

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

RESPONDENT P

A Member of the State Bar

No. 90-O-10765

Filed December 21, 1993

SUMMARY

Respondent represented a Medi-Cal beneficiary in a personal injury matter. The California Department of Health Services ("DHS") informed respondent that any settlement of the matter was subject to a lien to reimburse Medi-Cal for medical services to respondent's client. Respondent told DHS that the client was covered by medical payments insurance. Subsequently, without filing suit, respondent negotiated a settlement payable from uninsured motorist coverage, deducted his own fees and costs therefrom, and, at the client's request, distributed all the remaining settlement funds to the client. Respondent did not inquire whether DHS had been paid from the medical payments coverage, did not inform DHS of the settlement, and did not allow DHS an opportunity to satisfy the outstanding Medi-Cal lien. Subsequently, DHS demanded that respondent pay the lien, and complained to the State Bar when he refused to do so. After a hearing which included a culpability phase, but not a sanction phase, the hearing judge dismissed all disciplinary charges against respondent, based on the conclusion that respondent had no statutory obligation to DHS. (Hon. Alan K. Goldhammer, Hearing Judge.)

The deputy trial counsel sought review. The review department held that although respondent did not comply with the statutory obligation to provide timely notice of the settlement to DHS, a culpability determination that respondent had violated his statutory duty as an attorney to comply with California law was not appropriate because respondent acted on the good faith, erroneous belief that he was entitled to distribute all the settlement funds to the client and let the client deal with the Medi-Cal lien. Respondent was culpable, however, of violating the rule of professional conduct requiring prompt payment of entrusted funds upon demand by failing to ensure that DHS's claim for payment of the Medi-Cal lien was honored. The proceeding was remanded for further proceedings as to the appropriate disposition.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Bruce H. Robinson

For Respondent: Respondent P, in pro. per.

HEADNOTES

- [1] **130 Procedure—Procedure on Review**
 199 General Issues—Miscellaneous
Even though a disciplinary proceeding is a public matter, the respondent's name is not publicized in the review department's opinion when the disposition at the hearing level was dismissal and the review department cannot determine what the ultimate disposition of the proceeding will be.
- [2] **194 Statutes Outside State Bar Act**
 213.10 State Bar Act—Section 6068(a)
 490.00 Miscellaneous Misconduct
Where respondent settled a personal injury claim, without filing suit, on behalf of a client who was a Medi-Cal beneficiary, respondent's failure to notify the Department of Health Services of the settlement did not violate a statute which only required such notice if an action had been filed (Welfare and Institutions Code section 14124.79).
- [3] **194 Statutes Outside State Bar Act**
 204.90 Culpability—General Substantive Issues
 430.00 Breach of Fiduciary Duty
An attorney's obligation to his or her client is limited by the attorney's and the client's obligation to third parties. Where respondent's client, a Medi-Cal beneficiary, had a statutory obligation (Welfare and Institutions Code section 14124.76) to notify the Department of Health Services (DHS) of the impending settlement of a personal injury matter in which DHS claimed a lien, respondent had a fiduciary obligation under decisional law to provide the required notice on his client's behalf.
- [4] **194 Statutes Outside State Bar Act**
 213.10 State Bar Act—Section 6068(a)
 430.00 Breach of Fiduciary Duty
Where a statute (Welfare and Institutions Code section 14124.76) required Medi-Cal beneficiaries to notify the Department of Health Services (DHS) regarding the impending settlement of matters in which no suit had been filed and DHS claimed a lien, the review department construed the statute to require that attorneys representing such beneficiaries must also give the required notice, because to construe the statute otherwise would frustrate the Medi-Cal third party liability recovery system and be in derogation of an attorney's general fiduciary responsibility to lienholders.
- [5 a-c] **163 Proof of Wilfulness**
 194 Statutes Outside State Bar Act
 204.10 Culpability—Wilfulness Requirement
 213.10 State Bar Act—Section 6068(a)
 490.00 Miscellaneous Misconduct
The statute providing that attorneys have a duty to support the constitution and laws of California and the United States constitutes a conduit whereby attorneys may be disciplined for violating laws which are not otherwise disciplinable under the State Bar Act. However, a negligent mistake made in good faith does not constitute a violation of this statute. Thus, where respondent believed he had satisfied his obligation to a statutory medical lienholder by informing it of a source of insurance coverage, and thus believed that his client was entitled to all of the settlement funds obtained from a different source of coverage, respondent's failure to notify the lienholder of the impending settlement, as required by statute, did not violate his statutory duty to obey California law, because it constituted a negligent mistake, based on the good faith, erroneous belief that he was entitled to distribute all the settlement funds to the client and let the client deal with the statutory lien.

