STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT STEVEN KAPLAN

A Member of the State Bar

Nos. 88-O-14835, 89-O-13084

Filed August 20, 1993

SUMMARY

As a result of negligent office practices, respondent was charged with ten counts of misconduct and was found culpable of some of the charges in nine of the counts. The misconduct included five instances of failing to communicate, failing to file substitution of attorney forms promptly and/or forward client files in seven matters, failing to perform services in three matters, failing to endorse and return settlement drafts of former clients promptly in two instances and one instance of failing to pay court-ordered sanctions. All charges involving moral turpitude were rejected. Finding that respondent's testimony that his former office manager was responsible for most of the problems resulting in disciplinary charges was not believable, the hearing judge concluded that this testimony was not candid and this constituted a serious factor in aggravation. Primarily because of the finding of lack of candor, the hearing judge recommended a three-year stayed suspension, a three-year probation period, and one year of actual suspension. (Peter R. Krichman, Judge Pro Tempore.)

Respondent requested review, contending that the finding that his testimony at the hearing lacked candor was legally insupportable, that culpability should not have been found on certain charges, and that the recommended discipline was grossly excessive. The review department sustained all the essential culpability findings of the hearing judge except one charge involving a one-month delay in endorsing a misplaced settlement check. On the question of respondent's candor, the review department noted that an eyewitness had corroborated respondent's account of his former office manager's behavior, and concluded that respondent's testimony, although unusual, was plausible and uncontradicted. The review department therefore declined to adopt the hearing judge's finding that the testimony lacked candor. Without that aggravating factor, the Office of Trials conceded that less discipline was indicated. After reviewing comparable cases and the applicable standards, which provided for a minimum three-month actual suspension, the review department recommended a two-year stayed suspension and a two-year probation period on conditions including a three-month actual suspension, a law office management plan and a law office management course.

COUNSEL FOR PARTIES

For Office of Trials: Allen Blumenthal, Karen B. Amarawansa

For Respondent: David A. Clare

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

HEADNOTES

[1] **214.30 State Bar Act—Section 6068(m)**
Where the overall number of phone calls made by a client to respondent may not have been reasonable, but they reflected the client's increasing frustration at her inability to speak with respondent, the hearing judge properly found respondent culpable of failing to respond to the client's reasonable inquiries.

[2 a, b] **162.19 Proof—State Bar's Burden—Other/General**
162.20 Proof—Respondent's Burden
204.90 Culpability—General Substantive Issues
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
An attorney is responsible for the reasonable supervision of the attorney's staff. Where a client repeatedly demanded her file from respondent's office over a six-month period, this was sufficient to establish respondent's lack of reasonable supervision. Respondent's ignorance of the client's demands and lack of prior notice of his staff's failure to inform him of client communications did not absolve respondent from culpability absent additional evidence demonstrating his reasonable supervision of his staff.

[3] **162.20 Proof—Respondent's Burden**
204.90 Culpability—General Substantive Issues
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Where respondent received two letters from client's new counsel after respondent claimed to be confused as to whether client was discharging him, respondent's confusion did not excuse his delay in contacting successor counsel and forwarding client's file.

[4 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where respondent's signature was needed to negotiate a settlement draft, and respondent's former client insisted that her current counsel's messenger retain possession of the draft and not leave it with respondent or his staff, and the draft was tendered to respondent at his office and elsewhere but he declined to make himself available to endorse it, respondent was obligated to act promptly to release the client's funds by endorsing the check, he had constructive possession of the funds, and his unreasonable refusal to complete the endorsement in a timely manner constituted an improper withholding of the settlement funds.

[5] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
Where a court file was moved into evidence without objection or limitation, any objection to the admissibility of a proof of service contained in such file was waived.

[6] **142 Evidence—Hearsay**
147 Evidence—Presumptions
163 Proof of Wilfulness
220.00 State Bar Act—Section 6103, clause 1
The purpose of a proof of service is to establish notice of an order or other document, and it is the kind of document relied upon in the conduct of serious affairs. Where a proof of service of a sanctions order on respondent was in evidence, and there was no indication in the record of any misconduct by respondent's staff concerning receipt of the order, respondent was presumed to have been served with the court order. His receipt of the order and his admission that he did not satisfy it established a violation of the statute requiring attorneys to obey court orders.

[7] **106.30 Procedure—Pleadings—Duplicative Charges**
213.20 State Bar Act—Section 6068(b)
220.00 State Bar Act—Section 6103, clause 1
Where an attorney failed to pay court-ordered sanctions, and was charged with violating both the statute requiring respect for courts and the statute requiring obedience to court orders, the misconduct was more specifically addressed under the statute requiring obedience to court orders and that charge was therefore to be preferred.

[8] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a settlement draft was misplaced by respondent's temporary clerical employee for a little over a month, there was no indication that the client informed respondent of immediate need of the settlement funds, and there was no effort by successor counsel to alert respondent that the draft had not been returned, respondent's conduct did not rise to the level of negligent supervision of staff and the resulting delay in respondent's endorsement of the draft did not constitute improper withholding of requested client funds.

[9 a-d] **165 Adequacy of Hearing Decision**
213.90 State Bar Act—Section 6068(i)
615 Aggravation—Lack of Candor—Bar—Declined to Find
Lack of candor toward the State Bar during disciplinary investigation or proceedings, including presenting intentionally misleading testimony, fabricating evidence, or attempting to mislead the court through material omissions, is an aggravating circumstance. However, a respondent's honest, if mistaken belief in his or her innocence, and resulting in failure to acquiesce in the State Bar Court's findings, is not in and of itself aggravating. Lack of candor cannot be found based merely on a respondent's different memory of events from that of complaining former clients. Where respondent's testimony concerning his former office manager's conduct in hiding or destroying letters and messages was uncontroverted and not implausible, and was corroborated by an eyewitness, hearing judge's finding that such testimony lacked candor was not adopted by review department.

