

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JESS TRILLO

A Member of the State Bar

[No. 85-O-13726]

Filed May 3, 1990

SUMMARY

Respondent was hired by two clients to pursue a civil matter for both of them and a wage claim against the same parties for one of the clients. Respondent rendered some services on the wage claim, but thereafter ceased to perform services and failed to communicate with the clients. He also misrepresented to his clients that he was a partner in a law firm, and misappropriated unearned advanced attorney's fees and costs. The hearing referee recommended disbarment. (Burton R. Popkoff, Hearing Referee.)

The review department modified the referee's findings and conclusions, and concluded that the referee's disbarment recommendation was excessive. Instead, it recommended a three-year stayed suspension, three years probation, and actual suspension for one year and until respondent makes restitution to his clients.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance (default)

HEADNOTES

- [1] **163 Proof of Wilfulness**
 204.10 Culpability—Wilfulness Requirement
Only violations of the Rules of Professional Conduct that are wilful are grounds for discipline. Where hearing referee's decision did not expressly state that respondent's rule violation was wilful, but referee's comments indicated conclusion of wilfulness, review department regarded referee as having found violation to be wilful.
- [2] **135 Procedure—Rules of Procedure**
 166 Independent Review of Record
Under rule 453(a) of the Transitional Rules of Procedure, the review department independently reviews the record; that is, the review department treats the findings of the hearing referee as recommendations to it and may make findings or draw conclusions at variance with those of the

referee. This type of review requires the review department to examine the record independently and reweigh the evidence and pass upon its sufficiency. As to any matter resolving issues concerning testimony, the review department gives great weight to the hearing referee who saw and heard the witness.

- [3] **106.20 Procedure—Pleadings—Notice of Charges**
 107 Procedure—Default/Relief from Default
 192 Due Process/Procedural Rights
 221.00 State Bar Act—Section 6106
 545 Aggravation—Bad Faith, Dishonesty—Declined to Find

Where notice to show cause did not charge that respondent misrepresented to his clients the status of their claims, and respondent defaulted and did not appear at hearing, the review department declined to find, based on client's testimony at hearing, that respondent had committed act of dishonesty by making such misrepresentation. The review department is most reluctant to consider, even for the purpose of aggravation, misconduct which could have been, but was not charged in notice to show cause, especially where respondent is in default and has no opportunity to learn of or rebut matters arising during hearing.

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

Respondent wilfully failed to provide legal services competently, where although respondent's attention was repeatedly directed to clients' legal needs for which he had accepted significant advanced fees and costs, respondent failed to provide promised services for a year, resulting in prejudice to clients due to defendant's bankruptcy.

- [5] **410.00 Failure to Communicate**

Attorney's failure periodically to communicate with clients, standing alone, warrants discipline.

- [6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

Where attorney was hired to handle two matters, but retainer agreement made clear that advanced fee was attributable only to one of the matters, attorney was obligated to return entire advanced fee after failing to perform any services on that matter, even though attorney did perform some services on the other matter.

- [7 a, b] **163 Proof of Wilfulness**

280.00 Rule 4-100(A) [former 8-101(A)]

280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]

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

Respondent's admission to a State Bar investigator that he misused advanced costs given to him by his clients and failed to place them in a trust account, and his clients' testimony that he did no work on the matter for which the costs were advanced and failed to refund or account for the advanced costs, established respondent's wilful violation of his duties to hold the funds in a trust account, to render an accounting for the funds, and to refund them on request.

- [8] **221.00 State Bar Act—Section 6106**

Respondent's false representation to his clients that he was a partner in a law firm and respondent's conversion of advanced attorney's fees and costs without performing any services were acts of dishonesty.

