STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WALTER HARRY KOPINSKI

A Member of the State Bar

No. 88-O-10704

Filed March 2, 1994

SUMMARY

Respondent represented a mother and daughter, as well as other members of their family, in various legal matters. He was found culpable of failing to communicate adequately with both clients, of failing to return the mother's file promptly on demand when she terminated his employment, and of failing to take steps to avoid prejudice to the daughter when he withdrew from representing her. The hearing judge recommended that respondent be suspended for six months, stayed, with two years probation on conditions, and no actual suspension. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent requested review, contending that he did not commit any of the charged misconduct, and alternatively that he should receive at most a private reproval. The review department held that respondent was properly found culpable of failure to communicate with his clients because the misconduct lasted until after the effective date of the statute requiring such communication; that respondent's failure to give the daughter important information upon his withdrawal violated his duty to avoid foreseeable prejudice to her; and that the mother's failure to sign a substitution of attorney did not excuse respondent from failing to release her file. Noting that the clients' frequent changes of address did not entirely mitigate respondent's failure to keep in contact with them, the review department upheld the hearing judge's findings, conclusions, and discipline recommendation. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Geri Von Freymann, Andrea T. Wachter

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] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
565 Aggravation—Uncharged Violations—Declined to Find
Evidence of uncharged misconduct can be considered in aggravation or for purposes such as impeaching witness credibility. However, where hearing judge's findings on uncharged misconduct were too tentative to warrant consideration for enhanced discipline, review department did not adopt them as findings or conclusions, although it declined to strike them from the decision.

[2 a, b] **214.30 State Bar Act—Section 6068(m)**
410.00 Failure to Communicate
Conduct which falls below the standard of the statute requiring attorneys to communicate with their clients, but which occurred prior to the effective date of the statute, does not violate its ban. However, where the attorney's failure to communicate began prior to that effective date, but extended beyond it, discipline has been imposed under the statute. Accordingly, where respondent's principal failures to communicate with client occurred prior to effective date of statute, when he withdrew from representing her, but respondent thereafter continued to encourage client to contact him as a conduit for her new counsel after his withdrawal, and did not respond to her efforts to contact him after effective date of statute, respondent was properly found culpable of violating his statutory duty to communicate with the client.

[3] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Where, at time client requested file, respondent had already transferred client's file to successor attorney, respondent was not culpable of failure to release file to client on demand. However, where, upon transferring file to successor counsel and withdrawing from representation, respondent had failed to give client due notice, and had allowed client to believe that respondent remained conduit for contact with successor counsel, respondent violated rule prohibiting withdrawal without taking steps to avoid foreseeable prejudice to client.

[4] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
Portion of client's file which is client's property must be surrendered promptly upon request to client or client's new counsel once representation has terminated. Client's failure to sign substitution of counsel did not excuse failure to release file, where respondent did not take position that file was needed to protect client's legal interests until client signed substitution.

[5 a-c] **214.30 State Bar Act—Section 6068(m)**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
582.10 Aggravation—Harm to Client—Found
1091 Substantive Issues re Discipline—Proportionality
Where respondent with no prior record of discipline failed to communicate reasonably with two clients and failed to relinquish their files promptly, causing harm to clients, six-month stayed suspension, with no actual suspension, was well within appropriate range of discipline as indicated by comparable cases.

[6] **173 Discipline—Ethics Exam/Ethics School**
174 Discipline—Office Management/Trust Account Auditing
Where probation conditions requiring office organization plan and completion of Ethics School would amply address respondent's misconduct, review department deleted recommended probation condition requiring respondent to join and maintain membership in State Bar's Law Practice Management Section.

ADDITIONAL ANALYSIS

Culpability
Found
214.31 Section 6068(m)
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
Not Found
213.45 Section 6068(d)
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)]
320.05 Rule 5-200 [former 7-105(1)]
Aggravation
Found
521 Multiple Acts
Mitigation
Found
715.10 Good Faith
735.10 Candor—Bar
Found but Discounted
710.33 No Prior Record
793 Other
Discipline
1013.04 Stayed Suspension—6 Months
1017.08 Probation—2 Years
Probation Conditions
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management
Other
162.11 Proof—State Bar's Burden—Clear and Convincing
166 Independent Review of Record

OPINION

STOVITZ, J.:

At the request of respondent, Walter H. Kopinski, we review a decision of the hearing judge finding him culpable of failing to communicate reasonably with two clients who were members of the same family and failing to take required ethical steps when withdrawing from employment. The hearing judge recommended that respondent be suspended from practice for six months, that the suspension be stayed and that respondent be placed on probation for two years on conditions with no actual suspension.

