to be accorded this evidence. The death of respondent's father in July 1989 was not argued by respondent as adversely affecting his law practice, but was found to be a factor independently by the hearing judge. While respondent identified the closure of his office by the IRS in May 1989 as a devastating psychological and financial blow, that event does not account for misconduct which took place before that time. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 113; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 702 [emotional crisis which resulted in attorney abandoning law practice did not mitigate misconduct which occurred prior to crisis].)

The examiner notes that respondent offered no corroborating or expert testimony concerning his depression and its effect, if any, on his misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 197.) While respondent testified concerning his remorse, the scaling-back of his practice with the intent to leave private practice altogether, his consultation with a Christian Science practitioner regarding his emotional problems, and the alleged beneficial effect of his marriage in December 1990, he has not shown clear and convincing evidence of recovery such that the situation would not recur in the future. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527-528.) [15] In fact, the *Keller v. Van Buren* charges in the second disciplinary case here occurred after respondent's alleged "turning point" and his default in the second disciplinary proceeding and failure to participate on review are cogent evidence that respondent does not yet have a handle on his problems.

[16] Financial stress can be a factor in mitigation as well. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 254; see *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 672.) However, the lack of management skills necessary to succeed in private practice and the difficulties inherent in a solo practice are not ordinarily considered mitigat-

ing factors. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667.) The closing of respondent's office by the IRS did have a crippling effect on respondent's practice. Even so, it cannot be considered unforeseeable or beyond respondent's control since he admittedly had not filed his federal income tax returns for several years prior to the IRS action. (*In re Naney, supra*, 51 Cal.3d at pp. 196-197 [financial difficulties resulting in part from an attorney's failure to pay income taxes were not an unforeseeable financial problem].)

[17] Respondent's participation in these State Bar proceedings has been sporadic at best. (See fn. 2, *ante*.) At the hearing in the first proceeding below, respondent blamed his humiliation at being the subject of disciplinary charges for his inability to participate. The hearing judge accepted this excuse for respondent's initial inaction, but warned respondent of the consequences of continuing to be derelict in his duty to the State Bar. Respondent subsequently failed to participate on review of that decision before this department and defaulted in the second proceeding below. Under these circumstances, respondent's failure to participate demonstrates both his indifference to his professional obligations and a substantial risk to the public.

There are multiple acts of wrongdoing here, involving six different clients, over a period from May 1985 to March 1991. (Std. 1.2(b)(ii).)

There has been significant harm shown to a number of respondent's clients. Because of respondent's inaction, Cain lost the opportunity to continue his business through the protection of the bankruptcy laws. Once Cain's equipment had been repossessed, the likelihood of a successful operating plan in chapter 11 was considerably lessened. When no action was taken thereafter either to seek an order in the bankruptcy court for return of the equipment or to negotiate a deal with the supplier for equipment in which Cain held some equity interest, there was virtually no chance to save Cain's business. Cain testified to the financial and emotional cost he experienced as a result, attributable largely to respondent's misconduct.

McKechnie has been unable to afford another attorney to help her secure custody of her grand-

daughter since respondent has not refunded her advanced fees and costs of \$453, \$153 of which was misappropriated by him.

Niemeyer has recovered only a small portion of the \$17,000 of personal savings he loaned to respondent. These were funds which he was reluctant to lend and which he might not have loaned, or done so under different terms, had respondent advised him to seek independent counsel or presented fair terms which Niemeyer could have enforced.

Respondent placed his clients' causes of action at risk in three instances, first by failing to take action which resulted in default judgments, and then, after having the judgments set aside, failing in two cases to pay the court sanctions ordered as a condition of reopening the matters and paying them late in a third. His inaction foreclosed any pursuit of the cause of action for Niemeyer in the *Olson* matter and prevented Niemeyer from seeking an appeal of the arbitration decision in the *City of Modesto* case.

[18] Respondent's misconduct continued up through the period that the first disciplinary matter was pending in the hearing department. There is no enhanced discipline in this instance as a result of a prior discipline since the first case has been consolidated in our court with the second matter. However, it is significant that respondent was engaged in additional misconduct while he was aware that his conduct was being scrutinized as part of a then pending disciplinary proceeding.

B. Appropriate Discipline

[19a] In reweighing the appropriate discipline, the examiner urges us to recommend to the Supreme Court a lengthy period of actual suspension and supervised probation, with a standard 1.4(c)(ii) provision, requiring respondent to show his rehabilitation, fitness to practice and learning and ability in the law prior to his return to active practice. Given the record of misconduct, the comparable case law and respondent's current lack of participation, this discipline appears clearly appropriate, despite respondent's lengthy prior unblemished record and public sector service.

