

Public Matter –Designated for Publication

Filed July 9, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	Case No. 96-O-03184
)	
Justin R. Dahlz,)	OPINION ON REVIEW
)	
A Member of the State Bar.)	
_____)	

Respondent Justin R. Dahlz¹ seeks our review of a hearing judge’s decision in which the hearing judge found respondent culpable of multiple acts of misconduct in a single client matter. Of at least equal, if not greater concern are the hearing judge’s findings of deception by respondent in dealings with (1) the opposing party in the underlying action, (2) the State Bar investigators investigating the complaint of his client and (3) the State Bar Court in the presentation of testimony and exhibits before the hearing department.

More specifically, the hearing judge found that respondent (1) violated rule 3-110(A) of the former Rules of Professional Conduct (effective May 27, 1989, to September 13, 1992) (hereafter former rule 3-110(A)) by failing to competently perform the legal services for which he was retained; (2) violated Business and Professions Code section 6068, subdivision (m)² by failing to respond to the client’s reasonable status

¹Respondent was admitted to the practice of law in the State of California on June 6, 1989, and has been a member of the State Bar since that time.

²All further statutory references are to the Business and Professions Code unless otherwise indicated.

(See Concurring and Dissenting Opinion)

inquiries; (3) violated “former” rule 3-700(A)(2) and rule 3-700(A)(2) of the “current” Rules of Professional Conduct by improperly withdrawing from employment; (4) violated “former” rule 3-700(D)(1)³ by failing to give the case file to the client; and (5) committed an act of dishonesty in violation of section 6106 by misrepresenting, to an opposing insurance adjuster, that the client no longer wanted to pursue her claim.⁴ In aggravation, the hearing judge did not find “credible” respondent’s testimony that his client told him she did not wish to pursue her claim. He further found that respondent offered into evidence a false telephone log entry that was prepared solely for the purposes of trial. Further, that he presented to the State Bar investigator a copy of a stipulation under which his client settled her claim and which bore his signature, when he had not participated in the settlement and was not a signatory to that stipulation, and falsely represented to the State Bar investigator that he had appeared before a Workers Compensation Appeals Board (WCAB) judge at the time of the settlement of his client’s claim, when, in fact, he had not. In addition, the hearing judge found respondent “was less than forthright in his testimony . . .” Finally, the hearing judge found further aggravation in that respondent’s misconduct harmed the client.

³Contrary to the State Bar's charges and the hearing judge's finding, there is no “former” rule 3-700(A)(2) or “former” rule 3-700(D)(1). Rules 3-700(A)(2) and 3-700(D)(1) became effective on May 27, 1989, and have not been modified or amended since that time. Accordingly, we deem the charged and found violations of “former” rules 3-700(A)(2) and 3-700(A)(1), as charged and found, violations of rules 3-700(A)(2) and 3-700(D)(1) of the Rules of Professional Conduct (effective May 27, 1989, to present).

⁴On the motion of the State Bar, the hearing judge dismissed (1) the violation of rule 3-700(A)(2) of the Rules of Professional Conduct charged in count four of the first amended notice of disciplinary charges and (2) the violation of section 6152, subdivision (a) charged in count six of the first amended notice. We adopt those dismissals, but modify them to provide that the charges are dismissed with prejudice. (Rules Proc. of State Bar, rule 261(a).) The hearing judge also dismissed for want of proof the violations of rule 1-400(C) of the Rules of Professional Conduct charged in count six of the first amended notice. He also found the charge of violation of section 6106, as alleged in count seven, duplicative of count five because of the absence of proof in count six. He found no culpability in count seven. The State Bar does not challenge that finding or those dismissals on review, and after independently reviewing the record, we adopt them, but modify them to provide that the dismissals are with prejudice.

The hearing judge recommended that respondent “be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;[⁵] that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: [¶] 1. That during the first 150 days of said period of probation, Respondent shall be actually suspended from the practice of law. . . .”

On review, respondent does not contest any of the hearing judge’s culpability findings. Instead, he raises only the following three points of error; (1) that the evidence is insufficient to support the hearing judge’s aggravation finding that his misconduct harmed the client; (2) that the hearing judge’s discipline recommendation is excessive; and (3) that the hearing judge erred in including, in his discipline recommendation, a requirement that respondent establish his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii).

The State Bar argues that respondent’s first two points of error, in which he challenges the hearing judge's finding of harm and appropriateness of the hearing judge's discipline recommendation, are without merit. Furthermore, the State Bar argues that, if anything, the hearing judge's discipline recommendation is inadequate in that the recommended period of actual suspension of “less than 6 months -- is generous, perhaps even to a fault. [Fn. omitted.]”

With respect to respondent's third point of error, the State Bar suggests that the hearing judge’s recommendation of a standard 1.4(c)(ii) condition is incomplete and ambiguous as written and should be modified on review to correct any such deficiency.

⁵These standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

Of course, we independently review the record and may make findings and conclusions at variance with the hearing judge. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207.) While we focus primarily on respondent's points of error attacking the hearing judge's finding of harm and discipline recommendation, we must still independently review the record to determine whether all of the hearing judge's findings of fact and conclusions of law are supported by the record. (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 709; cf. *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 902 [even if attorney does not contest the State Bar Court's findings of misconduct, the Supreme Court independently reviews them because their validity bears on its ultimate choice of discipline].)