Our independent review of this record supports the basic findings of the hearing judge as well as her overall recommendation of discipline.

I. FACTS

A. Introduction.

Respondent was admitted to practice law in California in 1980. He has no record of prior discipline.

Respondent was originally charged with six counts of misconduct involving six clients. On motion of the examiner, counts 1, 2, 4 and 6 were dismissed prior to trial, along with alleged violations of Business and Professions Code sections 6068 (a) and 6103 in the remaining charges.[1] The remaining charges of violation of former rule 2-111(A)(2)[2] in counts 3 and 5 and violation of former rule 6-101(A)(2) in count 5 were amended to include an alleged violation of section 6068 (m) in count 3 and violations of sections 6068 (m) and 6068 (d) and former rule 7-105 in count 5. At the close of the culpability phase of the hearing, the examiner moved to dismiss the charge in count 3 that respondent's representation of both mother and daughter (passenger and driver) at the outset of his employment was a violation of former rule 5-102 and the motion was granted.

The hearing judge's findings of misconduct arose from respondent's relationship with the Lee family. Respondent was initially retained by Richard Lee in 1983 to handle his personal bankruptcy. Richard had separated from his wife Joan Lee (now Birch) in 1979 and he instructed respondent not to disclose the bankruptcy filing to Joan. Joan was living with the couple's college-aged daughter, Shelly[3] and with her mother (Shelly's maternal grandmother), Edna Birch, in Oregon. Joan had no income and Richard sent money for Shelly's support and for her college education. The couple's joint residence in California had been sold shortly after the separation, while Richard was working overseas, with Joan using his power of attorney. Joan's residence in Oregon had been built with funds from Edna, but was in Joan's name. After its completion, Joan gave her mother $45,000 from the proceeds of the sale of the California house.

On September 16, 1984, while traveling from California to Oregon, Joan, Shelly and Edna were injured when their car, owned and insured by Joan and driven by Shelly, was struck by an on-coming automobile near Marysville, California.[4]

In December 1984 Richard suggested to respondent that he contact the women about the accident and in January 1985, respondent did so by telephone. All three women signed and returned respondent's retainer agreements. At respondent's request, they sent him narratives of their recollections of the accident.

The women continued to live together at addresses in Oregon and San Diego and Montclair,

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

2. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect after May 26, 1989, and references to former rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

3. Shelly Lee has since married and is known as Candace Michelle Lilabeth Cook.

4. The hearing judge found that the accident occurred in Lancaster but the record shows it happened several hundred miles north of that city, near Marysville, in Sutter County.

California, until Shelly's marriage in July 1990. Shelly also maintained a post office box in San Diego from October 1986 until December 1990, at which all three of them received mail.

B. Count 3 - Respondent's representation of Shelly Lee.

Between January and May 1985 respondent spoke by telephone to Shelly and her mother, Joan, about the personal injury case. In May 1985 respondent advised Shelly that there was a problem with his continuing to represent both her and her mother in the automobile accident case, but did not explain the reason. The hearing judge accepted Shelly's testimony that respondent told her then and in subsequent conversations that he was going to refer the case to another attorney, Richard Singer, but that respondent would continue to do the "legwork." Shelly testified that she asked respondent for Singer's telephone number and address on at least two occasions and rather than giving her the information, respondent told her that if she had any questions, she should contact him.

Between May 1985 and 1987, Shelly spoke to respondent 12 times, in which she asked him about the status of her case and was told that she had nothing to worry about. She also met respondent briefly in August 1986 when Shelly, Joan and Edna traveled to respondent's office for Edna's deposition. Shelly then had a brief, five-minute discussion with respondent concerning general pleasantries and his head cold, which prevented him from conducting the deposition himself. On October 7, 1986, Ann Tehan from respondent's office also wrote to Shelly and Joan enclosing a copy of the accident reconstruction and asking them to review it and contact respondent to discuss it in further detail. Shelly testified, and the hearing judge found, that she had no contact with Singer, had not seen the September 6, 1985, civil complaint filed on her behalf by Singer, and had no idea as to the status of her claim for her injuries from the accident.

Shelly admitted that she had seen a letter respondent addressed solely to her mother, Joan, dated May 13, 1985, in which respondent stated that further pursuit of the matter would be unwarranted and outlined several possible courses of action. According to this letter, his office could continue to represent Joan and Edna, a lawsuit would be filed against the other driver *and* Shelly, the negligence of both drivers would preclude any finding of criminal liability against Shelly, and respondent "would refer Shelly to another attorney that could handle her case—thereby eliminating any possible conflicts of interest." Respondent's letter invited Joan to call his office collect if she wished respondent to represent Joan further. Respondent did not send any correspondence to Shelly describing the conflict and his possible withdrawal. Respondent has relied on the letter to Joan as notice of his withdrawal from representing Shelly and communication to her of the reasons. Unknown to Shelly, in about July 1985, respondent transferred Shelly's file to Singer.