- [6] **135 Procedure—Rules of Procedure**
 162.19 Proof—State Bar’s Burden—Other/General
 169 Standard of Proof or Review—Miscellaneous
On the issue of whether a respondent acted in good faith, the credibility determinations of the hearing judge deserve great weight. (Trans. Rules Proc. of State Bar, rule 453(a).) In addition, the State Bar Court must resolve all reasonable doubts about culpability in favor of the accused attorney and must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts.
- [7] **220.00 State Bar Act—Section 6103, clause 1**
 220.10 State Bar Act—Section 6103, clause 2
Where a disciplinary proceeding did not involve a court order, respondent did not violate the statute which authorizes discipline to be imposed upon an attorney who violates a court order, but otherwise is not a basis for charged misconduct.
- [8] **204.90 Culpability—General Substantive Issues**
 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
 430.00 Breach of Fiduciary Duty
An attorney holding funds for a person who is not the attorney’s client must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. Where an attorney represents a Medi-Cal beneficiary in a personal injury matter and has received notice of the Medi-Cal lien, the attorney has a fiduciary obligation toward the Department of Health Services as to its advancement of funds for the beneficiary and the Medi-Cal lien.
- [9 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
The rule regarding prompt payment of entrusted funds upon demand applies not only to an attorney’s obligation to clients, but also to the attorney’s obligation to pay third parties out of funds held in trust, including the obligation to pay holders of medical liens. Where respondent disbursed to a client the entire amount of the settlement of a personal injury claim without ensuring that the request by the Department of Health Services for payment of a Medi-Cal lien was honored, respondent wilfully violated such rule. It was no defense that respondent acted at the client’s request, because the client was not entitled to receive all the settlement funds.
- [10] **163 Proof of Wilfulness**
 204.10 Culpability—Wilfulness Requirement
 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Unlike the proof of a violation of the State Bar Act, the proof of a wilful violation of the Rules of Professional Conduct merely has to demonstrate that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. Where respondent knew he was settling a personal injury claim without ensuring the payment of an applicable Medi-Cal lien and intended to do so, he acted wilfully; and a determination of culpability under the rule requiring proper payment of entrusted funds was appropriate even if he acted in good faith.
- [11] **715.10 Mitigation—Good Faith—Found**
 791 Mitigation—Other—Found
The lack of judicial precedent clearly establishing an attorney’s duty at the time of the attorney’s misconduct may be considered on the issue of possible mitigation.

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

Where respondent negligently erred in failing to take proper steps to ensure payment of a medical lien, but the record did not contain clear and convincing evidence that respondent's misconduct was intentional, reckless, or repeated, respondent did not violate the former rule making intentional, reckless, or repeated incompetence a disciplinable offense. Respondent's conduct, which was invited by the client, in leaving his client open to a possible lawsuit by the medical lienholder, was not so extreme as to constitute recklessness.

[13 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**

106.40 Procedure—Pleadings—Amendment

119 Procedure—Other Pretrial Matters

136 Procedure—Rules of Practice

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

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

Duplicative allegations of misconduct serve little, if any purpose. It should be apparent by the time of the pretrial conference which charges are most apt, which other charges might show additional misconduct, and which are simply duplicative and unnecessary. Amendment or dismissal of charges, particularly at the time of filing the pretrial statement (rule 1222(k), Provisional Rules of Practice), serves the interest of litigant and judicial economy. Thus, where respondent failed to ensure payment of a medical lien when settling a personal injury case, there was no benefit to charging respondent with failing to act competently, when the charge that respondent violated the rule requiring proper payment of entrusted funds addressed the alleged misconduct far more aptly and supported identical or greater discipline.

[14] **130 Procedure—Procedure on Review**

139 Procedure—Miscellaneous

1099 Substantive Issues re Discipline—Miscellaneous

Where, due to the dismissal of all charges, a disciplinary hearing had included a culpability phase but not a sanction phase, and where the review department found respondent culpable of misconduct, it would be inappropriate for the review department to recommend or impose any sanction even if the State Bar wished to waive its opportunity to introduce evidence regarding aggravation, because respondent wanted and was entitled to the opportunity to offer evidence in mitigation.

[15] **199 General Issues—Miscellaneous**

204.90 Culpability—General Substantive Issues

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

791 Mitigation—Other—Found

Where respondent settled a personal injury claim on behalf of a Medi-Cal beneficiary without ensuring the payment of the applicable Medi-Cal lien, an issue to be addressed on remand was the effect, if any, on the appropriate degree of discipline of the policy adopted by the Office of the Chief Trial Counsel, with the approval of a committee of the Board of Governors, against prosecuting future health care provider "collection" cases, at least for private lienholders.

ADDITIONAL ANALYSIS

Culpability

Found

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

Not Found

213.15 Section 6068(a)

220.05 Section 6103, clause 1

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

OPINION

PEARLMAN, P.J.:

We review the decision by a hearing judge of the State Bar Court to dismiss all of the disciplinary charges against respondent,¹ [1 - see fn. 1] who represented a Medi-Cal beneficiary in a personal injury matter and distributed the settlement funds to his client without first allowing for the satisfaction of the outstanding Medi-Cal lien. We affirm the dismissal of all but one of the charges. Because we conclude, under applicable Supreme Court precedent, that respondent did have a fiduciary obligation to the State Department of Health Services ("DHS") to ensure DHS an opportunity to collect the money due under the Medi-Cal lien under former rule 8-101(B)(4) of the Rules of Professional Conduct and that such obligation was breached by respondent's distribution of the settlement funds to his client, we must remand the proceeding for a disciplinary hearing and recommendation or imposition of an appropriate disposition.