Following our independent review, we affirm the hearing judge's finding of moral turpitude (section 6106), failure to perform (former rule 3-110(A)) and improper withdrawal (rule 3-700(A)(2)). We reject the hearing judge's separate finding of culpability under rule 3-700(D)(1) because we have used the misconduct alleged under that count as part of the evidence to find culpability under former rule 3-110(A). While we disagree with a portion of the hearing judge's findings in the count charging a violation of section 6068, subdivision (m), we do find culpability under that section because we find that his client Michelle Douglas sent at least one letter to respondent in which she made a reasonable request for information concerning her claim against Pacific Bell. Respondent failed to respond to that request for information. Because of respondent's serious aggravation in lying to the opposing party in the underlying action and to the State Bar investigator and the State Bar Court in the presentation of testimony and exhibits, we increase the recommended discipline to include one year actual suspension as a condition of probation.

The Charges

Before the conclusion of the culpability phase of the trial in this matter, the State Bar moved to amend the first amended notice "to conform to proof" with respect to the charged

violations of the Rules of Professional Conduct. In count one, the State Bar incorrectly amended the charges by deleting the charged violation of rule 3-110(A) of the Rules of Professional Conduct (as amended effective September 14, 1992, to present) (hereafter current rule 3-110(A)). As noted below, respondent's misconduct under count one began in 1989 and ended in 1996; accordingly, respondent's misconduct violated both former rule 3-110(A) and current rule 3-110(A). Therefore, the State Bar should not have deleted the charged violation of current rule 3-110(A), but should have added a charged violation of former rule 3-110(A) to it.

No due process violation will occur by our holding that, under the facts alleged in count one, respondent violated both former rule 3-110(A) and current rule 3-110(A). First, the text of former rule 3-110(A) is virtually identical to that in current rule 3-110(A). Second, respondent has not argued any lack of adequate notice. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 381, fn. 13.) Third, the trial was not limited to respondent's conduct during the time period in which former rule 3-110(A) was effective, but covered respondent's conduct after that time period when current rule 3-110(A) became effective.

Findings of Fact

The record established that, in the fall of 1989, attorney Richard Rodriguez-Ivanhoe referred to respondent a case in which Rodriguez-Ivanhoe represented Michelle Douglas with respect to a workers' compensation claim pending before the WCAB in Walnut Creek against Pacific Bell, Douglas's employer. Pacific Bell is a self-insured workers' compensation employer.

Respondent's first communication with Douglas was in a telephone conversation in the late fall of 1989. In that telephone conversation, they discussed respondent representing Douglas. In December 1989, respondent sent Douglas a substitution-of-attorney form authorizing him to replace Rodriguez-Ivanhoe as Douglas's attorney of record in the WCAB.

Douglas promptly signed the form and returned it to respondent. At all relevant times, Douglas not only continuously worked for Pacific Bell, but she continuously lived at the same address and had the same home telephone number.

At trial, Douglas did not independently recall the date or time of making any one of ten alleged calls to respondent between April 1990 and August 1990. Accordingly, she was permitted to testify from a document (exhibit 4) that she claims is a log in which she recorded each of her telephone calls to respondent. According to Douglas, she prepared the “log” by recording in it each telephone call that she made to respondent at (or very near) the time she made the call. Respondent denied receiving any such calls or messages relating to such calls. Our review of Douglas’s telephone “log” convinces us that there is an absence of clear and convincing evidence that such calls were made by Douglas. Accordingly, we reject the hearing judge’s finding that Douglas telephoned and left messages for respondent on 10 different occasions. Nor do we find clear and convincing evidence that any such calls were made by Douglas.

In addition, Douglas claimed that she had mailed six letters to respondent between August 1990 and February 1991 and that respondent did not reply to those letters. She testified that she hand wrote a letter to respondent in August 1990, duplicated it and sent the original to respondent, and kept the copy. Douglas claims she periodically added an additional date to the letter, duplicated it with the additional date or dates, again duplicated the letter and sent a copy to respondent, repeating that process six times between August 1990 and February 1991. The only evidence of the dates of mailing of those letters is the remaining copy of the letter containing six dates. Respondent denied receipt of any of those letters. We conclude that the evidence that Douglas sent six letters to respondent does not rise to the clear and convincing level. Accordingly, we reject the hearing judge's findings that Douglas sent respondent six letters. However, the record is clear that Douglas sent at least one letter. We further conclude that respondent did not communicate with Douglas

during the period of either the alleged phone calls from Douglas or the alleged letters from Douglas.

After respondent substituted in as Douglas's attorney of record in the WCAB, he did virtually nothing on her case for almost a year. In November 1991, Fale Sala Leui, a Pacific Bell workers' compensation claims manager, sent respondent a letter informing him that Pacific Bell intended to file a petition to dismiss Douglas's case for want of prosecution unless respondent contacted her within 30 days. On November 29, 1991, respondent sent Leui a letter in which he stated that his law office had been in contact with Douglas and that Douglas had informed his office that she "fully intends to pursue" her claim against Pacific Bell. Respondent further stated, in this letter to Leui, that his office was in the process of accumulating the data needed to process Douglas's claim and that he would get back to Leui "within the next couple of weeks." We find that in fact respondent had not been in touch with Douglas, and respondent admits that he never got back to Leui.

Respondent testified that, after he or someone in his office contacted Douglas in November 1991 regarding Leui's letter, he was unable to locate Douglas because she had moved. But the hearing judge rejected respondent's testimony and so do we. Douglas credibly testified that she did not hear from nor was she able to contact respondent, after her telephone conversation with him in late fall of 1989 until March 1996, when she spoke with him again in a second telephone conversation. Moreover, as noted above, Douglas did not move or change her telephone number throughout the relevant time period. Further, respondent testified that he didn't remember talking to Douglas between the time she signed the substitution of attorneys and 1996.

In September 1993, Elaine Wazz, another Pacific Bell workers' compensation claims manager, sent respondent a letter in which she noted that respondent had done nothing on Douglas's claim for over a year and that Pacific Bell intended to file a petition to dismiss

Douglas's case for want of prosecution unless respondent contacted her within 30 days.

Respondent admits that he did not respond to Wazz's letter.