When Shelly was sued by the other driver, Joan's insurance company provided an attorney, Peter Viri, to defend Shelly against the lawsuit. Shelly had a few telephone conversations with Viri. She testified that she knew that Viri had been hired by the insurance company and was only defending her, not pursuing her personal injury claims.

After early 1987, Shelly's only effort to contact respondent was her attempt, in conjunction with her mother and grandmother, to recover her file from respondent. To do this, they hired Harold Fair, a private investigator. On his instructions, on November 6, 1988, Shelly signed a joint letter with Joan and Edna, asking respondent for all their files. As will be discussed, *post*, although respondent communicated with Fair, he did not turn over Shelly's file as he had given it to Singer in 1985.

The hearing judge concluded that respondent failed to withdraw properly from his representation of Shelly, contrary to former rule 2-111(A)(2), by failing to take reasonable steps to avoid foreseeable prejudice, noting that respondent did not advise Shelly what work had been done on her behalf, what work remained outstanding or needed to be started, or how to reach her new counsel. She also found that respondent did not communicate properly with Shelly in violation of section 6068 (m) when he did not fully explain to her the reasons that he was not continuing to represent her or the problems with the lawsuit; did

not provide complete and accurate information about her new counsel, and did not explain the impropriety of continuing to discuss the lawsuit with her thereafter. The hearing judge dismissed charges that respondent did not provide competent legal services for Shelly.

C. Count 5 - Respondent's representation of Joan Lee in three matters.

1. Bankruptcy matter.

As part of the bankruptcy proceeding of Richard, Joan Lee's estranged husband, Joan and Richard were sued by the trustee in bankruptcy regarding the Oregon house where Joan, Edna, and Shelly lived. In 1982, in applying for a loan from a credit union, Richard had listed this Oregon property as an asset.[5] When he filed his bankruptcy petition, he did not include the Oregon property. It was the trustee's position that the proceeds of the sale of the marital home were used to purchase the Oregon house and therefore Richard had an interest in the Oregon house as a community asset. If the house was Richard's asset, the bankruptcy court would have jurisdiction over it and the trustee would have the authority to sell it to satisfy Richard's debts.

In November 1985, the attorney for the trustee filed and mailed to Joan, Richard, and respondent a summons and complaint to define the interests in the Oregon property. The attorney for the trustee admitted at the State Bar Court hearing that because Joan was not the debtor in the case, mailing the summons and complaint to her was not sufficient service and personal service would be required to bring her within the court's jurisdiction. Joan denied that she received the complaint or spoke to respondent to represent her prior to her receipt of a proposed stipulated judgment in July 1986. In a note Joan sent to respondent dated December 31, 1985, she indicated to him that she had gotten his message concerning her house papers, did not understand why she was involved in her estranged husband's problems, and enclosed a copy of her warranty deed for respondent. The hearing judge found that respondent spoke to Joan during this time and told her that the trustee wanted to take the Oregon house and sell it, and that if she did not file an answer, her default would be taken. The hearing judge accepted respondent's testimony that Joan agreed to have respondent file an answer to the complaint on her behalf. Respondent filed an answer for Joan in bankruptcy court on December 23, 1985.

After legal research, respondent concluded that Joan did not have a viable defense to the bankruptcy trustee's action to include the Oregon house as one of Richard's assets and to sell it to pay his creditors. In negotiations with the trustee's attorney, and to save additional costs to the estate, respondent agreed to a proposed stipulated judgment drafted by the trustee's attorney and respondent sent it to both Richard and Joan. Accompanying the proposed judgment was a letter from respondent in which he stated that unless he heard from either Richard or Joan within seven days, he was going to assume that they each consented to entering the stipulated judgment. The hearing judge found that Joan did not understand the proposed stipulated settlement. Respondent acknowledged at the disciplinary hearing that he did not get Joan's specific authority to enter the stipulated settlement, but rather he claimed that he had her authority to do so because he represented her and was acting in her best interests. When Joan received the signed, stipulated judgment dated August 22, 1986, she called respondent for an explanation and was told that the bankruptcy court was going to take her house and sell it.