I. FACTS

As the hearing judge and the parties observed, the facts of this proceeding are not in significant dispute. We accept the factual findings in the hearing judge's decision and in some respects amplify them on the basis both of documents of undisputed validity and of testimony which the hearing judge found credible.

Ms. A suffered personal injuries in a car accident in April 1983. She was a passenger in a car driven by Mr. B, who had uninsured motorist coverage issued by a subsidiary of an insurance group ("Insurance Group"). The driver of another vehicle caused the accident, but had no insurance.

Ms. A employed respondent to represent her on a contingent fee basis. Learning that A had received medical treatment at county health facilities in connection with her receipt of funds from the county department of public social services, respondent wrote to the DHS in September 1983 that the Medi-Cal program may have paid for her treatment and, if so, that he wished to know the amount of the Medi-Cal lien.

In November 1983, the DHS sent respondent a document entitled "Notice of Lien." This notice stated the following:

(1) Ms. A was a Medi-Cal program beneficiary and had received health care benefits.

(2) Respondent and A were required to report to the DHS pursuant to Welfare and Institutions Code section 14124.70 et seq.

(3) The DHS claimed a lien upon the proceeds or satisfaction of any judgment, or upon the proceeds of any settlement negotiated with or without suit, in favor of A. No rights under Welfare and Institutions Code section 14124.70 et seq. were waived.

(4) Medi-Cal payment records would be researched, and respondent would be notified of the amount required to satisfy the DHS's lien.

Accompanying the notice of lien was a form seeking further information. Respondent promptly completed, signed, and returned this information form to the DHS. He stated that the case was pending, that no complaint had been filed, that he needed to know the amount of the Medi-Cal lien, and that he did not know whether any medical payments coverage was available or whether A was covered by any form of health insurance.²

1. [1] This proceeding has been a public matter before the State Bar Court and remains so. We do not, however, publicize respondent's name because the disposition at the hearing level was a dismissal of the action, which would not result in publication of respondent's name, and because at this stage we cannot determine what the ultimate disposition will be. (See *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1; *In the Matter of Respon-*

dent A (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 258, fn. 2.)

2. The hearing judge found that neither respondent nor A consented to the Medi-Cal lien. Although the record supports this factual finding, such agreement or consent was unnecessary because the Medi-Cal lien arose by operation of law. (See *post*, section III.D.)

In January 1984, the DHS sent respondent an itemization of payments made by the Medi-Cal program for medical services to A. The DHS's letter stated the total amount of the lien as \$2,197.84 and asked respondent to contact the DHS when A's claim neared settlement, so that the DHS could furnish respondent with a further itemization. Also, the letter advised respondent that payment in satisfaction of the Medi-Cal lien had to be sent to the DHS in Sacramento.

In February 1984, respondent replied to the DHS. His reply stated that he had reviewed the DHS's January letter, that medical payments insurance up to \$5,000 covered A for the accident in which she was involved, that the carrier was the Insurance Group, and that the policy number was 96-110249532.

At the disciplinary hearing, respondent testified that A had told him about the medical payments coverage in the policy, although he had no "independent source" to establish whether the policy actually included medical payments coverage, which could have satisfied the Medi-Cal lien separate from B's uninsured motorist coverage. Mr. S, a litigation claims representative with the Insurance Group, testified that the Insurance Group's file regarding A's claim had been destroyed, but that he had reviewed the file prior to its destruction and had noticed medical payments coverage up to \$5,000 in B's policy. Thus, we find that such coverage was available.

More than a month later, in March 1984, without providing further notice to the DHS and without filing an action, respondent settled A's claim. Respondent did not discuss the Medi-Cal lien with the Insurance Group. Nor did he negotiate a payment for A under the medical payments coverage of B's policy. He asserted that he had only settled A's uninsured motorist claim.

The Insurance Group sent respondent a \$10,000 check made payable to A and respondent. The DHS was not listed as a payee on the check, nor does any evidence in the record suggest that the Insurance Group asked respondent to pay the Medi-Cal lien out of the check. A cover note described the check as "full settlement" of the matter involving B.³ Enclosed with the check were an uninsured motorist release and proof of claim form to be executed by A and returned to the Insurance Group.

Upon receiving the \$10,000 settlement check, respondent had his client sign it and the release and deposited the check in his trust account. According to his testimony before the hearing judge, respondent told A, "DHS has a lien." Showing A his letter of February 1984 to the DHS about the medical payments coverage under B's policy, respondent said, "I've notified [the DHS], . . . but this is your money. You tell me what you want me to do." Ms. A replied that she wanted the money and would "deal with" the lien. Respondent then distributed \$3,362.72 to himself for fees and costs and the remaining \$6,637.28 to A.

At the hearing, respondent testified that he had specialized in handling personal injury claims for almost his entire 18-year career and had routinely settled cases involving notification of the DHS. According to respondent, his practice was to notify the DHS as soon as he found out that a Medi-Cal beneficiary had medical payments coverage. He testified that such coverage was "very easy to collect" and that collection occurred "within a week or two" of notification.