In October 1995, Pacific Bell filed its answer in Douglas's case and served a copy of it on respondent. Then, in February 1996, Rita McPeake, a Pacific Bell workers' compensation hearing representative, sent respondent a letter informing him that a status conference was set in Douglas's case for March 28, 1996. Respondent received McPeake's letter on February 6, 1996. In March 1996, respondent telephoned and spoke with Douglas at her place of employment without any apparent difficulty in locating her. During that telephone conversation, respondent told Douglas something to the effect that "I don't want to be bothered with this" (i.e., Douglas's case).⁶

Thereafter, on March 15, 1996, respondent telephoned McPeake and unequivocally told her that Douglas did not intend to pursue her claim against Pacific Bell and that he would not be attending the March 1996 status conference in Douglas's case. McPeake told respondent she would send a confirming letter for his signature. Accordingly, McPeake prepared a "confirmation" letter, which she faxed and mailed to respondent for his signature. Respondent did not sign and return or otherwise respond to McPeake's confirmation letter. Nor did he attend the March 1996 status conference even though he had actual knowledge of that conference.

Respondent does not completely deny telling McPeake that Douglas did not intend to pursue her claim against Pacific Bell, but asserts that he would have "couched" his language and told McPeake something to the effect that "I'm trying to get a hold of my client. She does not seem to be interested" or that "I think my client does not want to pursue this claim." The hearing judge did not find respondent's testimony credible. Nor do we.

⁶In a subsequent letter Douglas referred to that conversation as occurring on March 7, 1996, while respondent offered a purported log of telephone calls making reference to a March 13, 1996, telephone call with Douglas.

The hearing judge found that respondent fabricated an entry into his telephone log in Douglas's case file for purposes of defending the charges against him in this proceeding and "not as a record of any conversation that took place with Douglas." That entry is dated March 13, 1996, and contains purported notes from a telephone conversation that respondent allegedly had with Douglas on March 13. The entry includes a statement to the effect that Douglas is "basically not interested in pursuing this matter." While that entry may have been made at or about the time of that telephone conversation, we conclude that Douglas said nothing to the effect that she did not want to pursue her claim. We find, by clear and convincing evidence, that the log entry does not accurately reflect the conversation between respondent and Douglas and that it was offered into evidence by respondent with knowledge of that fact.

Because respondent did not attend the March 1996 status conference, the WCAB judge directed McPeake to serve on respondent copies of the minute order from the status conference and the notice of hearing. McPeake sent respondent copies of those documents, and respondent received them. The notice of hearing clearly notified respondent that the trial in Douglas's case was set for July 2, 1996, at 1:30 p.m. at the WCAB's Walnut Creek venue. Moreover, the minute order clearly directed that the "parties shall submit briefs 30 days before trial." Because respondent failed to attend the March 1996 status conference, the judge also directed McPeake to begin serving Douglas with copies of Pacific Bell's pleadings as though Douglas were representing herself pro se.

On April 15, 1996, Douglas sent respondent a letter by certified mail. In that letter Douglas referenced the statement that respondent made to her in their March 7, 1996 telephone conversation to the effect that he did not want to be "bothered" with Douglas's case. She then stated that respondent needed to file the necessary papers with the WCAB to remove himself from her case and to send her file to her. Respondent received Douglas's letter on April 16, 1996.

Respondent testified that, on April 22, 1996, he sent Douglas a letter acknowledging her April 15, 1996 letter, asking her to please come into his office and pick up her file, and advising her to hire another attorney. His file, introduced into evidence, contains a copy of that purported letter. Douglas testified that she did not receive this letter or any further communications from respondent. We find no clear and convincing evidence that respondent's testimony in this regard is false. Respondent made no further attempts to communicate with Douglas, to withdraw as her attorney of record in WCAB, or to give Douglas her case file.

Even though he clearly knew that he remained Douglas's attorney of record, respondent did not prepare for trial, did not meet with Douglas in preparation for trial, and did not submit a brief any time before the July 2, 1996 trial, as ordered by the WCAB judge.

At this late date, Douglas could not find another attorney to take over her case, although there is no evidence she attempted to do so. Accordingly, she obtained copies of her medical reports, prepared her own trial brief, and attended the trial by herself. On the day the WCAB case was tried, the parties entered into stipulations with an agreed amount requested for an award (hereafter the stipulation). Douglas and McPeake were the only persons who signed the stipulation before it was filed with the WCAB. However, because respondent remained Douglas's attorney of record, there was a designated space on the stipulation for his signature. The WCAB judge entered an award in favor of Douglas in accordance with the terms of the stipulation. In the award, the judge entered “-0-“ in the blank for sum “payable to applicant's attorney as to the reasonable value of services rendered.”

Respondent admits that he did not attend the July 2, 1996 trial, but testified that he did not make it because he got lost on his way to court. Respondent testified that, when he finally arrived, he spoke with the WCAB judge and that the judge told him that Douglas's case had been settled. In accordance with respondent's testimony, the hearing judge found that

“[r]espondent did not appear for the trial but did arrive after the proceedings were concluded.” However, the hearing judge rejected respondent's testimony that (1) he went to the hearing to protect Douglas's interests, (2) he did not know whether he was still Douglas's attorney of record, and (3) he did not remember what time it was when he finally arrived at the WCAB and spoke to the judge. We agree with and adopt these three enumerated findings.

Conclusions of Law

COUNT ONE, RULE 3-110(A) (FAILURE TO PERFORM)

We agree with the hearing judge's conclusion that, at a minimum, respondent violated rule 3-110(A) (both former and current versions) by repeatedly and recklessly failing to perform the legal services for which Douglas retained him. Contrary to respondent's contentions, he did not perform any substantive work on Douglas's case for the more than five years that he represented her. Such a complete failure to act is clearly repeated and reckless. Moreover, respondent's unjustified failure to attend the March 1996 status conference was reckless.