In order to attempt to set aside the stipulation, Joan hired first an Oregon law firm and later a Los Angeles firm. On January 2, 1987, the Los Angeles firm moved to set aside the stipulation based on respondent's lack of authority from Joan to act. The motion was denied in March 1987 after respondent

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5. The hearing judge incorrectly stated that the Montclair, California house was listed on the loan application. The Montclair house had been sold in 1979. According to his deposition in the bankruptcy matter, Richard had listed the Oregon house on the loan application in 1982 because he thought he was automatically an owner due to his marriage to Joan.

testified as to his discussions with Joan concerning the proposed stipulated judgment. Joan paid $400 for her representation and at the time of the State Bar Court hearing still owed the law firm $380. The property was eventually sold and shortly before the State Bar Court hearing began, Joan received $12,000 representing her homestead interest.

2. Family law matter.

In 1986 Joan decided that she should be legally separated from Richard and asked respondent to handle the matter. She completed and returned respondent's questionnaire and paid him $125 to cover court filing costs. On respondent's advice, Joan and Richard signed a paper reflecting an allocation of their assets dated July 29, 1986. On January 13, 1987, after rejection by the clerk's office several times, respondent filed Joan's petition for legal separation. When Joan called respondent on January 9, 1987, to ask about the status of the case, thinking that it would be final soon, respondent told her he had just filed the papers the week before. Joan decided instead to dissolve the marriage and retained new counsel, Carol McFarland. In April 1987 McFarland filed an action to dissolve Joan's marriage. On May 26, 1987, McFarland moved to dismiss the legal separation matter filed by respondent. The dismissal was entered on May 29, 1987. Joan paid McFarland $2,800 for her services. Her divorce became final in 1988.

In the same January 9, 1987, conversation Joan had with respondent about the status of her family law matter, and later by letter dated January 16, 1987, Joan asked respondent to send all her files to the Los Angeles law firm which was then representing her in her attempt to set aside the stipulated judgment re the Oregon house. Thereafter, Allison Kotlarz, an attorney with the Los Angeles firm, spoke to respondent twice concerning release of Joan's files. Kotlarz arranged to pick up the files from respondent's office on the morning of March 17, 1987, but no one was in the office when she arrived. By letter dated March 17, 1987, Kotlarz demanded delivery of the files by March 20, and respondent sent unrelated bankruptcy files to her on March 28. Kotlarz made another demand for the files by letter dated March 31, 1987. By letter dated April 2, 1987, respondent refused to surrender the files until he received an executed substitution of attorney form from Joan.

3. Automobile accident matter.

After she retained respondent, Joan Lee called him regularly for status reports and with questions on her auto accident case, as well as her mother's and daughter's causes of action. In May 1985, after respondent wrote to Joan to advise her of further options if he was to continue to represent her, she found it increasingly difficult to communicate with respondent. On September 3, 1985, respondent filed a lawsuit on Joan and Edna's behalf against Shelly and the driver and owner of the other vehicle. This is the same lawsuit in which Shelly was defended by attorney Peter Viri.

After March 1987, the only outstanding matter in which respondent served as counsel for Joan was her personal injury lawsuit. Joan remained the only plaintiff in that suit after respondent had settled Edna Birch's claims against the defendants for $30,000 and she had been dismissed out of the lawsuit in December 1986. Joan did not hear from respondent after her attempt to secure her file in January 1987 until she, along with her mother and daughter, retained the services of private investigator Harold Fair in September 1988 to recover their files from respondent. On October 3, 1988, Joan sent a mailgram to respondent asking that he turn over her files, as well as Edna's, to Fair. Fair called respondent's office five days later and respondent agreed to turn over the files once he got a signed substitution of attorney form. Fair asked respondent to send the needed forms to Joan at their address at 4580 Ohio Street in San Diego. Respondent sent the forms to *4080* Ohio Street and continued to use this incorrect address in later attempts to contact Joan. In late October 1988, after his clients had not received anything from respondent, Fair called respondent's office and left a message, but did not receive a reply. On November 6, 1988, as discussed *ante* under count 3, Joan, Edna, and Shelly sent a joint letter to respondent asking that their files be sent to Fair. Fair followed this letter with a strongly-worded letter of his own to respondent dated November 8, 1988, asking for the files. Respondent did not answer this letter, but did send Fair a letter dated January 6, 1989, asking

for Joan's correct address. Fair answered three days later, reiterating his request to release Joan's files. Fair had no further contact with respondent.

On January 24, 1989, respondent filed an at-issue memorandum with the superior court in Joan's accident case. Trial was set for June 1989, then later reset for September 19, 1989. Respondent sent interrogatories to Joan in February 1989, again to the incorrect address on Ohio Street. By March 1989 Joan and Shelly had filed a complaint against respondent with the State Bar. State Bar investigator Duane D. Dade wrote to respondent on March 20, 1989, advising him of the complaint and seeking a written response. The next day, respondent replied that his correspondence with Edna and Joan had been returned, that he had been dealing with Harold Fair "to no avail" and enclosed a "notice," presumably the interrogatories from February, for Dade to forward to Joan.