- [9] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
 420.00 Misappropriation
 An attorney's conversion of advanced attorney's fees and costs without performing any services is regarded most seriously by the Supreme Court. Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses.
- [10] **802.30 Standards—Purposes of Sanctions**
 Review department recommends professional discipline not to punish, but to protect the public, courts and legal profession, to preserve public confidence in the profession and to maintain professional standards.
- [11] **822.39 Standards—Misappropriation—One Year Minimum**
 824.10 Standards—Commingling/Trust Account—3 Months Minimum
 Even though only one matter was involved, respondent's misconduct was serious; misappropriation of advanced costs alone could result in recommendation of at least one year of actual suspension, and abdication of trust account responsibilities could warrant three month actual suspension.
- [12] **725.32 Mitigation—Disability/Illness—Found but Discounted**
 Where there was evidence that respondent was ill during the time period in which misconduct occurred, but there were no details of duration or extent of illness or how it may have accounted for respondent's misconduct, illness was not considered to be a mitigating factor.
- [13] **107 Procedure—Default/Relief from Default**
 615 Aggravation—Lack of Candor—Bar—Declined to Find
 Where respondent admitted many of the serious charges against him during State Bar investigation, review department declined to find failure to cooperate with State Bar as aggravating factor, despite respondent's failure to participate in proceedings against him.
- [14] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
 Respondent's false representation to his client that he was a partner in a law firm was not appropriately considered as aggravating factor because it was already the basis for finding respondent culpable of dishonesty.
- [15] **1091 Substantive Issues re Discipline—Proportionality**
 1092 Substantive Issues re Discipline—Excessiveness
 Recommendation of disbarment for misconduct in single matter, involving failure to perform services, misappropriation of advanced fees and costs, trust fund violation, and misrepresentation to clients was excessive when viewed in the context of decisions of the Supreme Court.
- [16] **176 Discipline—Standard 1.4(c)(ii)**
 Where review department recommended that respondent be suspended for one year and until respondent made restitution to clients, review department also recommended that if respondent was suspended for more than two years, he be required to make showing required by standard 1.4(c)(ii).

ADDITIONAL ANALYSIS

Culpability**Found**

- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

- 221.50 Section 6106
- 277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Aggravation**Found**

- 521 Multiple Acts
- 582.10 Harm to Client
- 601 Lack of Candor—Victim

Mitigation**Found**

- 710.10 No Prior Record

Discipline

- 1013.09 Stayed Suspension—3 Years
- 1015.06 Actual Suspension—1 Year
- 1017.09 Probation—3 Years

Probation Conditions

- 1021 Restitution
- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1026 Trust Account Auditing
- 1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that Jess Trillo ("respondent"), a member of the State Bar since 1974 with no prior record of discipline, be disbarred. Respondent did not answer the formal charges and his default was properly entered. (Rules Proc. of State Bar, rules 552.1, et seq.)

We review this matter at the request of the State Bar examiner ("examiner"). (Trans. Rules Proc. of State Bar, rule 450(a).) The examiner contends that the hearing referee ("referee") failed to make certain findings and conclusions warranted by the record. Commendably, the examiner also points out that the referee's disbarment recommendation may be excessive. As we shall discuss, our independent review of the record has led us to conclude that the referee should have made the additional findings and conclusions requested by the examiner and we shall make those findings we deem appropriate. We shall also delete one of the referee's findings as not within the formal charges. Finally, we have concluded that the referee's recommendation of disbarment is excessive and we shall recommend a three-year suspension, stayed, on conditions including actual suspension for one year *and until* respondent makes restitution to his clients of \$2,500 of unearned fees and costs, together with interest. We shall also make other recommendations customary in such suspension matters and set them forth fully at the end of this opinion.

1. THE CHARGES

On January 23, 1989, the notice to show cause (formal charges) was filed in this matter. It was properly served by certified mail on respondent's current address of record. (Exhs. 1 and 2; see also

proofs of service attached to notice to show cause; Bus. & Prof. Code, § 6002.1 (c).)