COUNT TWO, SECTION 6068, SUBDIVISION (m) (FAILURE TO RESPOND TO STATUS INQUIRIES)

Although we have reversed most of the hearing judge's findings concerning Douglas's purported attempts to communicate with respondent between April 1990 and February 1991, we do find that she made at least one effort to obtain information by writing respondent a letter. We determine that letter was a reasonable request by Douglas for information concerning her WCAB matter. Respondent failed to respond to that request. We find him culpable of a violation of section 6068, subdivision (m)⁷.

⁷Respondent was not charged with failing to adequately communicate with Douglas; only with failing to respond to Douglas's status inquiries.

COUNTS THREE AND FOUR, RULE 3-700(D)(1) (FAILURE TO RELEASE CLIENT FILE) AND RULE 3-700(A)(2) (IMPROPER WITHDRAWAL)

We combine counts three and four in our analysis because of the possibility that identical conduct may be the basis for charges under each of the charged rules, and initially address rule 3-700(A)(2) (count four) because it is the more comprehensive. Rule 3-700(A)(2) provides that an attorney “shall not withdraw from employment until [he] has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D)(1), and complying with applicable laws and rules.” Accordingly, under the express terms of rule 3-700(A)(2), an attorney's failure to give the file to his client in accordance with rule 3-700(D)(1) after the attorney has withdrawn from employment may be at least a portion of conduct properly disciplinable as a violation of rule 3-700(A)(2). Such is the case before us, and we decline to again use that conduct in finding a separate violation of rule 3-700(D)(1).

The record is clear that Douglas terminated respondent's employment in her April 15, 1996 letter to him. This did not terminate respondent's responsibilities to Douglas. He remained attorney of record for her until either a proper substitution of attorney was filed with the WCAB or a motion relieving him as attorney of record was granted. He took no action to terminate his position as attorney of record, leaving his client without representation or her file, and the WCAB as well as the opposing party in a dilemma as to how to proceed. Further, respondent had a continuing obligation to comply with rule 3-700(A)(2), or its predecessor, former rule 2-111(A)(2), which prohibits an attorney from withdrawing services until he or she has taken reasonable steps to avoid any foreseeable prejudice to the client, and which also applies when the client fires the attorney. (*In the Matter of Myrdall, supra*, 1 Cal. State Bar Ct. Rptr. at 374.) That same rule, and its predecessor, requires that the attorney “continue representing the client until he or she has taken steps to avoid foreseeable prejudice.” (*In the*

Matter of Taylor (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 574.) An attorney of record in a case remains the client's counsel and continues to have a duty to avoid foreseeable prejudice to the client's interests until a substitution of counsel is filed or the court grants the attorney leave to withdraw. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115; rule 3-700(A)(1).)

At an absolute minimum, to effect a proper withdrawal from representation, respondent was obligated to advise his client of the dates of upcoming events, including trial dates, advise her of filing dates for various required documents, including a trial brief, and ensure that she had the ability to retrieve her file. Respondent met none of these minimal requirements. The fact that Douglas, without his knowledge, learned of these requirements elsewhere did not relieve him of these obligations. Respondent claimed he wrote to Douglas, telling her to pick up her file. In that alleged letter he expressed his doubt about whether Douglas would even receive that letter. In summary, respondent made no effort to protect the interests of his client on his de facto withdrawal from representation of Douglas. Respondent willfully violated rule 3-700(A)(2) because he failed to properly remove himself as Douglas' s attorney of record in the WCAB, because he failed to give the case file to Douglas in accordance with the request she made in her April 15, 1996 letter, because he failed to advise her of the trial date in her case, and because he failed to advise her that she was required to file a trial brief no later than 30 days before July 2, 1996.

Because we have used the failure of respondent to take reasonable steps to see that Douglas had the ability to receive her file as part of the basis for finding respondent culpable of violating rule 3-700(A)(2) we reject a separate finding of culpability under rule 3-700(D)(1).

The hearing judge determined that respondent was culpable of abandonment. We note that no such charge was made against respondent and reject that finding.

COUNT FIVE, SECTION 6106 (MORAL TURPITUDE)

We adopt the hearing judge's finding that respondent committed an act of dishonesty in violation of section 6106 when in March 1996 he misrepresented to McPeake that Douglas no longer wanted to pursue her claim against Pacific Bell.

Aggravating Circumstances

It is clear that aggravating circumstances must be shown by clear and convincing evidence to have an effect on discipline. (Standard 1.2(b); *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 148.) Each of the indicated areas of aggravation have been found to be true by such clear and convincing evidence.

PRIOR RECORD OF DISCIPLINE

Under standard 1.2(b)(i) a prior record of discipline is an aggravating factor in measuring discipline. In accordance with a stipulation as to facts and discipline between respondent and the State Bar, that was approved by a State Bar Court hearing judge, the Supreme Court filed an order in June 1996 in which it placed respondent on 12 months' stayed suspension and two years' probation with conditions (but no actual suspension). The Supreme Court also ordered respondent to take and pass the Multistate Professional Responsibility Examination.

Respondent's prior misconduct involved the mishandling of trust funds in two client matters. More specifically, the balance in respondent's client trust account repeatedly dropped far below the amounts he was to have maintained on deposit. Undeniably, respondent's prior misconduct is serious.