Respondent's office again wrote to Joan on April 3, 1989, this time at the correct address, enclosed a second set of interrogatories, advised her that her trial was in June and asked that she contact the office for a telephone conference. Two weeks later, Joan sent a letter to the State Bar enclosing the interrogatories, stating that she had been trying to fire respondent and recover her file, and asking for the Bar's assistance as she had to respond to the interrogatories at once.

Respondent's office sent notices to Joan by certified mail at her correct Ohio Street address and by regular mail to her post office box, advising her of the September 19, 1989, trial date. The certified mailing was returned unclaimed, and the regular mailing returned marked "moved, left no address." By this point, respondent had been sanctioned by the trial court for failure to comply with defendant's discovery request. Respondent filed a motion to be relieved as counsel on July 19, 1989. Respondent sent a copy of the motion and supporting papers to Pat Kissane of the State Bar ("[f]or your reading in your spare time . . .") with the request that he would appreciate Kissane "finding the time and informing Ms. Lee to obtain new counsel to represent her." On July 15, 1989, respondent forwarded Joan's file and a substitution of attorney form to Kissane for her to forward to Joan. Kissane returned both the substitution form and Joan's file to respondent by certified mail dated July 31, 1989, and advised respondent that the State Bar could not be used as a conduit to deliver client files or secure a client's signature on a substitution of counsel form. Joan acknowledged at the disciplinary hearing that she had received respondent's motion to withdraw as counsel but thought that it meant that he would only continue to be her attorney through the trial of *this* case.

In the minute order granting respondent's motion to withdraw, the civil court noted that it had asked respondent if he had had any mail to Joan returned to him as undelivered, and he responded that as of July 28, 1989, none had been returned as non-deliverable. Respondent advised the trial court that Joan had filed papers with the State Bar but that he had had no correspondence from Joan.

The case was called for trial on September 19, 1989. Joan was not present, nor was she represented by counsel. Defendants moved for dismissal based on her nonappearance, the motion was granted and the case was dismissed with prejudice.

4. Decision of the hearing judge as to count 5.

The hearing judge concluded that in representing Joan in her personal injury case, the bankruptcy matter and her family law matter, respondent did not adequately communicate with her, as required by section 6068 (m). She found Joan's frequent moves and failure to always provide respondent with written notice of her address changes did not excuse respondent's loss of contact with her, finding that more frequent and more careful contact would have avoided the gaps and problems in communicating with Joan. The judge rejected the charge that respondent had misrepresented information to Joan or the bankruptcy court, contrary to section 6106 and 6068 (d), or former rule 7-105(1).

The hearing judge also rejected the allegation that respondent violated section 6104, stating that there was insufficient evidence to prove respondent knew he did not have authority to act on Joan Lee's behalf. Similarly, she found the record did not show clear and convincing evidence that respondent did

not represent Joan competently during his employment (former rule 6-101(A)(2)).

As to the charge of improper withdrawal from representation, the hearing judge concluded that Joan had made it clear without using the "technically correct words" that she wished to sever her relationship with respondent, when she hired other counsel to undo the stipulated judgment in bankruptcy court and to withdraw her legal separation complaint and requested that respondent forward her files to other law firms. Joan's failure to complete the interrogatories almost five years into her personal injury lawsuit and otherwise to cooperate with respondent at that point contributed to the compromise of Joan's rights, but in the hearing judge's view, respondent's inaction in response to Joan's efforts to recover her files and discharge respondent led to the breakdown of the relationship and the resulting harm to her cause of action.

D. Factors considered in aggravation and mitigation.

In aggravation, the hearing judge found that respondent's misconduct was repeated, lasted over a three-year period, and resulted in significant harm to the causes of action of both Joan and Shelly. Respondent had no prior record of discipline but the misconduct began only five years after his admission to practice, and therefore the hearing judge allotted little weight in mitigation to his lack of a prior record. Considered by the hearing judge to be mitigating was respondent's showing of some good faith in taking some limited steps to locate Shelly and Joan to return their files and his demonstration of candor and cooperation with the State Bar.

II. DISCUSSION

A. Procedural point.

Respondent urges that the portion of the hearing department decision immediately under the heading "Conclusions of Law" entitled "Uncharged Violations" (decision, p. 14) was improper and should be stricken. This very brief discussion concerns charges which were not made, or if made, were dismissed by OCTC.