[19b] This case involves eight instances of abandonment or failure to provide legal services to four clients, failure to return unearned fees to three clients, lack of communication with three of the clients, failure to pay court-ordered sanctions in two cases, one case of misappropriation of a small amount of client advanced costs, the improper securing of a large loan from a client, and the failure to cooperate with the State Bar. The standards provide for suspension or disbarment, depending upon the gravity of the offenses and the harm to the victims, respondent's clients. (Stds. 2.4(b), 2.6, 2.10.) The trust fund violations, because of the small amount involved, would require between a three-month and one-year actual suspension. (Std. 2.2.)

The standards are guidelines for us to follow in determining discipline, but we also look to the case law to recommend discipline to suit the respondent and misconduct at issue. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) There are comparable cases of misconduct involving attorneys without prior discipline records in which the Court imposed discipline of between one and two years actual suspension.

The examiner cites to *Rose v. State Bar, supra*, 49 Cal.3d 646, in support of her suggested discipline. That case encompassed seven client matters but concerned only one client abandonment. It also involved failure to communicate with clients, failure to return client property and advanced fees, a business transaction with a client without the proper disclosures or opportunity to seek independent counsel, and the improper solicitation of a client. None of the misconduct involved moral turpitude. Rose, admitted in 1971, presented evidence of his marital problems and expert testimony of his treatment for his emotional problems, both of which underlay his misconduct. Rose also presented impressive evidence of his pro bono work and significant civic and charitable activities. The Court found that balancing the seriousness of the misconduct against the mitigating evidence, the appropriate discipline was a two-year actual suspension.

In *Pineda v. State Bar* (1989) 49 Cal.3d 753, an attorney who abandoned clients in seven matters, retained unearned fees, and took a portion of a

settlement set aside to pay a client's medical lien had his discipline increased by the Court from a one-year actual suspension to two years of actual suspension because of his multiple acts of wrongdoing and his misappropriation of client funds. The Court stopped short of disbarring Pineda because of his cooperation with the State Bar, his expressions of remorse and his determination to rehabilitate himself. (*Id.* at p. 760.)

In contrast, in *Hawes v. State Bar* (1990) 51 Cal.3d 587, the attorney was a 1970 admittee who had abandoned six cases, failed to return unearned fees to three clients, failed to return the file to a client, did not pay a court-ordered discovery sanction until it was reduced to judgment and did not cooperate with the State Bar. Like respondent, Hawes had been a government attorney for many years prior to entering private practice. Unlike respondent, Hawes came forward with a strong evidence of mitigating circumstances, including the lack of harm to his clients and his undiagnosed manic depression and resulting alcoholism and drug abuse which the Court found to have contributed to his misconduct. Hawes presented evidence of his sustained recovery from his disorder. Persuaded by this mitigating evidence, the Court reduced the actual suspension for Hawes from the three years recommended by the review department to one year.

In *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, an attorney admitted in 1972 defaulted in a case involving four abandonments, failure to return unearned fees to two clients and lack of communication with three of his clients, and failure to cooperate with the State Bar. While the Court rejected the State Bar's recommendation of disbarment, it also rejected Bledsoe's suggestion, citing to the Court's decision in *Gold v. State Bar* (1989) 49 Cal.3d 908, that a one-year actual suspension was sufficient. The Court noted that the *Gold* case involved only two client cases and they had been reimbursed voluntarily by Gold. The Court found the additional misconduct by Bledsoe toward four clients, coupled with his failure to participate in State Bar proceedings, to warrant a two-year actual suspension.

While there are cases of attorneys with more extensive or more serious misconduct who received discipline of one year or less, these attorneys pre-

sented extensive mitigating evidence, including professional and community service, and recovery from severe emotional distress or debilitating illness. (See, e.g., *Porter v. State Bar*, *supra*, 52 Cal.3d 518 [attorney who abandoned eight clients, made large misappropriations, deceived clients, and engaged in the unauthorized practice of law disciplined with one-year actual suspension]; *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071 [attorney who engaged in misconduct concerning 14 clients but demonstrated recovery from severe physical and emotional difficulties received one-year actual suspension.]

Balancing the facts and circumstances as found, the aggravating and mitigating evidence, and the unresponsive behavior of respondent toward the discipline system, the discipline suggested by the Office of Trials is, in our view, consistent with the case law and the standards and commensurate with the gravity of the underlying misconduct. We will adopt the conditions of probation recommended by the hearing judge in his initial decision filed on September 20, 1991, regarding restitution and conditions of probation, modifying them where appropriate to reflect changes in the recommended discipline and to refer to the newly created Probation Unit in the Office of Trials in lieu of the former Probation Department of the State Bar Court.