The hearing judge gave respondent's prior record of discipline "little weight in aggravation" because he found that respondent's prior misconduct "took place in 1990 and 1992, after Respondent had entered into the Douglas case." While we disagree, in part, with that finding we do not totally reject the hearing judge's analysis. Contrary to the hearing

judge's finding, respondent's misconduct in the prior proceeding took place from 1992 through 1995. Although the Supreme Court did not file its disciplinary order in respondent's prior case until June 1996, the State Bar filed, and served on respondent, the first notice to show cause in respondent's prior case in the fall of 1994. Respondent signed the stipulation as to facts and disposition in which he admitted committing the misconduct stated above in January 1996. Respondent's misconduct in the present proceeding commenced well before the State Bar had begun disciplinary proceedings in the prior matter in the fall of 1994, but continued and accelerated during the pendency of that prior proceeding and after he had stipulated, in January 1996, to engaging in serious prior misconduct from 1992 through 1995. In fact, the more egregious portion of respondent's misconduct in the present matter occurred after his stipulation to culpability in the prior matter.

Although respondent's present misconduct does not resemble that addressed in the prior disciplinary proceeding it did occur after issuance of a notice to show cause in the prior proceeding. We do accord some aggravating weight to that prior discipline. (Cf. *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564.) His failure to conform his conduct to the standards of the legal profession after the institution and prosecution of that prior disciplinary case is a factor in aggravation. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80.) We give respondent's prior record of discipline some greater weight than did the hearing judge.

LACK OF CANDOR

Standard 1.2(b)(vi) determines that a lack of candor is an aggravating factor. The hearing judge found that respondent displayed a lack of candor because respondent was "less than forthright in his testimony and deceptive in his dealing with the State Bar investigators." The hearing judge gave this factor considerable weight. Like the hearing judge, we find that respondent deliberately made misrepresentations to the State Bar investigator and that he deliberately presented false testimony in the State Bar Court. Like the hearing judge, we

consider respondent's lack of candor to be a strong aggravating circumstance. In fact, respondent's lack of candor is more egregious than the misconduct found against him in this proceeding. The Supreme Court has repeatedly noted “that deception of the State Bar may constitute an even more serious offense than the conduct being investigated.” (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.))

There is a clear distinction between credibility and candor. (See, e.g., *Franklin v. State Bar, supra*, 41 Cal.3d at p. 708 & fn. 4.) The determination of a witness’s credibility (i.e., believability) is primarily within the province of the hearing judge because he or she saw and heard the witness testify. (Rules Proc. State Bar, rule 305(a).) On the other hand, the determination that a witness’s testimony lacks candor (i.e., the witness is lying) must ordinarily be found by clear and convincing evidence. (Stds. 1.2(b), 1.2(b)(vi); but see *Siegel v. Committee of Bar Examiners* (1973) 10 Cal.3d 156, 178-179 [in cases involving an applicant’s exercise of a First Amendment right of free speech, the committee must prove the applicant to be lying beyond a reasonable doubt]). Even though a witness’s candor must ordinarily be shown by clear and convincing evidence, great weight is still given to the hearing judge’s findings on candor. (*Franklin v. State Bar, supra*, 41 Cal.3d at p. 708.)

Misrepresentations to State Bar Investigator

After Douglas complained about respondent's conduct to the State Bar, a State Bar investigator sent respondent a letter asking him for an explanation. On October 8, 1996, respondent sent the investigator a letter in which he included the following statement in his list of services that he allegedly performed for Douglas: “Appearance before Hon. George W. Mason on 7/2/96 in Walnut Creek, CA.” Furthermore, respondent stated in his letter “[p]lease be aware that complainant's [i.e., Douglas's] case . . . was settled through a Stipulation which resulted in an award of \$1,785.00 to claimant and payment of future medical expenses (see Exhibit “D”) on July 2, 1996.” The “Exhibit `D” respondent included in that letter was a copy of the stipulation that contained a signature by respondent in the space provided for his

signature. Respondent, however, never signed the original stipulation. As noted above, the original stipulation was signed only by McPeake and Douglas and then filed with WCAB. The original stipulation that is in the WCAB's official file is not signed by respondent.

On November 25, 1996, respondent sent another letter to the investigator. In that letter respondent made the following statement: “As you have been made aware, I have been to the hearing at WCAB in Walnut Creek on July 2, 1996.”

When respondent wrote his letters of October 8, 1996, and November 25, 1996, he knew that he had not made an “appearance” before Judge Mason and that he had not “been to the hearing . . . on July 2, 1996.” The evidence clearly establishes that respondent made these statements knowing that they were false and misleading and made them with the intent to deceive the investigator.

Moreover, when he sent the investigator a copy of the stipulation with his signature on it, respondent knew that he had never signed the original stipulation that is on file at the WCAB. Respondent's signing of the stipulation is inconsistent with his claim that he did not know whether he still represented Douglas after March or April 1996. The evidence clearly establishes that respondent sent the investigator the copy of the stipulation with the intent to deceive the investigator into believing that respondent had actually appeared at the July 2, 1996 trial and represented Douglas in settling her claims.

False Testimony in the State Bar Court

As did the hearing judge, we find respondent's testimony in the hearing department to be false in several respects. Respondent initially testified that he did not know if he talked to, or had any communication with, Douglas between the time of her signing the substitution of attorney in late 1989 and the middle of 1996.⁸ Dealing with that same period of time, respondent later testified “But [Douglas] told me, I think, that she moved from Benicia to

⁸He testified “I don't remember that I talked to her. I don't remember.”

another place, Richmond, I thought it was. . . . And that's how I got to know her new address. I think she gave it to me by telephone or something like that." In fact Douglas had the same address in Richmond throughout respondent's representation of her, had not moved during that period, and respondent had not talked with her.

As we have indicated, respondent wrote a representative of Pacific Bell in November 1991 indicating that he had been in contact with Douglas. In fact he had not been in contact with her. When questioned in the hearing department about the truthfulness of this statement in his letter, he testified "I was in contact with her by telephone, I think, not by the letter. . . . I think I called her, and at that time she told me go ahead and pursue the claim." This testimony was not true and respondent knew it was not true.