When he settled A's claim, respondent made no inquiries to determine whether the DHS had obtained any reimbursement of expenditures by the Medi-Cal program on A's behalf. The record does not establish exactly when the DHS received respondent's February 14, 1984, letter or exactly when respondent negotiated the settlement with the

3. S testified that when the Insurance Group made a full settlement, it did not expect to make any payments under medical payments coverage because its policies contained a provision whereby it deducted from any final settlement such medical payments as were defrayed. According to S, the

Insurance Group's standard procedure was for adjusters to write "lien pending" or "leave Med-Pay open" if the Insurance Group intended to pay a Medi-Cal lien, but A's file contained no such notation.

Insurance Group, although the date of the cover note accompanying the settlement check was March 23, 1984.

In September of 1986 the DHS wrote to the Insurance Group to ascertain what had happened regarding the Medi-Cal lien for services rendered to A. In August 1987, the DHS asked respondent for more information. In September 1987, he replied that he had settled A's uninsured motorist claim for \$10,000 and that A had medical payments coverage under B's policy. Apparently, A could not be located. In 1989, the DHS sought payment of the Medi-Cal lien from respondent, who refused to pay it.

II. PROCEEDINGS BELOW

In February 1990, the DHS filed a complaint with the State Bar against respondent. In September 1991, the Office of the Chief Trial Counsel ("OCTC") filed a one-count notice to show cause, charging respondent with the violation of Business and Professions Code section 6068 (a) and former rule 6-101(A)(2) of the Rules of Professional Conduct.⁴ In October 1992, the OCTC filed an amended notice to show cause, adding to the existing charges the allegation that respondent had violated Business and Professions Code section 6103 and former rule 8-101(B)(4). A hearing occurred in November 1992. After the hearing, respondent discharged the attorney who had represented him and became his own attorney in propria persona. The decision dismissing the charges against respondent was filed in January 1993, and the deputy trial counsel sought review in February 1993.

III. DISCUSSION

Because the hearing judge found that no statutory obligation to DHS existed, as a preliminary matter, we discuss the means whereby the DHS may have recovered its expenditures on behalf of Medi-Cal beneficiaries. We then examine the allegations against respondent.

A. Two Systems Available to the DHS for Recovering Medi-Cal Expenditures

Under the Medi-Cal program, California makes payments to health care providers who render medical care and treatment to Medi-Cal beneficiaries. (Welf. & Inst. Code, § 14000 et seq.; *Kizer v. Ortiz* (1990) 219 Cal.App.3d 1055, 1058.) The DHS has two separate and distinct systems for recovering such payments: (1) "other coverage" recovery and (2) "third party liability" recovery. (*Palumbo v. Myers* (1983) 149 Cal.App.3d 1020, 1027, 1033-1034.)

Welfare and Institutions Code section 14024 permits "other coverage" recovery. In relevant part, section 14024 states: "When health care services are provided to a person . . . who at the time of the service has any other contractual or legal entitlement to such services, the director [of the DHS] shall have the right to recover from the person . . . who owes such entitlement, the amount which would have been paid to the person entitled thereto, or to a third party in his behalf, or the value of the service actually provided, if the person entitled thereto was entitled to services." As construed by the DHS, "other contractual or legal entitlement to [health care] services" is "other coverage." Recovery from "other coverage" is available if a person, at the time of applying for Medi-Cal assistance, had another means of obtaining the services paid for by the Medi-Cal program. (*Palumbo v. Myers, supra*, 149 Cal.App.3d at p. 1027.) According to the testimony of the chief hearing officer for the DHS, such "other coverage" includes "coverage under an uninsured motorist policy," when an insured has paid more for automobile insurance to get medical care. (*Id.* at p. 1032, fn. 12.)

Welfare and Institutions Code sections 14124.70 through 14124.92 deal with "third party liability" recovery. These sections allow the DHS to obtain reimbursement for Medi-Cal expenditures by pursuing a lawsuit on its own behalf or by satisfying a lien against a Medi-Cal beneficiary's recovery from a

4. All further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

third party. (See Welf. & Inst. Code, §§ 14124.71-14124.79.) Unlike the “other coverage” provisions, the “third party liability” provisions permit recovery by lien. (*Palumbo v. Myers, supra*, 149 Cal.App.3d at p. 1033.)

Citing Welfare and Institutions Code section 14019.4, subdivision (a), and section 14024 and *Palumbo v. Myers, supra*, 149 Cal.App.3d at p. 1027, respondent’s counsel characterized “other coverage” recovery as “primary” and “third party liability” recovery as “only secondary.” The deputy trial counsel and the hearing judge did not address this characterization, nor does the law cited by respondent’s counsel support it. The two systems of recovery apply in different situations and confer upon the DHS separate and distinct rights. (*Palumbo v. Myers, supra*, 149 Cal.App.3d at pp. 1031, 1033-1034.)

At the disciplinary hearing, respondent expressed the belief that he had satisfied his obligation with respect to the Medi-Cal lien by sending his February 1984 letter to the Insurance Group and that he had a good faith belief that the lien was not outstanding at the time of the settlement. However, he also testified that he told his client “DHS has a lien,” that he followed her instructions to distribute the settlement fund, and that she told him she would “deal with” the lien.