[10 a-c] **174 Discipline—Office Management/Trust Account Auditing**
582.32 Aggravation—Harm to Client—Found but Discounted
750.10 Mitigation—Rehabilitation—Found
801.45 Standards—Deviation From—Not Justified
802.61 Standards—Appropriate Sanction—Most Severe Applicable
824.10 Standards—Commingling/Trust Account—3 Months Minimum
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
863.10 Standards—Standard 2.6—Suspension
901.30 Standards—Miscellaneous Violations—Suspension
1092 Substantive Issues re Discipline—Excessiveness
Where respondent's misconduct involved negligent law office management over an extended period of time, resulting in delay and disservice to a number of clients but no act of moral turpitude or serious misconduct in any individual matter, and respondent had since changed his office practices, a one-year actual suspension was excessive in the absence of serious aggravation. However, where no persuasive reason had been offered to go below the minimum three-month actual suspension called for by the standards, a one-year stayed suspension, two years probation, and a three-month actual suspension, with law office management requirements, constituted sufficient discipline.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
214.31 Section 6068(m)
220.01 Section 6103, clause 1
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

214.35 Section 6068(m)
220.35 Section 6104
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.25 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation

Found

521 Multiple Acts

Mitigation

Found

710.10 No Prior Record
725.12 Disability/Illness
745.10 Remorse/Restitution
760.12 Personal/Financial Problems
791 Other

Standards

801.30 Effect as Guidelines
801.47 Deviation From—Necessity to Explain

Discipline

1013.08 Stayed Suspension—2 Years
1015.03 Actual Suspension—3 Months
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

Other

1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

This case involves negligent law office management, particularly in supervising staff, which resulted in numerous instances of minor misconduct. Respondent was admitted to practice in 1979 and runs his own office specializing in plaintiff's tort litigation. At the time of the events in question he had an office manager and several secretaries working for him in his practice. The amended ten-count notice to show cause charged respondent with misconduct concerning ten clients. At the hearing, count 3 of the notice was dismissed upon the motion of the Office of Trials. The hearing judge found culpability of some of the charges on each of the remaining nine counts, including failing to communicate in five matters, failing to sign substitution of attorney forms promptly and/or forward client files in seven matters, failing to perform services in three matters, failing to endorse and return settlement drafts of former clients promptly in two instances and failing to pay court-ordered sanctions in violation of Business and Professions Code section 6068 (b).[1] The hearing judge also rejected a number of charges including all charges of acts of moral turpitude in violation of section 6106.

Respondent testified at the hearing that his former office manager, a longtime, trusted employee, had screened all his calls and mail. Unbeknownst to him she had hidden from him letters and phone messages from certain clients who called frequently or requested their files, and substitution of attorney forms and file requests from the new counsel of former clients. When respondent discovered the scope of her misconduct he demoted the employee and took away her authority to screen incoming communications and by August 1990, she had resigned. New office procedures were in place by March 1992, when the culpability portion of the hearing was held. Respondent's counsel analogized to other cases involving negligent supervision and urged stayed suspension as the appropriate discipline. The Office of Trials sought three to six months actual suspension. The hearing judge found respondent's testimony that his former office manager was responsible for most of the problems not believable and further found lack of candor at the hearing to constitute a serious factor in aggravation. Primarily because of the finding of lack of candor, the hearing judge recommended that respondent be suspended from practice for three years, that the suspension be stayed, and that a three-year probation period be imposed on conditions including one year of actual suspension.

On review, respondent disputes the recommended discipline as grossly excessive and the conclusion that he displayed lack of candor at the hearing as legally insupportable particularly in light of the fact that the hearing judge failed to address the credibility of a corroborating witness. Respondent admits negligence in supervising his staff which resulted in culpability in seven counts, but points out that he waived his fees to all of the affected clients. He also challenges on review culpability on five charges (twice failing to forward files and substitution of counsel forms in counts 1 and 2, two delays in signing settlement drafts of former clients in counts 6 and 9 and failing to pay court-ordered sanctions in count 7). He contends that these charges either have no evidence to sustain them, are contrary to respondent's own uncontradicted testimony or do not rise to the level of a willful violation.

The Office of Trials recognizes that the finding of lack of candor was the key reason for the one-year actual suspension recommendation and defends the hearing judge's decision in its entirety. The deputy trial counsel contends that the hearing judge's assessment of respondent's credibility is entitled to great deference and the judge's reliance on documentary evidence in sustaining a number of the violations was proper in that there was no hearsay objection or other limitation on the use of the documents.

Upon our independent review, we uphold all of the essential findings except culpability on count 9 and the finding in aggravation of lack of candor.

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

Based on the Standards for Attorney Sanctions for Professional Misconduct[2] and precedent in comparable prior cases, we recommend three months actual suspension as a condition of two years stayed suspension and two years probation. We also recommend, inter alia, that respondent take a law office management course and provide an acceptable law office management plan, be required to comply with rule 955, California Rules of Court, and take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners.

THE PROCEEDINGS BELOW

Respondent was originally served with a six-count notice to show cause in case number 88-O-14835 on March 16, 1990. Although he did not respond in timely fashion, his answer was filed prior to the entry of his default. A second, four-count notice to show cause was filed in case number 89-O-13084 on June 15, 1990, and, after he answered, the deputy trial counsel moved to consolidate the two proceedings which motion was granted by the assigned judge on September 20, 1990. An amended notice to show cause was thereafter filed in the consolidated proceedings on January 18, 1991, which were transferred for trial to a judge pro tempore. Although respondent has only challenged factual findings in five of the counts in the amended notice to show cause in the consolidated proceedings, all nine are summarized here by count and the name of the client.

Count 1 (Webster)

Count 1 charged respondent with wilful violations of section 6068 (m) and of former rules 2-111(A)(2) and 6-101(A)(2) of the Rules of Professional Conduct.[3] Respondent had been retained in April 1986 to pursue a personal injury suit on behalf of David Webster. Respondent filed the lawsuit in April 1987, and obtained medical information concerning his client in August 1987, but did not serve the action on the defendants. In February 1988, Webster retained new counsel and the counsel wrote to respondent on February 22, 1988, enclosing a substitution of attorney form, acknowledging respondent's lien and requesting Webster's file. He wrote again on May 10, 1988, and July 8, 1988, enclosing another substitution of counsel form in the July letter. Respondent's office received the letters but the counsel did not receive an immediate response. Respondent executed and returned the February substitution of counsel form on August 27, 1988, six months after the initial letter.

Respondent testified that he was unaware of the change of counsel by the client until shortly before he signed and returned the substitution in August and that his office manager, Karen Hooks, hid the letters and only showed him the July letter sometime after he completed a two-week trial in July 1988. Respondent severely reprimanded Hooks for this occurrence. The hearing judge did not find this explanation credible, but found that the State Bar did not prove by clear and convincing evidence that respondent failed to perform legal services competently in wilful violation of former rule 6-101(A)(2) or that he failed to communicate with Webster in violation of section 6068 (m). He did find that respondent had insufficient excuse for failure to deliver the client's file promptly to subsequent counsel in violation of former rule 2-111(A)(2).