Respondent testified that he did not know the hearing date of the WCAB hearing for Douglas. When confronted with the notice of the hearing from his own file containing the exact date and time of that hearing with his handwritten notes on that notice, he testified that he thought the question had to do with the filing of a trial brief in the WCAB matter. The question was clear and unambiguous. We find that respondent's testimony in this regard was deliberately false.

MULTIPLE ACTS OF MISCONDUCT

Standard 1.2(b)(ii) urges that multiple acts of misconduct be treated as aggravation. We agree, but do note that it occurred in a single client matter. However, we do note that respondent's found lying to the Pacific Bell representative that Douglas did not wish to pursue her claim is similar to the found aggravation under the subheading Lack of Candor, *supra*. We include this factor in the weighing of aggravation.

HARM

Under standard 1.2(b)(iv) significant harm caused by a respondent's misconduct is an aggravating factor in recommending discipline for an errant attorney. The hearing judge found that respondent's misconduct significantly harmed Douglas. In his first point of error,

respondent contends that this finding is erroneous or, alternatively, that the hearing judge improperly gave it too much weight in aggravation. We disagree.

Ordinarily, a short delay, even if it is “harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was ‘significantly’ harmed thereby.” (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217.) However, in the present case, we are not dealing with a short delay. We are dealing with a delay of more than five years.

In addition, we have held that an attorney's failure to perform for more than five years caused the client harm under standard 1.2(b)(iv) because the client lost her cause of action. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 642, 646.) We recognized such harm even though the client's claim was weak and she could not have reasonably expected to receive a substantial settlement or judgment. (*Id.* at p. 646.) While Douglas did not lose her cause of action it is clear that the inexcusable delay in the resolution of her claim did have a substantial impact on her. A reasonable economic measure of the harm caused to Douglas is her lost use of the value of her settlement proceedings for five years. We are not dealing with a short delay, but one of an extended duration. We decline to attempt to define the extent of the economic harm to Douglas, but note that it meets the requirement of significant harm as set forth in standard 1.2(b)(iv).

Mitigating Circumstances

The hearing judge gave respondent mitigating credit for his pro bono and community service. (Std. 1.2(e)(vi).) Our review of the record discloses that respondent's pro bono and community involvement was not great and is somewhat remote in time. Accordingly, we give him slight mitigating credit for that pro bono service.

Level of Recommended Discipline

In his second point of error, respondent contends that the hearing judge's discipline recommendation is excessive. In contrast, the State Bar argues that if anything, the recommended discipline errs on the side of too little actual suspension.

In determining the appropriate level of discipline, we first look to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

The applicable sanction in this proceeding is found in standard 2.3, which provides that an attorney's culpability of an act of moral turpitude shall result in actual suspension or disbarment depending upon the extent of harm, the magnitude of the act, and the degree to which it relates to the attorney's practice of law. In the present proceeding, the magnitude of the misconduct is substantial and it directly relates to and involves respondent's practice of law. Respondent committed multiple acts of dishonesty and moral turpitude. Thus, significant discipline is warranted under standard 2.3.

Both the State Bar and respondent cite cases for our consideration in determining the appropriate level of recommended discipline. However, recommended discipline does not arise from a fixed formula, but should be based on a fair balance of all relevant factors, including mitigation and aggravation. (*Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) Though we look to the standards for guidance, “[i]n determining discipline, the particular facts of each case must be reviewed. . . . ‘There are no fixed standards as to; the appropriate penalty.’ [Citations omitted.]” (*Franklin v. State Bar, supra*, 41 Cal.3d 700, 710.). None the less, we look to like cases for guidance in an effort to provide an even hand in our recommendations. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor, supra*, 1 Cal. State Bar Ct. Rptr. at p.580.)

In support of his position that the hearing judge’s recommendation of 150 days of actual suspension is excessive, respondent primarily relies on four cases; *Wren v. State Bar*

(1983) 34 Cal.3d 81; *Calvert v. State Bar* (1991) 54 Cal.3d 765; *Colangelo v. State Bar* (1991) 53 Cal.3d 1255; and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585. In *Wren* the attorney, in a single client matter, failed to communicate, misrepresented the status of the matter by, inter alia, giving the client a trial date when the action had not been filed. (*Wren v. State Bar, supra*, at pp.86-89.) Wren was suspended for 45 days. (*Id.* at p. 83.) In *Calvert* the attorney was found culpable of a failure to communicate with her client and continuing representation when she did not have time to represent the client with competence, and not culpable of abandonment. (*Calvert v. State Bar, supra*, at pp.782-783.) Although there was a conflict in the evidence between Calvert and her client, (*id.* at p. 771) there was no finding of lying by Calvert. She was suspended for 60 days. (*Id.* at pp. 785-786.)

In *Colangelo*, a default in the State Bar Court proceedings although the respondent appeared before the Supreme Court, Colangelo was found culpable of, inter alia, failure to perform, failure to respond to status inquiries and failure to keep his client reasonably informed of the status of his matter. (*Colangelo v. State Bar, supra*, 53 Cal.3d at pp. 1266-1267.) Taking particular note of the apparent lack of harm and the weakness of the evidence in the default matter (*Ibid.*), the Supreme Court imposed no actual suspension (*id.* at pp. 1258, 1267-1268.). But the dissent urged 60 days actual suspension. (*Id.* at p. 1270, dis. opn. of Baxter, J.) In *Johnston*, also a default, the final case cited by respondent concerning the length of actual suspension, the attorney was found culpable in a single client matter of a failure to perform, failure to communicate with his client and holding himself out to his client as entitled to practice law when he was not, in fact, entitled to practice and failure to cooperated with a State Bar investigation. (*In the Matter of Johnston, supra*, 3 Cal. State Bar Ct. Rptr. at p. 589.) We recommended an actual suspension of 60 days (*id.* at p.591) which was approved by the Supreme Court.