[1] Evidence of uncharged misconduct can be considered in aggravation (see *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36) or for purposes such as impeaching witness credibility. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401.) Had the hearing judge made clear findings of culpability on the added violations, they could have figured into her discipline recommendation. Her findings on the uncharged misconduct, however, are too tentative to merit consideration for enhanced discipline and she disclaimed any consideration of those issues. We do not adopt them as findings or conclusions but we see no good reason to strike them from her decision.

B. Culpability.

Respondent contends that he did not commit any charged misconduct in counts 3 and 5 and we should dismiss the proceeding. He argues that the bulk of his acts allegedly violating section 6068 (m) occurred prior to January 1, 1987, the effective date of the statute, and thus we should reverse that finding of culpability. He also contends that he had no duty to return Shelly's or Joan's files since either he was not their attorney at the time of their demand for the return of files, or, in the case of Joan's files, she had not provided a substitution of attorney. A considerable force of respondent's attack on the findings rests on disagreement with the hearing judge's assessment of witness credibility. Respondent urges that we accept his view of the facts as the more plausible. If we do not dismiss the proceeding, he urges that we impose no more than a private reproval.

The Office of the Chief Trial Counsel (OCTC) supports all of the findings and conclusions of the hearing judge and her recommendation of stayed suspension.

Disciplinary charges against an attorney must be proven by OCTC by clear and convincing evidence and if equally reasonable inferences may be drawn from proven facts, the inference leading to innocence must be chosen. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239-240, and cases cited.) Our review is independent based on the record below but our procedural rules require us to give great weight to the credibility

determinations of the hearing judge who saw and heard the conflicting testimony and reviewed it together with the documentary evidence. (Trans. Rules Proc. of State Bar, rule 453(a); see *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 42.)

[2a] It is clear that conduct which falls below the standard of section 6068 (m)[6] but which occurred prior to January 1, 1987, does not violate its ban. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 902-903; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 297-298.) However, we cannot agree with respondent that he is therefore innocent of the charges.

[2b] We have imposed discipline under section 6068 (m) where the attorney's failure to communicate began prior to, but extended beyond December 1986. (See *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 204; see also *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486-487 [pre-1987 failure to communicate disciplinable under section 6068 (a) if properly charged].) That was the situation both in counts 3 and 5. Respondent's principal failures to communicate with Shelly occurred in 1985 and 1986 in not making clear that he was no longer representing her and that attorney Singer was taking over that representation, and in not providing her with Singer's address and phone number. Respondent not only failed to convey this information clearly, and failed to send Shelly any document addressed to her in that regard, but also continued to encourage Shelly to contact him as a conduit for Singer. Moreover, the record reveals no documents sent by Singer to Shelly. In count 3 the hearing judge concluded that respondent's obligation under section 6068 (m) lasted until into 1988 and Shelly contacted respondent about her auto accident case at least into the beginning of 1987. Well into 1988, Shelly sought her file from respondent. Although he had long since transferred it to Singer, he failed to inform her of that fact. Thus, we find support for the hearing judge's conclusions that respondent's failure to clearly apprise Shelly of his withdrawal from employment and purported transfer of responsibility to Singer violated section 6068 (m).

Applying the foregoing principles, respondent also violated section 6086 (m) in count 5 by failing to communicate with Joan for over two years starting in January 1987 in response to her requests in the auto accident case.

[3] Respondent points to his 1985 transfer of Shelly's file and urges us to reverse the hearing judge's conclusions of a violation of former rule 2-111(A)(2) on the ground that he no longer had the file to give her. Although we agree on the fact of file transfer, an attorney's delivery to the client of her file is not the only duty required by former rule 2-111(A)(2) when an attorney withdraws from employment. That rule, as well as successor rule 3-700(A), requires a withdrawing attorney to give due notice to the client, to avoid foreseeable prejudice and to allow time for employment of successor counsel. Respondent did not give Shelly the notice due her when he transferred her case and file to Singer. As we have seen, he let Shelly believe that he was the conduit for contact with Singer. We therefore uphold the hearing judge's conclusion of respondent's culpability of wilful violation of former rule 2-111(A)(2) as to Shelly.