At oral argument, respondent contended that he was entitled to take the position on behalf of his client that *Palumbo v. Myers, supra*, 149 Cal.App.3d at p. 1027, required the DHS to pursue “other coverage” recovery, if available. Yet *Palumbo v. Myers, supra*, sets out no such requirement. Further, Welfare and Institutions Code section 14024 provides that the DHS “shall have the right” to pursue recovery from “other coverage,” not that it must do so.

B. No Violation of Business and Professions Code Section 6068 (a)

The deputy trial counsel argues that by failing to comply with the notification requirements of Welfare and Institutions Code sections 14124.76 and 14124.79, respondent violated Business and Professions Code section 6068 (a). We agree that respondent

failed to comply with Welfare and Institutions Code section 14124.76, but do not conclude that he failed to comply with Welfare and Institutions Code section 14124.79. Nor, for reasons we shall explain, does respondent’s level of scienter constitute a violation of Business and Professions Code section 6068 (a).

Welfare and Institutions Code section 14124.76 broadly provides that “No judgment, award, or settlement in any action or claim by a [Medi-Cal] beneficiary to recover damages for injuries, where the director [of the DHS] has an interest, shall be satisfied without first giving the director notice and a reasonable opportunity to perfect and satisfy his lien.”

Welfare and Institutions Code section 14124.79 provides that “In the event that the [Medi-Cal] beneficiary . . . brings an action against the third person who may be liable for the injury, notice of institution of legal proceedings, notice of settlement and all other notices required by this code shall be given to the director [of the DHS] in Sacramento except in cases where the director specifies that notice shall be given to the Attorney General.” Further, section 14124.79 contains the specific provision that “All such notices shall be given by the attorney retained to assert the beneficiary’s claim, or by the injured party beneficiary . . . if no attorney is retained.”

[2] As the hearing judge concluded, respondent had no obligation under Welfare and Institutions Code section 14124.79 to provide the DHS with notice of the March 1984 settlement since section 14124.79 applies only if an action has been filed.

Welfare and Institutions Code section 14124.76 does not contain a provision analogous to the provision of Welfare and Institutions Code section 14124.79 explicitly requiring the attorney representing the Medi-Cal beneficiary to provide required notices. The hearing judge concluded that Welfare and Institutions Code section 14124.76 operated “only against the ‘beneficiary’ and not against the attorney for the beneficiary since the section refers only to the beneficiary.” (Decision pp. 11-12.) We disagree.

In concluding that respondent also had no obligation under Welfare and Institutions Code section 14124.76 to notify the DHS of the impending settlement with the Insurance Group, the hearing judge relied upon *Brian v. Christensen* (1973) 35 Cal.App.3d 377, interpreting the then-applicable provision of Welfare and Institutions Codes section 14117. The hearing judge concluded that *Brian v. Christensen* “held in a situation almost identical to the [current] one . . . that there was no statutory requirement for an attorney to give notice of a settlement of a personal injury action involving a Medi-Cal recipient The Court of Appeal specifically held that the only fiduciary relationship was between the attorney and his client and that no duty arose notwithstanding the attorney’s knowledge of the Medi-Cal lien and notwithstanding the client’s liability to the Director of the DHS.” (Decision p. 11.) Without explaining his reasoning, the hearing judge added that he was “not persuaded” by the argument that *Brian v. Christensen* “is no longer good law” (*Ibid.*)

As the deputy trial counsel suggests, current Welfare and Institutions Code section 14124.79, which was enacted in 1976, has superseded former section 14117. Because section 14124.79 requires that notice of a settlement be given if an action has been filed and that the attorney retained to assert the beneficiary’s claim give such notice, *Brian v. Christensen* is no longer controlling law.

Brian v. Christensen also appears inconsistent with subsequent Supreme Court case law regarding attorneys’ fiduciary duties to lienholders. (See, e.g., *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.) We addressed a similar situation involving the duty of an attorney to communicate to the DHS as a lienholder in *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 200. Nunez settled a personal injury action for a Medi-Cal beneficiary after the beneficiary had filed a bankruptcy petition. Believing that the bankruptcy would eliminate the Medi-Cal lien, the attorney failed to answer two letters from the DHS concerning the action. In *In the Matter of Nunez*, we upheld the dismissal of the count because the failure to communicate to DHS had not been charged, but stated our view that Nunez had a fiduciary obligation to the DHS with respect to its lien

and therefore a duty to answer the letters from the DHS. The hearing judge properly characterized these statements as dicta, but assumed that we had failed to consider Nunez’s obligations to his client. Also, the hearing judge stated that the duty of communication articulated in *In the Matter of Nunez* was consistent with the dismissal of the current proceeding because respondent answered the inquiries which he received from the DHS.

We disagree. [3] We have previously ruled, based on Supreme Court precedent, that an attorney’s obligation to his or her client is limited by the attorney’s and the client’s obligation to third parties. (See, e.g., *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 27-28; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.) Here, respondent did not timely notify the DHS of a crucial development in A’s matter: the impending settlement in March 1984 of her claim against the Insurance Group. His client had a statutory obligation to provide such notice under Welfare and Institutions Code section 14124.76, and we hold he also had a fiduciary obligation to do so under decisional law.