The hearing judge's restitution condition was carefully fashioned to take into account respondent's precarious financial situation and his need for rehabilitation, which restitution promotes, as well as serving the requirements of respondent's former clients. [20] The conditions that respondent submit a list of his open files to his probation monitor, draw up a law office plan, and take law office management courses are all unnecessary in light of our recommended actual suspension of two years and until respondent demonstrates his rehabilitation, fitness to practice, and learning and ability in the law. The standard 1.4(c)(ii) hearing will give respondent the

opportunity to demonstrate that he has taken the initiative to remedy past office and financial practices, recognizes his professional responsibilities, has made restitution payments as ordered or has done so to the best of his financial capability, and is ready to resume a productive career in the law.¹²

III. RECOMMENDATION

We recommend that respondent Gilbert W. Boyne be suspended from the practice of law in the state of California for five years, that execution of the order be stayed, and that respondent be placed on probation for a period of five years upon the following conditions:

1. That respondent shall be suspended from the practice of law in California during the first two years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;

2. That respondent shall make restitution as follows:

(a) Respondent shall remain actually suspended from the practice of law until he makes restitution in the amount of \$153 to Jean McKechnie and provides proof thereof to his probation monitor. The promptness with which respondent makes such restitution may be considered in assessing his rehabilitation at the hearing held pursuant to standard 1.4(c)(ii) prior to the termination of his actual suspension;

(b) Respondent shall make additional restitution in the following amounts: to Thomas Cain in the amount of \$3,500 plus interest at the rate of ten (10) percent per year from February 1, 1989; to Julie

12. We note for guidance at the standard 1.4(c)(ii) hearing that in his decision in the first proceeding, the hearing judge included a condition limiting respondent to no more than 30 active cases at any given time without express written consent of his probation monitor. Such consent was to be granted only upon "satisfaction of the probation monitor or Court, as

appropriate that he has developed and is maintaining an adequate office management plan, is otherwise meeting his professional responsibilities, is complying with his probation order and appears mentally and emotionally capable of maintaining the proposed increased caseload."

Sanchez in the amount of \$600 plus interest at the rate of ten (10) percent per year from July 1, 1989; to Jean McKechnie in the amount of \$300 plus interest at the rate of ten (10) percent per year from March 1, 1990; and to Jack Niemeyer in the amount of \$17,000 plus interest at the rate of ten (10) percent per year from March 15, 1985, with credit for \$2,057 previously paid. Restitution shall be paid to the individuals named in this paragraph or their successors or assigns, or to the State Bar's Client Security Fund to the extent that it may have compensated any of the above-named persons for the above-stated losses. Restitution shall be distributed in the following order of priority: 1) McKechnie, 2) Sanchez, 3) Cain, and 4) Niemeyer;

(c) Respondent shall provide copies of all of his federal and state income tax returns to his probation monitor within thirty (30) days of filing said returns. Respondent shall pay no less than the following amounts in restitution: ten (10) percent of that portion of his calendar year net income (before taxes) which exceeds \$8,000 but is less than \$20,000; twenty-five (25) percent of that portion of his calendar year net income before taxes which exceeds \$20,000;

(d) Respondent shall pay restitution in full to all parties as provided above within forty-eight (48) months of the effective date of the Supreme Court order in this matter, unless, for good cause shown by written motion filed initially in the State Bar Court and prior to the expiration of the forty-eight (48) month period, respondent obtains an extension of this obligation from the State Bar Court or the Supreme Court. Respondent's degree of progress in making restitution and good faith efforts to complete restitution as promptly as feasible may be considered in assessing his rehabilitation at the standard 1.4(c)(ii) hearing; and

(e) Respondent shall make restitution payments no less frequently than on or about June 1 of each year respondent is on probation. Respondent shall furnish satisfactory written proof of each restitution payment within forty (40) days of each payment to the Probation Unit and to respondent's probation monitor;

3. That during the period of probation, respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

4. That during the period of probation, respondent shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Unit, Office of Trials, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, respondent shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

5. That respondent shall be referred to the Probation Unit, Office of Trials, for assignment of a probation monitor. Respondent shall promptly review the terms and conditions of his probation with the probation monitor to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar.

6. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of Trials and any probation monitor assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

7. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Unit all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

9. That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

It is further recommended that respondent be ordered to take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State Bar of California within the period of his actual suspension and furnish satisfactory proof of such to the Probation Unit of the Office of Trials within said period.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

Finally, it is recommended that costs incurred by the State Bar in the investigation and hearing of this matter be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.