Count 2 (Craig)

Susan Craig retained respondent initially in October 1987 to file suit on her behalf as a result of an automobile accident. Respondent filed a personal injury action within the applicable time limits. Craig was involved in a second accident in April 1988 and respondent was asked to represent her interests in that matter as well. In March 1989, Craig retained new counsel to represent her in these actions and the

2. All references herein to "standards" are to the Standards for Attorney Sanctions for Professional Misconduct set forth in division V of the Transitional Rules of Procedure of the State Bar.

3. The former Rules of Professional Conduct were in effect from January 1, 1975, through May 26, 1989. Unless otherwise noted, all references herein to "former rules" are to the rules in effect during this time and all references to "rules" or "current rules" are to the Rules of Professional Conduct that became effective on May 27, 1989.

counsel wrote to respondent on March 15, 1989, advising respondent of Craig's decision, enclosing a substitution form executed by Craig, requesting respondent to sign the form and to forward Craig's file to him, and promising to honor any lien respondent might have. Thereafter respondent was contacted by a chiropractor, who told respondent that Craig still considered respondent her attorney. Respondent wrote to Craig on April 24, 1989, asking her to advise him if she wished to continue with his services. He sent this letter to the wrong address for Craig. Craig's new counsel wrote to respondent on April 27, 1989, and May 16, 1989, seeking respondent's cooperation. After no response was received, new counsel filed a formal complaint with the State Bar on May 19, 1989. Respondent's office contacted new counsel on July 5, 1989, and indicated that the substitution form and files would be delivered to new counsel's office by July 7. When the documents did not arrive and respondent's office did not return his calls, Craig's new counsel prepared a motion for a court order substituting himself as counsel, and seeking sanctions against respondent. Respondent signed and returned the substitution form and files on July 28, 1989. The motion was nevertheless filed with the court on July 31, 1989, and sanctions of $600 were ordered to be paid to counsel by respondent.

In count 2, respondent was again charged with wilful violations of sections 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). In addition, he was charged with violating current rules 3-700(A)(2) and 3-700(D)(1). The hearing judge found respondent culpable of wilful violations of former rule 2-111(A)(2) and rules 3-700(A)(2) and 3-700(D)(1) as a result of his failure to transmit promptly the client's files and the executed substitution of attorney to her subsequent attorney. However, the court indicated that it treated these rule violations as a single offense for purposes of discipline. Respondent was not found culpable of violating section 6068 (m) or former rule 6-101(A)(2) because no evidence was presented to establish that he in any way was incompetent in representing the client.

Count 4 (Meirovitz)

Count 4 also charged respondent with violating section 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). Respondent represented a teenager involved in an automobile accident. He admits that he failed to return numerous phone calls from the teenager's father, Dr. David Meirovitz, over a six-month period (February to July 1988). After Dr. Meirovitz, as guardian and parent, retained new counsel for his son's case, new counsel sent notice of the substitution on July 15, 1988, enclosed a substitution form, and asked that the file be delivered to him. This letter and a follow-up letter dated August 18, 1988, were sent to respondent's former office address. Respondent and a former employee testified that a copy of the Meirovitz file was sent to the client's insurance agent in July 1988, and another copy of the file given to Dr. Meirovitz several months later. There was no cover letter, receipt or other document indicating that the file had been copied. Dr. Meirovitz filed a complaint with the Orange County Bar Association on December 19, 1988, in which he alleged that respondent failed to communicate with him, file suit in a timely manner or release his son's file to the new counsel. The bar association contacted respondent and asked him to respond to the allegation. He promised to do so but did not. Finally, on March 27, 1989, a member of the bar association board of directors wrote to respondent and demanded that respondent deliver the file to Dr. Meirovitz and respond to the complaint within seven days. Respondent delivered the file and answered the complaint on April 1, 1989.

Respondent was found culpable of violating section 6068 (m) and of violating former rule 2-111(A)(2) as a result of his failure to transmit the file to Dr. Meirovitz or to his new attorney for more than eight months. No culpability was found of a wilful violation of former rule 6-101(A)(2). Neither party challenges these conclusions on review, and we adopt them.

Count 5 (Mantle)

Respondent was hired by Anthony Mantle on January 29, 1987, as successor counsel in a wrongful death case. Respondent wrote to Mantle's prior counsel on February 4, 1987, advising him of Mantle's decision, enclosing a substitution of counsel form, and asking that Mantle's file be forwarded to him. The prior counsel executed a substitution of counsel

form on January 31, 1987, which was never filed. Mantle reached respondent in February 1987 and respondent told him he had spoken to the prior counsel and was having trouble obtaining Mantle's file. He assured Mantle that the case would go forward and the prior attorney could be forced to relinquish the file. Respondent wrote to the prior counsel in August 22, 1988, because counsel had failed to forward the file.

After August 1988, Mantle had trouble reaching respondent. He had not been advised of respondent's office move in March 1987, and learned of the new address in January 1989. Mantle's letters dated October 31, 1988, and December 6, 1988, were sent to respondent's old office. It is undisputed that no action was taken to prosecute the Mantle case by respondent for two years. Mantle filed a complaint with the State Bar in June 1989. Respondent testified that he had advised Mantle in a conversation in August 1988 that in light of his inability to secure Mantle's file, he could not continue to represent Mantle. Mantle denied that this alleged conversation took place or that he had been advised that respondent was withdrawing from the case. The hearing judge found Mantle's testimony to be more credible and consistent with his subsequent attempts to contact respondent.

Respondent was also charged in this count of violating section 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). In addition, he was charged with violating section 6106. He was found culpable of violating section 6068 (m) and former rule 6-101(A)(2), but not former rule 2-111(A)(2) or section 6106. These conclusions are not challenged on review, and we adopt them.

Count 6 (Kennedy)

Respondent was hired to represent Sheila Kennedy in a personal injury matter in 1988 and was replaced by new counsel in mid-February 1989. Respondent does not dispute that he failed to forward a client file and execute a substitution form first requested on February 24, 1989. Successor counsel filed suit on Kennedy's behalf on April 4, 1989, to protect against the running of the statute of limitations[4] and settled the case for $25,000 without the file prior to July 24, 1989. The settlement draft was issued in the names of Kennedy (client), Goldstein (successor counsel) and respondent. On July 31, 1989, respondent agreed to sign the draft and directed counsel to schedule with his staff a convenient time to endorse the check. The counsel first arranged for a messenger to visit respondent's office to present the check for endorsement on August 4; then, at the request of respondent's office manager, it was changed to August 7, 1989. The client insisted that the check not leave the messenger's presence. When the messenger arrived at the designated time, respondent was in a deposition and unavailable. The messenger refused to leave the check with respondent's staff to be endorsed later and left the office.