[4] We also uphold the hearing judge's conclusions that respondent violated former rule 2-111(A)(2) by failing to honor Joan's request in 1987 to promptly turn over to successor counsel all her files and by failing in the auto accident case in which he still represented her as of 1988 to turn over her file in that matter. Respondent's defense that he had no signed substitution of attorney from Joan does not avail him. The rule has never been construed to require a substitution of attorney as a condition precedent to an attorney's duty to deliver the client's file, but we do not reach that issue for in this case respondent never

6. Section 6068 (m) makes it a duty of an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

took the position that he needed Joan's files in order to protect her legal interests until she signed a substitution. As the Supreme Court observed in *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 655, the portion of a client's file which is the client's property "must be surrendered promptly upon request to the client or the client's new counsel once the representation has terminated." (See also *Kallen* v. *Delug* (1984) 157 Cal.App.3d 940, 950 [refusal to forward a client's file until a successor attorney has signed a division of fees agreement breaches rule 2-111(A)(2)].)

C. Degree of discipline.

The hearing judge considered the applicable Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) but did not identify any comparable case law in her discipline discussion. On review, neither party analyzes any comparable decisional law in support of their respective positions on the appropriate discipline.[7]

[5a] Our decision in *In the Matter of Aguiluz*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 45-46, discusses a number of comparable cases in which an attorney with no prior record of discipline improperly withdrew from employment in a small number of matters, coupled in some instances with a failure to communicate, or with circumstances more serious than present here, such as misrepresentation to a client, a lack of remorse or appreciation of the disciplinary process, or failure to cooperate with the State Bar. From those cases, we see that the entirely stayed suspension recommended by the hearing judge is well within the range of discipline in comparable or slightly more serious cases. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921 [failure to communicate, to properly withdraw, or to take action in one client matter; default matter; six-month stayed suspension, one-year probation]; *Harris* v. *State Bar* (1990) 51 Cal.3d 1082 [neglect of case for one client resulting in large loss to estate; little recognition of wrongdoing; three-year stayed suspension; ninety days actual suspension]; *Layton* v. *State Bar* (1990) 50 Cal.3d 889 [neglect of estate over five years, failure to communicate; indifference to harm caused; three-year stayed suspension, thirty-day actual suspension].) In *Aguiluz*, we found the attorney had withdrawn as counsel in one matter but refused to turn over the clients' file until he was paid additional fees and a substitution of attorney form was signed. The clients were misled to some extent and unearned advanced fees were owed to them. We recommended and the Supreme Court ordered a one-year stayed suspension, two years on probation and restitution, but no actual suspension, in light of the impact of Aguiluz's son's death on his misconduct.

One Supreme Court case not summarized in our *Aguiluz* opinion which is also instructive in this matter is *Lister* v. *State Bar* (1990) 51 Cal.3d 1117. The Court dismissed charges that Lister had misappropriated client funds, but found that he had failed to perform legal services and communicate with two clients, with the loss of one client's cause of action, had not surrendered their files upon repeated requests, and kept a case which he was not competent to handle, resulting in delays and large interest and tax penalties owed by the clients. The misconduct was mitigated to some degree by an office move and staff problems suffered by Lister. Lister did have a prior private reproval but the Court agreed with the referee's decision below that it was minor and remote in time. The Court reduced the discipline to nine months actual suspension and three years probation.

[5b] Respondent's misconduct, as charged and found in this proceeding, focuses on failure to communicate reasonably with two of his clients and failure to relinquish their files promptly. This resulted in harm to the clients by added delay, expense and creating limited options for them. We recognize the mitigating circumstances found by the hearing judge including the clients' periodic moves which undoubtedly made respondent's attempts to provide services to them more difficult. However, we note that significant failures of respondent to communi-

7. Although respondent cites several private reproval cases in his brief, he does not demonstrate how the cited cases compare to his.

cate with his clients adequately occurred at times when they could not be attributed to confusion over the clients' whereabouts.

[5c] Accordingly, we shall adopt the hearing judge's recommendation of respondent's suspension for six months, stayed, on conditions of a two-year probation, with no actual suspension and with all of the other duties and conditions incident to the judge's recommendation, **[6]** except that we shall delete proposed condition 8 that respondent join and maintain his membership in the State Bar's Law Practice Management Section. We believe that the other remedial conditions of probation, notably conditions 6 (submission of an office organization plan approved by a probation monitor) and 9 (completion of the State Bar's "Ethics School"), will amply address respondent's misconduct. Other special conditions of respondent's probation involve assignment of a probation monitor referee and completion of six hours of law office management or organization courses.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for six months, and that execution of that suspension be stayed on conditions of a two-year probation, with all of the other duties and conditions incident to the judge's recommendation, except for condition 8. We further recommend that within one year of the effective date respondent be required to provide the State Bar proof that he has passed the California Professional Responsibility Examination. We also follow the recommendation of the hearing judge to recommend that costs incurred by the State Bar in the investigation and hearing of this matter be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I concur in the opinion of the court, but consider it important to emphasize why I have concluded that this case does not present reviewable conflict of interest issues despite facts which appear to abound in such conflicts. Only one conflict of interest was charged by the State Bar as a violation of former rule 5-102 and, for reasons not apparent from the record, was dismissed at trial by the hearing judge on the State Bar's own motion. As a consequence, the hearing judge noted some indication of conflicts of interest problems but declined to make any findings thereon because she did not consider them to be properly before her.[1] The State Bar did not seek review and, upon respondent's request for review, has simply sought affirmance of the hearing judge's decision.[2]