[4] The reference to the beneficiary in section 14124.76 does not limit the responsibility for notification. The beneficiary’s attorney is in an appropriate position not only to notify the DHS of the existence of a claim potentially subject to a DHS lien, as respondent did, but also to carry out the beneficiary’s duty to notify the DHS of the proposed settlement prior to distribution. As discussed above, section 14124.79 expressly provides that the attorney representing the Medi-Cal beneficiary in a filed action must notify the DHS of an impending settlement. To construe section 14124.76 as absolving the attorney of responsibility for such notification merely because no action has been filed would frustrate the “third party liability” recovery system. It would also be in derogation of the attorney’s general fiduciary responsibility to lienholders against funds in the attorney’s possession. Thus, we construe section 14124.76 as requiring that the attorney representing the Medi-Cal beneficiary give the DHS notice of an impending settlement so that the DHS has a reasonable opportunity both to perfect and to satisfy the Medi-Cal lien.

By advising the DHS in September 1983 that it might have a Medi-Cal lien against any recovery by A, respondent gave proper notice for perfection of the lien. The DHS then perfected the Medi-Cal lien simply by sending respondent the notice of lien in November 1983. (See *Brown v. Stewart* (1982) 129 Cal.App.3d 331, 342-343 [no formal procedure necessary for protecting a Medi-Cal claim for reimbursement].) This notice unequivocally informed respondent that the DHS claimed a lien upon any settlement in favor of A and that the DHS waived none of its rights under the "third party liability" statutes. Respondent, however, did not give the DHS notice for satisfaction of the Medi-Cal lien. In March 1984, he settled A's claim against the Insurance Group and distributed the funds which were the subject of the lien without advising the DHS and in disregard of its rights.

[5a] This brings us to the charged violation of Business and Professions Code section 6068 (a). Pursuant to Business and Professions Code section 6068 (a), an attorney has the duty to support the constitution and laws of the United States and California. Section 6068 (a) constitutes a conduit whereby attorneys may be disciplined for violating laws which are not otherwise disciplinable under the State Bar Act (i.e., Business and Professions Code section 6000 et seq.). If the notice to show cause charges an attorney with the violation of a statute not containing its own disciplinary provision and if the attorney committed the violation, the circumstances may support a determination of disciplinable misconduct under section 6068 (a). (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487, and cases cited therein.)

[5b] Neither of the parties has addressed the issue of whether a negligent mistake made in good faith constitutes a violation of Business and Professions Code section 6068 (a), although respondent seeks to have us affirm the dismissal of this charge. Cases decided under Business and Professions Code section 6067, which requires that every attorney take

an oath "faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability," establish that making a negligent mistake in good faith does not amount to violating broad duties under the State Bar Act. "[M]ere ignorance of the law in conducting the affairs of a client in good faith" does not violate the attorney's statutory oath to discharge his or her duties faithfully. "The good faith of an attorney is a matter to be considered in determining whether discipline should be imposed for acts done through ignorance or mistake." (*Call v. State Bar* (1955) 45 Cal.2d 104, 110-111.) "[S]ection 6067 recognizes that attorneys are not infallible and cannot at their peril be expected to know all of the law." (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) The Supreme Court "has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." (*Lewis v. State Bar* (1981) 28 Cal.3d 683, 688.) Thus, a mistake of law made in good faith may be a defense to an alleged violation of section 6067. (*Abeles v. State Bar* (1973) 9 Cal.3d 603, 610; *Millsberg v. State Bar* (1971) 6 Cal.3d 65, 75; *Zitny v. State Bar, supra*, 64 Cal.2d at p. 793.) We hold that Business and Professions Code section 6068 (a), which, like section 6067, broadly sets out duties of an attorney, must be similarly construed.⁵

[6] On this issue of good faith, we must give great weight to the credibility determinations of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240.) In addition, we must resolve all reasonable doubts about culpability in favor of the accused attorney and must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts. (*In the Matter of Respondent H, supra*, 2 Cal. State Bar Ct. Rptr. at p. 240, and cases cited therein.)

[5c] At the hearing, respondent testified that he believed he had satisfied his obligation to DHS by sending his February 1984 letter. He also asserted the

5. Although the Supreme Court has indicated in some cases that "wilful" failure to perform legal services constituted a disciplinable breach of an attorney's fiduciary duty, such failure resulted from intentional wrongdoing or gross negli-

gence. (See, e.g., *Lester v. State Bar* (1976) 17 Cal.3d 547, 549, 551 [intentional and repeated misconduct]; *Selznick v. State Bar* (1976) 16 Cal.3d 704, 708-709 [intentional misconduct or gross negligence].)

belief that the DHS would pursue “other coverage” recovery from the Insurance Group. According to his testimony, although he informed A of the extant Medi-Cal lien, he believed that A was entitled to all of the \$10,000 settlement which remained after the payment of attorney’s fees and costs. The hearing judge found respondent’s testimony to be credible. The hearing judge then expressly determined that even if his statutory analysis were “found to be incorrect and that there was an obligation on respondent’s part to have paid DHS rather than his own client, respondent’s failure to have paid DHS would still not appear to be an ‘intentional’ or ‘reckless’ failure to act competently” (Decision p. 16.) A culpability determination is therefore not appropriate under Business and Professions Code section 6068 (a) because respondent’s failure to inform the DHS of the impending settlement in March 1984 constituted a negligent mistake, based on the good faith, erroneous belief that he was entitled to distribute the settlement funds to his client and let her deal with the issue.