The successor counsel called respondent's office later and, upon learning that respondent was then unavailable, advised an employee that he was willing to come to respondent's office that evening or meet respondent at a nearby courthouse or at respondent's office the next morning to have respondent sign the check. The staff member declined those suggestions and said that counsel should send the draft for respondent to sign and return, a procedure the client would not permit. Successor counsel wrote to respondent on August 8, 1989, in which he summarized the history of his representation and asked respondent to contact him regarding endorsement of the draft. He sent copies of the letters to the State Bar and the Orange County Bar Association. Respondent wrote to successor counsel on September 6, 1989, asserted that he had tried to reach counsel by telephone several times and offered to have his employee

4. Respondent testified that he was not aware of counsel's letter to him dated February 24, 1989, until much later, nor did he see any subsequent correspondence from counsel until receiving counsel's July 24, 1989, letter advising him that Kennedy's case had been settled. Consistent with that testimony, the hearing judge found that respondent had not taken any action to protect Kennedy's claim prior to the expiration of the statute of limitations on April 7, 1989, and thus had provided incompetent legal services in willful violation of former rule 6-101(A)(2). Respondent does not challenge this finding on review.

or an independent messenger service pick up the draft, bring it to respondent for endorsement and return it to the counsel. He denied that he or his office had been uncooperative and blamed successor counsel for insisting that the draft could not leave the messenger's sight. The draft was finally signed on September 15, 1989, with the assistance of the State Bar's investigator.

Count 6 charged violation of section 6068 (m), former rules 2-111(A)(2) and 6-101(A)(2) and current rules 3-110(A), 3-700(D)(1) and 4-100(B)(4). The hearing judge found respondent culpable of a wilful violation of current rule 4-100(B)(4) and of former rule 2-111(A)(2) and current rule 3-700(D)(1) as a result of his failure to forward the file. He was also found culpable of wilfully violating former rule 6-101(A)(2) for failure to file the civil action within the applicable statute of limitations. He was not found culpable of violating current rule 3-110(A) since his misconduct predated the effective date of that rule. Nor was he found culpable of violating section 6068 (m) since the gravamen of this count was his failure to transmit the file and cooperate with the endorsement of the settlement draft which were separate bases for culpability.

Count 7 (Fontes)

This count charged respondent with failing to communicate with his client, Karen Fontes, and, after she retained new counsel, failing to forward her file and execute a substitution of attorney form until August 30, 1988, two months after written notice of the client's decision from successor counsel and one month after opposing counsel was told by respondent's staff that he was no longer representing Fontes. He does not dispute these findings on review.

While respondent was representing Fontes, a dispute arose over discovery. Respondent did not comply with the discovery requests and he, along with Fontes's new attorney, was served with a motion to compel discovery and award sanctions filed September 15, 1988. Respondent was also served with notice of a continuance of the hearing on the motion and with the ruling of December 7, 1988, finding respondent and new counsel jointly liable for $450 in court-ordered sanctions. Respondent has not paid any portion of the sanction and testified that he was unaware of the sanction order until he spoke to a State Bar investigator.

Count 7 charged respondent with wilful violations of sections 6068 (b), 6068 (m) and 6103 and former rules 2-111(A)(2) and 6-101(A)(2). Respondent was found culpable of violating section 6068 (m) for failure to respond to reasonable status inquiries and section 6068 (b) for failure to pay sanctions ordered by the court. He was also found culpable of violating former rule 2-111(A)(2) as a result of his failure to promptly execute the substitution of attorney form and deliver the file to the client or her new counsel. He was not found to have violated former rule 6-101(A)(2).

Count 8 (Ayers)

Count 8 charged respondent with wilful violations of sections 6068 (b), 6068 (m) and 6103 and former rules 2-111(A)(2) and 6-101(A)(2). The trial judge found respondent culpable of a wilful violation of former rule 2-111(A)(2) for delay in completing the substitution of attorney and for failure to deliver the file to the client. He was also found culpable of failure to communicate adequately with the client in violation of section 6068 (m). In addition, the hearing judge found him culpable of wilful violation of section 6068 (b) for failing to comply with a court order to return the file to his client. The hearing judge declined to find culpability of violating section 6103 based on the same misconduct on the grounds that it would be duplicative. Finally, the hearing judge found that respondent did violate former rule 6-101(A)(2) in this instance by failing to serve the summons and complaint within three years of filing the action as required by Code of Civil Procedure sections 583.210 and 583.250.

Respondent does not now dispute that he failed to communicate with his client, Ardee Ayers. After she decided to discharge him in January 1989, she visited his office with a substitution of attorney form and asked the receptionist to have respondent sign it and return it with her file. She was told to return in a week. When she did, she was told that respondent had to meet with her first before he would sign the substitution or return her file. She refused and there-

after on September 5, 1989, filed a motion for substitution of counsel. Respondent delivered an executed substitution form on October 2, 1989; the next day, the court ordered him to provide the client with her file. Ayers learned in November 1989 that respondent had not served the summons and complaint on the defendants in her personal injury action within the three-year statute, and her action was dismissed by motion in January 1990.[5]

Respondent testified at the hearing that he had executed the substitution of attorney form in February 1989 and given Ayers her file. The judge did not accept respondent's version of events, finding that respondent's file contained correspondence relating to the Ayers case dated after February 1989, that respondent executed a second substitution form, which would be unnecessary if a form had already been signed, and that Ayers's motion for a court-ordered substitution would likewise have been unnecessary if she had already secured the substitution and her file. We see no reason on this record to disturb the hearing judge's findings and conclusions, which respondent has not challenged on review.

Count 9 (Burgess)

This count charged respondent with wilful violations of sections 6068 (m) and 6104 and of former rules 2-111(A)(2), 6-101(A)(2) and 8-101(B)(1) and current rules 4-100(B)(1) and 4-100(B)(4). Respondent was found culpable of a wilful violation of former rule 2-111(A)(2) as a result of his failure to forward the file promptly to subsequent counsel. He was also found culpable of violating current rule 4-100(B)(4) due to his failure to endorse and return the settlement draft promptly. He was not found culpable of violating former rule 8-101(B)(1) or current rule 4-100(B)(1). Nor was he found culpable of violating former rule 6-101(A)(2) or section 6068 (m). The gravamen of his failure to communicate was his failure to forward the file and endorse and return the settlement draft, each of which was the subject of culpability findings under other provisions. Finally, the court did not find respondent culpable of violating section 6104 which prohibits an attorney from appearing for a party without authority.