Each of the cases relied on by respondent has underlying misconduct similar to the found misconduct on the charges brought in the present action. But, none of those cases involved lying by the respondent to the opposing party, to a State Bar investigator or to the State Bar Court. As the Supreme Court has noted an attorney's dishonesty "'violates 'the fundamental rules of ethics – that of common honesty– without which the profession is worse than valueless in the place it holds in the administration of justice.'" [Citations].’ (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to State Bar]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

On the other hand, each of the cases relied on by the State Bar involves far more egregious underlying misconduct. However, several of those cases involve misrepresentations to either the investigator for the State Bar or this court. In *Borré v. State Bar*, 1991, 52 Cal.3d 1047, the client Lascano was incarcerated in state prison on a felony conviction and was represented by court-appointed counsel. Lascano's girlfriend and her mother paid Borré the fee for an appeal. Upon notification of his representation of Lascano the court terminated the court-appointed counsel. Borré failed to file a brief following several extensions, and because of that failure the court dismissed the appeal on December 26, 1985. Borré wrote his client on February 11, 1986, and stated he had "abandoned" the appeal. (*Id.* at pp. 1049-1050.) In defense Borré presented a copy of a purported letter to Lascano's mother dated one month before the dismissal stating that he found no issues for appeal but he had obtained an extension to December 18, 1985, if she wanted to find another lawyer. (*Id.* at p. 1050.) The letter was found to be false. (*Id.* at p. 1052.) The Supreme Court took note of the fact that Borré abandoned an incarcerated client, and stated that "[p]etitioner's abandonment of his incarcerated client was itself a serious matter warranting substantial

discipline.” (*Id.* at p. 1053.) We consider Borre’s underlying misconduct more serious than that of respondent. (See *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465, 466 [abandoned incarcerated client, six months actual suspension].) However, Borre’s false letter demonstrates similar conduct to that of respondent in the matter before us.

In both *Worth v. State Bar* (1978) 22 Cal.3d 707 and *Warner v. State Bar* (1983) 34 Cal.3d 36 the Supreme Court disbarred the attorneys after finding serious misconduct followed by false evidence and testimony before the State Bar. Worth was on probation for mishandling client funds (*Worth v. State Bar, supra*, at p. 708) and was found culpable of misappropriation in the instant case along with offering a false letter, lying about it and lying about going to Missouri to obtain his clients signature on an undated disbursal letter (*id.* at pp. 708, 710-711). Warner had two separate proceedings consolidated by the Supreme Court. The first involved unconscionable fees and unilaterally withholding interest on a loan from a client with prior similar misconduct and giving false testimony, (*Warner v. State Bar, supra*, at pp. 40-44) while the second involved misappropriation involving moral turpitude and making false representations involving moral turpitude to the disciplinary panel (*id.* at pp. 44-48).

In *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, the respondent was found culpable of moral turpitude in signing a client’s name to a declaration under penalty of perjury, failure to provide competent service in four client matters, failure to return unearned fees in two client matters, failure to respond to status inquiries, failure to provide an accounting, misrepresenting to a client the status of his case, breaching client confidentiality and failure to comply with the conditions of a prior reproof. (*Id.* at pp. 183-190.) In aggravation, among other things, Johnson presented to the State Bar Court false verification forms purportedly signed by a client. (*Id.* at p. 191.) We recommended that Johnson be actually suspended for a period of two years. (*Id.* at p. 193.)

In *Olguin v. State Bar* (1980) 28 Cal.3d 195 the Supreme Court increased the recommended actual suspension from 90 days to six months following Olguin’s stipulation

that he failed to use reasonable diligence in prosecuting a client matter resulting in the action being dismissed and that he lied to a State Bar investigator about that client matter and fabricated documents for his defense. (*Id.* at pp. 197-200.)

With the exception of *Olguin* we determine that the underlying misconduct in each of these cases was more serious than that in the matter before us. In *Borre'* the respondent “recklessly represented to the Court of Appeal that he was Lascano’s appellate attorney when he knew or should have known that he could not reasonably perform the duties of an appellate attorney” (*Borré v. State Bar, supra*, 52 Cal.3d at p.1051.) In *Johnson* the respondent was found culpable in four client matters and a failure to comply with conditions of a prior reproof. The two misappropriation cases (*Worth* and *Warner*) were far more egregious than the matter before us.

We find no case that directly guides us, but take assistance from each of the cited cases and look to the essential facts of the matter before us. Respondent undertook representation of a client and for a period in excess of five years failed to perform any substantial service for that client. He lied to the opposing party about his activity on the case and later lied again to the opposing party about his client’s interest in pursuing her claim, to the potential detriment of the client, for which he has been found culpable of moral turpitude. He failed to respond to the client’s reasonable inquiry as to the status of her matter and then improperly withdrew from representation. In substantial aggravation he attempted to mislead the State Bar investigator in at least two instances and was found to lack candor in his testimony before the hearing department. While at the time of his present misconduct, respondent did not have a true record of discipline, he had acknowledged, by stipulation, prior unrelated misconduct at the time a portion of his present misconduct was ongoing. We also note Douglas was harmed by the unconscionable delay resulting from respondent’s inaction for in excess of five years.

We conclude that the interests of the public, the courts, and the legal profession will be protected only by increasing the discipline that would otherwise be imposed for the underlying

misconduct to a period of actual suspension of one year, as one of the conditions of a four-year stayed suspension. We make this recommendation because of the serious moral turpitude involved in respondent's deliberately attempting to mislead the State Bar investigator, his false testimony before the hearing department of this court, and his lying to the opposing party to the potential detriment of his client.