C. No Violation of Business and Professions Code Section 6103

[7] It is not clear from the record why the notice to show cause was amended to charge respondent with violating Business and Professions Code section 6103, which authorizes discipline to be imposed upon an attorney who violates a court order, but otherwise is not a basis for charged misconduct. (See *Read v. State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.) The deputy trial counsel at the hearing below conceded that the current proceeding involved no court order. Respondent clearly did not violate section 6103.

D. Violation of Former Rule 8-101(B)(4)

The deputy trial counsel argues that by failing to ensure that the DHS’s Medi-Cal lien claim was honored, respondent wilfully violated former rule 8-101(B)(4). We agree.

The hearing judge asserted that no violation of former rule 8-101(B)(4) occurred because the DHS had “no contractual or statutory right” to payment of

the Medi-Cal lien. (Decision p. 7; see also *id.* at p. 12.) He did not, however, address Welfare and Institutions Code section 14124.78, which establishes such a right. Pursuant to Welfare and Institutions Code section 14124.78, “the entire amount of any settlement of the injured beneficiary’s . . . claim, with or without suit, is subject to the [DHS] director’s claim for reimbursement of the [Medi-Cal] benefits provided and any lien filed pursuant thereto” Thus, by operation of law, the \$10,000 settlement obtained from the Insurance Group was subject to the Medi-Cal lien of \$2,197.84.

[8] An attorney holding funds for a person who is not the attorney’s client must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. (See *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 879; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355; *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr 185, 191; *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 27.) Where an attorney represents a Medi-Cal beneficiary in a personal injury matter and has received notice of the Medi-Cal lien, the attorney has a fiduciary obligation toward the DHS as to its advancement of funds for the beneficiary and the Medi-Cal lien. (See *In the Matter of Nunez, supra*, 2 Cal. State Bar Ct. Rptr. at p. 200.) In the current proceeding, respondent had a fiduciary obligation to the DHS with regard to the \$2,197.84 Medi-Cal lien by operation of law because he had received the DHS’s notice of lien.

[9a] Former rule 8-101(B)(4) required that an attorney “promptly pay . . . to the client as requested by a client the funds . . . in the possession of the [attorney] which the client is entitled to receive.” It is no defense that respondent acted at his client’s request, because she was not entitled to receive all of the funds. An improper request was likewise made by a client in *In the Matter of Respondent F, supra*, in which we upheld the attorney’s obligation to keep settlement funds in trust pending the client’s signing of a release which was the agreed basis for distribution of the funds. We similarly discussed the conflict between a client’s instructions and an attorney’s duty to the opposing party and the court in *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 470.

[9b] Former rule 8-101(B)(4) not only applied to the attorney's obligations to clients, but the attorney's obligation to pay third parties out of funds held in trust, including the obligation to pay holders of medical liens. (See *Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 979; *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 10.) By disbursing the \$10,000 settlement without ensuring that the DHS's request for payment of the \$2,197.84 Medi-Cal lien was honored, respondent wilfully violated former rule 8-101(B)(4).⁶

The hearing judge observed that the recovery of the \$2,197.84 Medi-Cal lien was frustrated because the DHS did not timely proceed against the Insurance Group or A and because the Insurance Group did not require respondent to pay the lien as a condition of the settlement. Yet respondent also is responsible. He failed to verify his assumption that the DHS would seek reimbursement from the medical payments coverage of B's policy. Knowing that the DHS had an existing Medi-Cal lien against the settlement, he failed to ensure that DHS had been otherwise reimbursed when he negotiated and completed the settlement in violation of section 14124.76.

[10] Unlike a violation of the State Bar Act, proof of a wilful violation of the Rules of Professional Conduct merely has to demonstrate "that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." (*King v. State Bar* (1990) 52 Cal.3d 307, 313-314, quoting *Zitny v. State Bar*, *supra*, 64 Cal.2d at p. 792.) Clear and convincing evidence in the record establishes that respondent knew he was settling A's claim without ensuring the payment of the Medi-Cal lien and that he intended to do so. Thus, respondent acted wilfully, and a determination of culpability under former rule 8-101(B)(4) is appropriate even if he acted in

good faith. (Cf. *In the Matter of Respondent F*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 25-26.) We therefore reverse the hearing judge's ruling on this charge. [11] However, the hearing judge would have been entitled to consider the lack of judicial precedent in 1984 clearly establishing respondent's duty to DHS under Welfare and Institutions Code section 14124.76 on the issue of possible mitigation of respondent's misconduct. (See *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602.)