Respondent does not challenge the conclusion that he failed to supervise his staff when two written requests for respondent to execute a substitution form and forward Burgess's file dated January 30, 1989, and April 27, 1989, went unanswered. Respondent executed a substitution form on June 7, 1989. Thereafter, Burgess's new counsel settled the case and sent respondent the settlement draft for his endorsement. The draft and accompanying letter dated August 2, 1989, arrived in respondent's office in early August, but was not signed by respondent until September 15, 1989, because, according to respondent, a summer file clerk had put the letter and draft in a shopping bag, along with other mail, and placed it in a cabinet. The draft was returned six weeks later with a letter of apology to the successor counsel. Respondent contests the finding that he wilfully failed to return the settlement draft promptly.

Count 10 (Pickerell)

Judith Pickerell retained respondent in October 1987 to pursue her claim arising from an automobile accident with an uninsured motorist. Respondent arranged, among other things, to have Pickerell's car repaired at a repair shop known to respondent. When the repairs proved inadequate, respondent made a claim on the repair shop's insurance company.[6]

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5. The hearing judge noted that the record disclosed with respect to the dismissed action that the policy limits on the defendant's insurance were $15,000 and there were outstanding liens in excess of $11,000 excluding any attorneys' fees against Ayers's interest in the lawsuit.

6. In conjunction with negotiating with the repair shop, respondent received a check to cover a part of Pickerell's claimed expenses. Respondent returned it to the shop because it was not signed. When a signed check was returned to respondent, he was advised that because of business reversals, there were insufficient funds in the account to cover the check. There was disputed testimony as to whether respondent had advised Pickerell of the receipt of the check and the problems with attempting to negotiate it. Although she elicited testimony at the hearing concerning this matter, the examiner did not pursue allegations of financial improprieties concerning the check.

In August 1988, Pickerell indicated that she intended to discharge respondent for lack of services and failing to return her phone calls. Despite this, respondent continued his representation and Pickerell provided additional information to respondent's office through February 1989. In July 1989, Pickerell again notified respondent that she was discharging him, complaining that he did not return her calls or adequately protect her interests. She subsequently settled her own claim with her insurance company. Pickerell's telephone records reflected 118 calls to respondent over a 2-year period with 25 of those calls lasting over 5 minutes and 2 over 10 minutes. Respondent sent only 2 letters to Pickerell over the same period.

This final count charged respondent with wilful violations of sections 6068 (m) and 6106 and of former rules 6-101(A)(2) and 8-101(B)(1) and current rules 3-500 and 4-100(B)(4). Respondent was not found culpable of violating rule 3-500 or section 6106. He also was found not to have violated current rule 4-100(B)(4), former rule 8-101(B)(4) or former rule 6-101(A)(2). **[1]** The hearing judge did conclude, however, that although the overall number of client calls to respondent may not have been reasonable, they reflected her increased frustration in being unable to speak with him. On this rationale, he found that respondent had failed to respond to his client's reasonable inquiries in violation of section 6068 (m). This conclusion has not been challenged on review, and we adopt it.

Evidence in Mitigation and Aggravation

Respondent and his present office manager, Candace McElduff, testified concerning the improvements made in his office systems since the State Bar complaints came to light. More experienced secretaries have been hired, there are staff meetings every six weeks, calls and correspondence are not screened as they were in the past and files and substitution of attorney requests are fulfilled within three days where possible. Respondent did not assert liens for fees due from any of the clients involved in seven of the cases which he filed. (Std. 1.2(e)(vii).) He also testified that his ex-wife, who suffers from severe mental illness, filed for divorce in 1985 and the final decree was issued in January 1989. He testified that the dissolution action was severely disruptive to his practice because she threatened his life and repeatedly harassed his office staff. The judge did not find that respondent's marital difficulties were directly responsible for his misconduct, but did accord them some weight in mitigation. (Std. 1.2(e)(iv); *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1364; *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318.) Respondent's unblemished record of nine years without discipline was also given some weight in mitigation as well. (See, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 498 [eight years without prior disciplinary record considered in mitigation].)

In aggravation, the judge found that there were multiple acts of misconduct by respondent. (Std. 1.2(b)(ii).) Further, while finding that respondent's conduct caused his clients frustration and delay, only one client (Ayers) lost her cause of action due to respondent's misconduct. Finally, the judge determined that respondent displayed a lack of candor during the hearing, finding in weighing the evidence on each count, that respondent's testimony that his office manager was principally to blame for his misconduct was unbelievable. (Std. 1.2(b)(v); see *Franklin* v. *State Bar* (1986) 41 Cal.3d 700, 710; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128.)

Hearing Judge's Discipline Recommendation

In reaching the recommended discipline of three years suspension, stayed, and a three-year probation term including as a condition a one-year actual suspension, the judge reviewed the applicable standards and the cases presented by the parties. Respondent was found culpable of violating rule 4-100(B)(4) in two matters as a result of failure to promptly endorse and return settlement drafts. Standard 2.2(b) calls for a minimum of a three-month actual suspension for a violation which does not result in misappropriation. Respondent was also found culpable of failure to communicate in five matters and failure to perform services competently in three matters. Under standard 2.4(b) culpability thereof calls for reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client. Respondent was found culpable in two counts of violating section 6068 (b). Standard

2.6 provides that culpability shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. In addition, respondent was found culpable of violating former rule 2-111(A)(2) in seven matters which standard 2.10 provides shall call for reproval or suspension according to the gravity of the offense or harm to the victim.

The judge noted that the standards serve as guidelines which need not be rigidly applied, but considered the cases presented by the respondent distinguishable primarily because of the higher number of clients involved here (nine), the lack of comparable mitigating evidence in this record, and the aggravation due to respondent's lack of candor. The hearing judge relied on four cases which he saw as providing a more accurate comparison: *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074 (a default case resulting in five years probation, two years actual suspension for abandoning four clients resulting in great harm to each, and failing to cooperate with State Bar; no prior record for 1972 admittee); *Martin* v. *State Bar* (1991) 52 Cal.3d 1055 (five years probation, two years actual suspension for abandoning five clients, issuing insufficient funds checks and making misrepresentations to two clients, by 1978 admittee with no prior record); *Young* v. *State Bar* (1990) 50 Cal.3d 1204 (three years probation and two years actual suspension for 1980 admittee who abandoned clients in seven matters); and *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131 (three years probation, one year actual suspension for attorney with two priors, for a single matter involving multiple misrepresentations and failure to perform services resulting in the loss of the client's cause of action).

ISSUES ON REVIEW

Respondent challenges only those adverse findings which he characterizes as being contrary to undisputed or uncontroverted evidence. On the issue of discipline, he characterizes the misconduct found as minor and resulting from respondent's failure to supervise his staff adequately. He contends the hearing judge did not accord the mitigating evidence sufficient weight and challenges the finding of lack of candor as unsupported by the record below. He has not changed his position from his position at the hearing, arguing for discipline of a stayed suspension with no actual suspension or, at most, 30 days actual suspension.