The last issue respondent raises is the hearing judge's recommendation that respondent "be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), . . . that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: . . ." We read that recommendation to provide that the standard 1.4(c)(ii) provision be stayed along with the stayed three-year suspension, provided, that in the event of a subsequent probation revocation proceeding in which all, or a part, of the period of stayed suspension may be imposed a standard 1.4(c)(ii) would be an available condition.

Finally, we do not recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination because, as noted above, the Supreme Court ordered respondent to take and pass that examination in his prior disciplinary proceeding and because none of respondent's misconduct in this proceeding was committed after that order.

Recommended Discipline

We recommend that respondent Justin R. Dahlz be suspended from the practice of law for a period of four years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), that the suspension and the standard 1.4(c)(ii) provision be stayed, and that he be placed on probation for a period of four years on the conditions that he be actually

suspended for one year and that he comply with each of the remaining conditions of probation recommended by the hearing judge.

Rule 955

It is recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Costs

It is recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with Business and Professions Code section 6140.7.

OBRIEN, P. J.

I concur:

WATAI, J.

Concurring and Dissenting Opinion of STOVITZ, J.

I agree fully with the majority's findings and conclusions of respondent's culpability and analysis of the mitigating and aggravating circumstances. I also join the majority's analysis of the cases cited by respondent, agreeing that those cases do not justify the lesser discipline respondent urges. However, even greater discipline than recommended by the majority is warranted for respondent's repeated and reckless failure to perform services for Ms. Douglas over a six-year period, his attempted sabotage of Douglas's WCAB claim, and his eight instances of deceit over more than an eight-year period collectively to the opposing party, to the State Bar investigators, and during his testimony in the State Bar Court. Noting also the weight we properly give to respondent's prior discipline, the public and the courts are entitled to the minimal protection of respondent successfully completing a rehabilitation showing under standard 1.4(c)(ii), incident to a two-year actual suspension from practice.

The majority's opinion documents well respondent's protracted failure to perform any significant services in what appears to be a routine workers' compensation claim. It also shows that respondent lied twice to agents of Pacific Bell, the workers' compensation employer in Douglas's case. He first misled Pacific Bell in November 1991, stating that he had been in contact with Douglas when he had not, in an apparent effort to forestall Pacific Bell's motion to dismiss Douglas's claim. His second lie, in March 1996, that Douglas did not intend to pursue her claim, had the clear effect of attempting to sabotage his own client's case. That it did not succeed is more fortuity than anything for which respondent can claim credit. Finally, at the proverbial "eleventh hour," Douglas was left to her own efforts to see her claim through to some recovery, six years after it was filed.

As the majority finds, after the State Bar started an investigation, respondent repeatedly deceived the State Bar and this court in defending his conduct. His deceit took varied forms over four years: written misrepresentations to State Bar investigators and false

testimony in three respects before the State Bar Court which, in part, also rested on respondent's fabrication of an entry within his telephone log.

By whatever framework cited by the majority we use to arrive at an appropriate recommendation of discipline, whether by examining the appropriate Standards, balancing all relevant factors, or looking at past decisions for guidance, this record shows grave misconduct, which, collectively, spanned eight of respondent's twelve years of practice. It shows repeated dishonesty and lack of basic adherence to the fiduciary duties of representing a client. Had that misconduct been extended to additional client matters, it could have justified a recommendation of disbarment, even without regard to respondent's prior discipline for trust account mismanagement. (Compare *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390.)

Almost all cases we decide have factual differences with reported decisions. However, I consider the decision of *Borré v. State Bar* (1991) 52 Cal.3d 1047, to be overall very guiding. Borré abandoned an appeal of an incarcerated criminal defendant and defended himself dishonestly in State Bar proceedings. The Supreme Court characterized as "egregious" Borré's fabrication of an exculpatory letter and his lies about it during State Bar proceedings. Borré had no prior record of discipline, and he had been admitted for 14 years prior to his misconduct in the criminal appeal. The Supreme Court imposed a two-year actual suspension as part of a larger stayed suspension. The majority appears to devalue the guidance of *Borré* primarily because it concludes that Borré's abandonment of his client was more serious than respondent's repeated failure to perform services for Douglas over six years, his deceit of Pacific Bell's agents and his failure to comply with ethical rules on withdrawal from employment. While I do not disagree that Borré's abandonment was extremely serious, as abandonment of an incarcerated defendant's case is presumed to be, the balance of all relevant factors in *Borré*, when measured against the totality of factors in the present case, guide me to conclude that recommendation of the same discipline as in *Borré*

is appropriate here. In particular, Borré's lack of a prior record and his much longer practice period before the start of misconduct show more mitigation than in the present case. Also, without condoning Borré's dishonesty, it appears to have been more narrow than this respondent's. In my view, those factors sufficiently equate the seriousness of Borré's misconduct with that of respondent's.

Respondent's practice of deceit in this record is highly unusual in California attorney disciplinary cases for its length and variety. Moreover, his clear disregard of his client's interests covered half of his practice, and his prior record shows that his previously-judged ethical failures also extended to trust account mismanagement. Substantial discipline is warranted. It is needed not as punishment of respondent but as justified protection of the public, courts and legal profession, and to allow respondent "time for introspection so that he will come to appreciate that law is more than a mere business. It is still a profession in which concerns for ethics matter." (*In re Morse* (1995) 11 Cal.4th 184, 210.)

For the reasons stated, I would recommend a two-year actual suspension from practice on conditions of probation recommended by the majority and with a requirement of satisfying the provisions of standard 1.4 (c)(ii) before the actual suspension ends.

STOVITZ, J.

Case No. 96-O-03184

In the Matter of Justin R. Dahlz

Hearing Judge

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