Under the circumstances, it would clearly be inappropriate for the review department to make adverse culpability findings against respondent based on facts which appear to demonstrate uncharged conflicts of interest. If the State Bar fails to move to amend the notice to conform to proof, an attorney may only be disciplined for conduct alleged in the notice to show cause. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35; *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420.) In *Edwards*, *supra*, the Supreme Court nonetheless upheld the use by the prior volunteer review department of evidence of uncharged misconduct to establish a circumstance in aggravation not found by the hearing panel. In that case, Edwards's own testimony, elicited for the purpose of inquiring into the cause of the charged misappropriation from his trust account, established that Edwards had a practice of commingling his own funds in his clients' trust account and failing to keep proper records.

Indeed, when a check issued against a trust account bounces, an inference of misappropriation may be drawn and the burden of proof shifts to the respondent to show that the office procedures he or

1. The hearing judge also noted that the facts provided some indication of uncharged violations of former rule 2-101(B) and former rule 7-103, but also did not consider such uncharged conduct in her decision.

2. The State Bar was represented by different attorneys before the review department than the attorney who prosecuted the case at trial.

she had in place were adequate. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) No such integral relationship exists here between the evidence related to the charged and uncharged conduct. Here, respondent was affirmatively led to believe that no conflicts issue remained when the State Bar dropped the rule 5-102 charge of its own volition in the culpability phase of the trial. His counsel points out in his brief on review that he therefore did not focus his presentation of evidence or his questioning of witnesses to defend respondent with respect to possible conflicts of interest or other uncharged allegations of misconduct. Under these circumstances, due process would not be afforded respondent if we were to make findings in aggravation based on uncharged conflicts appearing in the record.

Nonetheless, the recitation of facts in the majority opinion makes one wonder why conflict of interest issues did not become the gravamen of the charges. The facts appear to raise insurmountable questions of the ability of one attorney to represent zealously and competently all of the clients' interests—husband, estranged wife, her mother, and the couple's daughter. The husband's bankruptcy appeared to present potential conflicts of interest with his wife regarding ownership of the Oregon property, raising questions as to their joint representation in defense of the trustee's suit; it also posed issues with respect to respondent's representation of the wife in seeking formal separation from her husband. The fact that he did not charge fees for representing her in either situation does not alter the potential for harm to her interests.

Most notably, of course, the representation of both the driver and passenger in an automobile accident case poses inherent potential conflicts of interest problems. (See, e.g., *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 614-617.) The facts also appear to indicate respondent's disqualification from continuing to represent the passengers in the personal injury suit due to improper receipt of pertinent confidential information from an adverse party (i.e., the driver). (Cf. *Western Continental Operating Co.* v. *Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 759.)

One of the salutary purposes of the requirement in former rule 5-102 that "A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned" is to serve as a prophylactic against predictable problems of this type. Good intentions may be mitigating, but they are not a defense. "'The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]'" (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 351, quoting *Anderson* v. *Eaton* (1930) 211 Cal. 113, 116.)

Representation of conflicting interests without informed written consent is not only a rule violation, it is very risky practice. Attorneys must be attuned to these risks because the clients who come jointly to them for advice seldom realize what concerns they might have until it is too late. Even when the attorney may in fact be able to serve clients with conflicting duties to the full extent of their rights, the attorney risks the perception by one or more of the clients that the attorney's loyalty is impaired. The loss of faith in the attorney then engenders additional problems such as further lawsuits and State Bar complaints as well as adding to general distrust of the legal profession.

In the proceedings below, the hearing judge was careful not to take into account evidence of possible uncharged misconduct in her decision and so has this court been on review. But no one reading this opinion should conclude that an attorney's representation of various family members in multiple suits, however well-meaning, may not be rife with serious conflict problems. Fortunately for public protection, as part of the discipline recommended by the hearing judge for the charged conduct on which respondent was found culpable, it was recommended that respondent be ordered both to take and pass the California Professional Responsibility Examination and to complete a one-day session in the State Bar's Attorney Remedial Training System ("Ethics School"). In this case, unlike *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, both appear to be well-warranted conditions of probation.