Count 1 (Webster)

With respect to count 1, respondent contends that he should not be held liable for failing to forward the client file and substitution of counsel form from February until late August 1988 because the request had been hidden from him until then and he had no reason to doubt the trustworthiness and efficiency of his office manager prior to this point.

The hearing judge did not believe respondent's description of his former office manager's misdeeds of hiding correspondence in the telephone closet, her car trunk, and her desk drawer, and tearing up phone messages as her way of screening his telephone calls. Respondent points out that his testimony was confirmed by one of his other employees, Candace McElduff, who came to work for respondent in December 1989. While McElduff's observations were limited by the fact that her employment postdates much of the mischief allegedly caused by the office manager, McElduff did testify that she witnessed Hooks follow a practice of destroying and hiding telephone messages from December of 1989 when McElduff was hired until Hooks was relieved of her duties as office manager in June or July of 1990. She also testified that she did not inform respondent of this practice because Hooks threatened to fire her and see to it that she never got another job in the legal field in Orange County if she told respondent. The hearing judge did not indicate in his decision that he made any credibility assessment of McElduff's testimony.

Respondent testified that after he learned that the July 7, 1988, letter had been withheld from him, he severely reprimanded Hooks but took no other steps to ensure a similar incident would not happen again. He remained unchanged in his belief in his office manager's general performance and abilities.

[2a] Respondent recognizes that he is responsible for the reasonable supervision of his staff. (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 259-

260.) He also recognizes that he had the obligation to provide his client with her papers and records promptly upon request. He argues that until he had actual knowledge of her repeated requests or was on notice of his office manager's failure to provide similar information to him in the past he was not culpable of misconduct.

[2b] We disagree that the record exculpates respondent. It is true that "Attorneys cannot be held responsible for every detail of office operations." (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795; accord, *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857.) However, we consider the State Bar to have met its burden by showing the repeated demands of the client over a six-month period which were received by respondent's office. In *Sanchez* v. *State Bar* (1976) 18 Cal.3d 280, 284, Sanchez similarly sought to disavow culpability because of his secretary's failure to inform him a motion had been denied. The Supreme Court rejected the argument noting that Sanchez was responsible for the supervision of his staff and reasonable attention on his part would have disclosed the improprieties. (*Ibid.*) Given the evidence presented by the State Bar, the hearing judge was similarly justified in finding that respondent was culpable of violating former rule 2-111(A)(2) for failing to forward the client file and substitution of counsel form in a timely fashion absent production of evidence by respondent demonstrating reasonable supervision of this staff. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) Indeed, respondent's own changed office practices in 1992 help demonstrate the laxity of his prior supervision. More evidence would have to be produced by respondent than was presented on the record below to overcome the evidence that respondent was not reasonable in his supervision of staff during this period.

Count 2 (Craig)

[3] As to respondent's failure to respond to new counsel's requests for the client's file and an executed substitution form in count 2, respondent does not contend that he did not know of these three requests, which were sent to him March 15, April 27, and May 16, 1989. Rather, he insists that he was confused by other information which led him to believe that the client was not really discharging him. He wrote one letter to the client, but he remained confused when she did not reply. Although the letter was mistakenly sent to the wrong address, respondent received two letters from Craig's new attorney *after* he had sent the letter to Craig. Respondent did not contact the new attorney until July 1989. Respondent's confusion does not excuse his violation of rule 2-111(A)(2).

Respondent attacks the findings of culpability regarding his failure to endorse and return settlement drafts of former clients promptly in two other instances.

Count 6 (Kennedy)

[4a] On count 6, attorney Goldstein testified at the hearing that it was the client, Kennedy, who insisted that the check not be taken out of sight of the messenger by respondent or his staff because she did not trust respondent. Because she had extensive medical bills, she wanted the draft to be negotiated quickly. Goldstein attempted to accommodate his client with the least disruption to respondent, arranging in advance with respondent's staff for a convenient time when respondent would be available, and changing the date, and later, the time at the request of respondent's staff. After the messenger was unsuccessful in obtaining respondent's signature, Goldstein indicated he was willing to travel to respondent's office or a nearby courthouse the next morning to meet respondent for his endorsement, but was rebuffed. It was after these attempts that respondent made his offer to send an employee or an independent messenger service to pick up the check, have it endorsed and return it to Goldstein, conditions which Kennedy, due to her mistrust, was unwilling to accept. When Goldstein got the State Bar involved, a solution was fashioned.

[4b] Respondent argues that this situation did not constitute a withholding of client funds by respondent under rule 4-100(B)(4). Respondent says by definition, he never had possession of the funds at issue. The Office of Trials argues, and the hearing judge concluded, that respondent's unreasonable action which delayed and impeded his endorsement of the client's settlement draft significantly delayed

the client's receipt of the funds. The draft could not be negotiated without respondent's signature. The delay had the effect of withholding the funds when the client was entitled to receive them promptly. Respondent was obligated to act promptly to release those fund by endorsing the draft. We construe the check as constructively in respondent's possession due to its tender to him at his office and its non-negotiability without his endorsement. We also defer to the hearing judge's credibility determination and his resulting finding that respondent unreasonably refused to complete the endorsement in a timely manner.

Count 7 (Fontes)

As to the final contention concerning the failure to pay a court-ordered sanction, respondent states that he was unaware of the motion and order for sanctions and relies on our decision in *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367. In *Whitehead* we agreed with the hearing judge that the Office of Trials had not established Whitehead's personal knowledge of the sanction order because an associate who handled the case had not included the sanction order and related papers in the file reviewed by Whitehead. **[5]** Here the court file in the case was moved into evidence, without objection or limitation. In the file is the proof of service indicating service on respondent of the order for sanctions against him and successor counsel jointly. Because respondent did not object to the court file when it was offered into evidence, it is well settled that any objection on that point has been waived.

[6] The purpose of a proof of service is to establish notice of the order or other documents on whom it is served, and thus it is the kind of document relied upon in the conduct of serious affairs. There is no indication in the record of any improper conduct by respondent's staff on this count. Therefore respondent is presumed to have received the order (Evid. Code, § 641) and his admitted failure to satisfy it constitutes a violation of section 6103, as charged. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406.) **[7]** Although the hearing judge found the section 6103 charge to be duplicative of the section 6068 (b) charge, the violation of a court order is more specifically addressed under section 6103 and that charge is therefore to be preferred. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 9 (Burgess)

[8] As to the second alleged delay in endorsing a client settlement draft, in count 9, the actions of a young summer file clerk in misplacing a settlement draft of a former client do not appear to rise to the level of neglect in supervising his staff by respondent. Unlike the Kennedy case, there was no evidence that the client informed respondent of immediate need of the funds. There is no indication in the record that any follow-up correspondence was sent to respondent to alert him or his office that the draft had not been endorsed and returned. It was another member of respondent's staff who discovered the error and found the draft. Just over a month passed between the time the check was received and its endorsement. Therefore, we do not find this conduct to be a violation of rule 4-100(B)(4).