E. No Violation of Former Rule 6-101(A)(2)

The hearing judge concluded that respondent did not violate former rule 6-101(A)(2) on the grounds that respondent had no statutory or contractual obligation to the DHS. Although we conclude that respondent had a statutory and fiduciary obligation to the DHS, we agree that no violation of former rule 6-101(A)(2) occurred.

[12a] Former rule 6-101(A)(2) provided that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." According to the deputy trial counsel, respondent violated former rule 6-101(A)(2) by not giving notice to the DHS of the \$10,000 settlement and not taking steps to honor the Medi-Cal lien. The failure to provide notification is the same conduct which underlies the alleged violation of Business and Professions Code section 6068 (a); and the failure to ensure payment of the Medi-Cal lien is the same conduct which underlies the alleged violation of former rule 8-101(B)(4). As already discussed, these failures were found to have been negligent mistakes. The record does not contain clear and convincing evidence that respondent intentionally, recklessly, or repeatedly engaged in wrongdoing. Thus, respondent's failure to give notice of the \$10,000 settlement and to honor the Medi-Cal lien did not constitute a violation of former rule 6-101(A)(2).

6. Relying on Welfare and Institutions Code sections 14124.70 and 14124.71, the hearing judge asserted that only the insurance carrier, not the attorney representing the Medi-Cal beneficiary, is responsible for honoring the Medi-Cal lien. Section 14124.70 defines the terms "carrier" and "beneficiary," and section 14124.71 deals with the DHS's right to

recover Medi-Cal expenditures by pursuing a lawsuit on its own behalf against the insurance carrier. Sections 14124.70 and 14124.71 do not address the issue of whether the attorney representing the Medi-Cal beneficiary may also be responsible for satisfying a lien against the beneficiary's settlement with the insurance carrier.

[12b] The deputy trial counsel also argues that respondent violated former rule 6-101(A)(2) by recklessly leaving A open to a subsequent lawsuit by the DHS. The deputy trial counsel, however, does not explain why respondent's conduct—which was invited by his client—was so extreme as to constitute recklessness; and the record does not support such characterization. Thus, no determination that respondent violated former rule 6-101(A)(2) is appropriate under the deputy trial counsel's second theory.

[13a] At oral argument, the deputy trial counsel on review invited us to address and clarify the propriety of the overlapping and duplicative charges of statutory and rule violations. In *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060, the Supreme Court stated that "little, if any, purpose is served by duplicative allegations of misconduct." We likewise see no benefit to duplicative charges such as the charge that respondent violated former rule 6-101(A)(2) in addition to the charge that he violated former rule 8-101(B)(4). The latter charge addresses the same alleged misconduct far more aptly and supports identical or greater discipline. (See Bus. & Prof. Code, § 6077; compare standard 2.2(b) of the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("the standards") with standard 2.4(b); cf. *Bates v. State Bar*, *supra*, 51 Cal.3d at p. 1060.)

[13b] If it is not apparent at the time of filing of the notice to show cause, it should be apparent by the time of the pretrial conference which charges are most apt, which other charges might show additional misconduct, and which are simply duplicative and unnecessary. At any time prior to a decision, the OCTC may dismiss charges in the notice to show cause. Rule 1222(k) of the Provisional Rules of Practice specifically provides that the pretrial state-

ment is an opportunity to amend the pleadings or dismiss charges in order to focus the hearing on the true gravamen of the charges. Such amendment or dismissal of charges serves the interest of litigant and judicial economy and would clearly have been of benefit here.

F. No Recommendation or Imposition of a Sanction

We turn now to the issue of the appropriate disposition. The deputy trial counsel requests that we impose an "appropriate" sanction. Although this would serve the interests of judicial and litigant economy, we must decline the request.

[14] To recommend or impose any sanction at this stage of the proceeding would be inappropriate even if the State Bar wished to waive its opportunity to introduce evidence regarding aggravation, because, as noted at oral argument, respondent wants the opportunity to offer evidence in mitigation which he is entitled to do. This has not yet occurred because the disciplinary hearing included a culpability phase, but not a sanction phase.⁷ [15 - see fn. 7]

IV. CONCLUSION

We conclude that respondent violated only former rule 8-101(B)(4). Accordingly, we remand this proceeding to allow the parties to put forward evidence regarding aggravation and mitigation and the hearing judge to recommend or impose an appropriate disposition.

We concur:

NORIAN, J.
STOVITZ, J.

7. [15] Another issue, raised at oral argument, which might be addressed on remand is the effect, if any, on the appropriate degree of discipline of the OCTC's new policy against prosecuting future health care provider "collections" cases. We take judicial notice that on November 5, 1993, approximately two weeks following oral argument, at the request of the OCTC, the Board of Governors Committee on Discipline and Client Assistance adopted the following resolution: "RESOLVED: The Board Committee on Discipline and

Client Assistance concurs in the exercise of prosecutorial discretion by the Chief Trial Counsel to decline to investigate complaints limited to the enforcement of health care provider liens and that health care providers be referred to other available remedies." The deputy trial counsel suggested at oral argument that liens held by public entities such as Medi-Cal might be distinguishable from liens held by private lienholders addressed by his office's new policy.