Lack of Candor as Aggravating Circumstance

[9a] Under standard 1.2(b)(vi), lack of candor toward the State Bar during disciplinary investigation or proceedings is an aggravating circumstance. Attorneys are under a duty to be cooperative with the State Bar. (Bus. & Prof. Code, § 6068 (i).) Presenting intentionally misleading testimony before the State Bar Court is regarded as a serious factor in aggravation. (*Franklin* v. *State Bar*, *supra*, 41 Cal.3d at p. 710.) Such acts as fabricating evidence and testifying to its genuineness at the hearing are considered particularly egregious. (*Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1053.) "[F]raudulent and contrived misrepresentations to the State Bar may perhaps constitute a greater offense than misappropriation." (*Chang* v. *State Bar*, *supra*, 49 Cal.3d at p. 128.) It is not necessary to find that the attorney lied to conclude that he or she lacked the requisite candor. (*Franklin* v. *State Bar*, *supra*, 41 Cal.3d at p. 708 & fn. 4.) Attempts to mislead the court about the facts in an underlying disciplinary allegation through material omissions of fact are aggravating as well. (*Id.* at p. 709.)

[9b] However, the Supreme Court has recognized that a respondent may have an honest, if mistaken belief in his innocence. (*Van Sloten* v. *State*

Bar (1989) 48 Cal.3d 921, 932.) He is entitled to dispute the findings of the State Bar Court and his failure to acquiesce is not in and of itself an aggravating factor. (*Beery* v. *State Bar* (1987) 43 Cal.3d 802, 816.) The Court has stated in reinstatement and moral character proceedings that an applicant's refusal to recant prior professions of innocence cannot be held against him on assessing his moral character, nor can he be forced to adopt a guise of a fraudulent penitent in order to be admitted to practice. (*Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 747; *Hightower* v. *State Bar* (1983) 34 Cal.3d 150, 157; *Hall* v. *Committee of Bar Examiners* (1979) 25 Cal.3d 730, 743-745.)

[9c] A hearing judge is not justified in finding lack of candor merely based on respondent's different memory of events from that of complaining former clients. (Cf. *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.) The deputy trial counsel acknowledges that not every adverse finding against a respondent should lead to the conclusion that an attorney lacked candor, but contends that the number of instances in which respondent's recitation or explanation of events was found by the judge to be unbelievable supports the finding of a lack of candor.

[9d] The hearing judge's findings resolving issues of testimonial credibility are entitled to great weight. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429; *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 328.) Nonetheless, the key issue here is whether respondent lacked candor in blaming his staff for many of the problems, primarily in his testimony that Hooks, a longtime trusted employee, hid or destroyed letters and messages so that he did not receive them. No prosecution witness testified to any knowledge on this issue. Respondent's testimony with regard to Hooks's bizarre conduct was corroborated by an eyewitness and while unusual was not implausible. We therefore do not adopt the finding of lack of candor. (Cf. *Edmondson* v. *State Bar* (1981) 29 Cal.3d 339; *Davidson* v. *State Bar* (1976) 17 Cal.3d 570; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 725-726, 730.)

RECOMMENDED DISCIPLINE

[10a] This proceeding involves negligent law office management over an extended period of time. A number of clients were delayed and disserved by respondent's inaction although no serious misconduct was found in any individual matter.

In urging either no actual suspension or at most 30 days suspension, respondent relies principally on *Colangelo* v. *State Bar* (1991) 53 Cal.3d 1255 (1-year stayed suspension, 18 months probation and no actual suspension); *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116 (3 years stayed suspension, 3 years probation and 30 days actual suspension); and *Wells* v. *State Bar* (1984) 36 Cal.3d 199 (2 years stayed suspension, 2 years probation and 30 days actual suspension). He also relies on *Waysman* v. *State Bar* (1986) 41 Cal.3d 452 and *Palomo* v. *State Bar, supra*, 36 Cal.3d 785, both of which resulted in no actual suspension.

Colangelo was a deputy state public defender at the time of the State Bar proceedings which involved misconduct in his prior private practice. In four matters he was found to have withdrawn from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his clients, wilfully failed to perform services in a competent manner, wilfully failed to communicate reasonably with clients, and failed to promptly return unearned advanced fees. (*Colangelo* v. *State Bar, supra*, 53 Cal.3d 1255.)

Colangelo's case was unique in that he defaulted in the State Bar proceedings before a hearing judge and no review was sought before this review department before the Supreme Court accepted his petition for review. This occurred just prior to adoption by the Supreme Court of new rules of court requiring exhaustion of review rights before the State Bar Court before seeking Supreme Court review. (See Cal. Rules of Court, rule 952(e), as amended eff. Dec. 1, 1990.) The State Bar defended the recommendation of stayed suspension which the respondent attacked as unwarranted. A majority of the Supreme Court adopted the recommendation although it characterized the result as appearing

lenient, but recognized that the misconduct was in part attributable to Colangelo's suffering from a form of epilepsy. It also noted his career change and the assurances of the office of the State Public Defender that clients would be protected in the event of a relapse. (*Colangelo* v. *State Bar*, *supra*, 53 Cal.3d at p. 1267.) Two dissenting justices would have ordered 60 days suspension due to substantial harm to three clients. There is far less client harm here, but more instances of misconduct.

Chefsky v. *State Bar*, *supra*, 36 Cal.3d 116 involved a hearing department recommendation from a volunteer panel of one year of actual suspension for multiple statutory and rule violations with regard to five clients. The misconduct was far more serious than we have here. It involved misrepresentations in court and misappropriated funds, as well as failure to perform services and/or failure to communicate with several clients, and withdrawing from representation without taking steps to prevent prejudice to his clients. There, however, the Supreme Court found more mitigation than is present in this record. All the violations occurred during a relatively short time period, the behavior was characterized as aberrant in a nearly 20-year career with no disciplinary record and was mitigated by the attorney's illness, office relocation and loss of his full-time secretary. Nonetheless, two dissenters would have imposed greater discipline—one would have imposed the recommended one year of actual suspension and the other would have suspended Chefsky for 90 days. Given the findings of misappropriation and false statements to a court, under the current standards and more recent case law, a respondent committing similar acts today would clearly face greater discipline than Chefsky received.

In *Wells* v. *State Bar*, *supra*, 36 Cal.3d 199, the attorney and the State Bar stipulated to facts and discipline including 30 days actual suspension for misconduct of duties to communicate and perform services diligently. The Court would have imposed a reproval but for two prior instances of discipline in 1975 and 1978. The dissent pointed out Wells's repeated failure to discharge his ethical obligations and would have ordered three months suspension for the current misconduct. In light of the fact that one of Wells's priors involved fraudulent concealment of misappropriation, a respondent in a similar situation could clearly expect far greater discipline today in light of the standards and more recent case law.

Waysman v. *State Bar*, *supra*, 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785 were also decided prior to the adoption of the standards which generally urge greater discipline than previously imposed. However, as we noted with regard to the issue of negligent misrepresentation in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, in both *Waysman* and *Palomo*, the Supreme Court accepted the principle that if misconduct occurs due to the attorney's laxity rather than intent to defraud, and if the lack of intent is reinforced by the attorney's having taken remedial steps immediately upon discovery of the problem, far less discipline is appropriate than if the misconduct were intentional.

In *In the Matter of Bouyer*, *supra*, 1 Cal. State Bar Ct. Rptr. 404, respondent was found culpable of multiple counts of misconduct stemming from negligent office management over a period of one year. There, we concluded that in lieu of disbarment for intentional misappropriation the far lesser sanction of six months suspension was sufficient because the misappropriation resulted from negligent supervision which had been mitigated by subsequent institution of office practices designed to remedy the problem. In that case, as in *Waysman* and *Palomo*, serious trust account violations had occurred through lax supervision and restitution was commenced but not entirely completed at the time of the disciplinary proceeding. Here, no trust account violations were found or any need for restitution. Indeed, respondent waived any fees in most of the cases.

[10b] Although the precedent cited by respondent is not persuasive, we also do not consider the cases cited by the hearing judge and Office of Trials analogous. No act of moral turpitude was found here as it was in *Bledsoe* v. *State Bar*, *supra*, 52 Cal.3d 1074 where, among other things, affirmative misrepresentations were made to clients regarding the status of their cases. Nor do we have a case like *Young* v. *State Bar*, *supra*, 50 Cal.3d 1204, where the attorney demonstrated contempt for the practice of law by abandoning his clients and moving to Florida. Nor

does this case resemble *Martin* v. *State Bar*, *supra*, 52 Cal.3d 1055, which involved both client misrepresentations which were found to be acts of moral turpitude in violation of section 6106 and issuance of checks on insufficient funds. The deputy trial counsel conceded at oral argument that absent the lack of candor, far less discipline would be justified here.

We therefore look to other cases which we deem to involve more similar misconduct to that which occurred here. In *Sanchez* v. *State Bar*, *supra*, 18 Cal.3d 280 the Supreme Court ordered three months suspension of an attorney for two counts in which he was found culpable of gross negligence in failing to supervise employees who signed his name to legal documents without his authorization and gross negligence in failing to establish an internal calendaring system resulting in the dismissal of two clients' cases. Here, too, one case was dismissed and one would have been untimely but for the saving action of successor counsel without respondent's knowledge. *Sanchez* was also a pre-standards decision and would likely result in greater discipline today. Nonetheless, Sanchez's gross negligence was also found to have risen to the level that it permitted the unauthorized practice of law by his subordinates, a serious situation not involved here.

In *In the Matter of Whitehead*, *supra*, 1 Cal. State Bar Ct. Rptr. 354 the misconduct found by the hearing judge included commingling in one matter and failure to supervise associates and respond to letters in a second matter. Literal application of the standards would have resulted in a minimum of three months suspension which the Supreme Court has declined to apply rigidly. (*Id.* at p. 371, citing *Howard* v. *State Bar* (1990) 51 Cal.3d 215.) Indeed, for an isolated instance of a similar violation it had imposed a public reproval. (*Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.) The hearing judge in *Whitehead* likewise considered three months suspension inappropriate under the circumstances and recommended no actual suspension in light of mitigating evidence. On review, we also found Whitehead culpable for failure to perform services competently and took into account a prior private reproval discounted by the hearing judge as being too remote. After consideration of relevant precedent, we recommended, and the Supreme Court subsequently adopted, 45 days actual suspension.

In *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, the Supreme Court suspended the attorney's license for nine months for misconduct in three client matters. Although more serious charges of misappropriation in one matter were dismissed by the Court, it found the attorney failed to perform legal services and communicate with two clients, with the loss of the client's cause of action in one instance, failed to return their files upon request, and retained an estate tax case that was beyond his competence to handle, resulting in delays and the accumulation of sizeable interest and penalties. The attorney's hurried move during part of the period of misconduct and the chaotic state of his staff were contributing factors. In contrast with the present case, the attorney's misconduct caused considerable harm to one client, he did not cooperate with the State Bar's investigation, and he had a prior record of discipline, although minor and remote in time.

Here, the various applicable standards call for a range of discipline from reproval to suspension or disbarment depending on the gravity of the offense or harm to the victim with a minimum of three months suspension called for under standard 2.2(b). Standard 1.6(a) calls for imposition of the most severe of the different applicable sanctions which, in this proceeding, would be a minimum of three months suspension irrespective of mitigating circumstances. While we are not bound to apply the standards in talismanic fashion, the Supreme Court expects reasons to be given for departing from them. (*Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1061, fn. 2.)

[10c] We agree with the hearing judge that on this record of numerous violations over an extended period of time no persuasive reason has been offered to go below the minimum of three months suspension called for by the standards. We conclude that taking all factors into account, including lack of harm to all but one client and respondent's changed office practices, actual suspension of respondent for ninety days as urged below by the deputy trial counsel is sufficient, as a condition of two years stayed suspension and two years probation on the essential conditions set forth below including development of a law office management plan (or proof of an existing one) that meets with the approval of the probation monitor. We therefore modify the recommendation of the hearing judge accordingly, reducing the rec-

ommended stayed suspension to two years, and substituting three months of actual suspension for the one-year suspension set forth in paragraph 1 of his decision but retaining paragraphs 2-10 thereof with the substitution of two years instead of three years of probation in paragraph 10. We add to paragraph 8 a requirement that within one year respondent shall also provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor.

We also recommend, as did the judge below, a requirement that respondent timely comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court and that respondent be directed to take and pass the California Professional Responsibility Examination (CPRE) given by the State Bar Committee of Bar Examiners within one (1) year from the date the order of the Supreme Court in this matter becomes effective. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891 & fn. 8; *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9.)

Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.