The notice to show cause charged that in August 1984, respondent was hired by two clients to file a civil action for monies they had invested in a business venture. Respondent was also hired to pursue a claim filed by one of the clients with the Labor Commissioner for back wages. The clients advanced respondent \$500 as costs and \$2,350 as attorney fees. In late March 1985, one of the clients received a labor commission award of \$9,250 for wages owed. Respondent represented to his clients that he would take action to enforce that award but failed to perform the services for which he was hired and failed to communicate with his clients despite their attempts to contact him. Respondent allegedly misrepresented to his clients that he was a partner in a law firm and he failed to refund to the clients their unearned legal fees. Moreover, respondent failed to deposit and maintain in his trust account the advanced costs and fees and misappropriated the funds to his own use. Respondent was alleged to have violated his duties in wilful violation of Business and Professions Code sections 6068 (a) and 6103; to have violated section 6106 of that Code and the following (former) Rules of Professional Conduct of the State Bar: 2-111(A)(2), 2-111(A)(3), 6-101(A)(2), 8-101(A) and 8-101(B)(1), (3), (4).¹

2. THE EVIDENCE

Since respondent's default was entered for failure to answer the notice to show cause, the charges of that notice were admitted (Bus. & Prof. Code, § 6088; rule 552.1(d)(iii), Rules Proc. of State Bar), but a trial hearing was nonetheless held. At the default trial, one of the clients who hired respondent, Ms. Hortense Casillas, an accountant, testified. In addition, the referee received documentary evidence, several items of which were authored by respondent and given to Casillas. That evidence shows:

1. All references to the Rules of Professional Conduct are to the former rules in effect between January 1, 1975, and May 26, 1989, and which apply to respondent's conduct. (See *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1113, fn. 3.) Unless otherwise noted, these rules will be cited as "rule" or "rules". As pertinent, the rule 2-111(A)(2) and (3) charges

concern respondent's withdrawal from employment without returning the clients' property and unearned fees paid in advance, the rule 6-101(A)(2) charges concern his failure to perform legal services competently and the rule 8-101 charges concern his failure to handle properly monies advanced to him for costs.

In 1984, Casillas, together with the other client, Ms. Alberta Lee Klein, were in the apparel manufacturing business together. The clients needed legal counsel, for they had a dispute with two other people involved in the apparel business, a Mr. and Mrs. Palacios (also relatives of Casillas). The clients had invested jointly about \$22,000 in the Palacios' business and wanted to recover their monies. In addition, Klein had a back wage claim against one or both Palacios. A relative of Casillas referred the clients to the law firm of Alexander and Hughes. A secretary of the law firm told Casillas that the clients would be meeting with respondent who was a "junior partner" of that firm whom Mr. Michael Alexander of the law firm had assigned to meet with clients. (R.T. pp. 7-10, 19.) Later respondent also told clients that he was a "junior partner." However, the senior partner of the firm, Alexander, also told Casillas later that respondent was not a partner but was either an associate or was only "renting space" from the Alexander and Hughes firm. (R.T. pp. 41, 44-46.) The clients first met with respondent on August 10, 1984. Respondent said that, based on initial discussion, he thought the clients had a good case but he would have to discuss the case with Alexander before accepting it. (R.T. p. 10.)

The clients returned to respondent's office on August 15, 1984. Respondent told them he would take the case and he asked for two separate checks for the clients' suit against the Palacios to recover investment monies: a \$500 check for court costs and a \$2,000 advance retainer. Respondent requested that the checks be made out to respondent himself (not the firm of Alexander and Hughes) in order to "expedite things." (R.T. pp. 11-17; exhs. 4 and 5.) That same day, respondent gave the clients a retainer agreement acknowledging receipt of the total sum of \$2,500, acknowledging that \$500 of that sum was to be for "Court Costs," that respondent's work above the \$2,000 "minimum fees" was to be at the rate of \$100 per hour and that this money was for legal action against the Palacios (not for the labor claim). The fee agreement respondent gave to the clients showed that they were retaining respondent only (not the law firm of Alexander and Hughes). (Exh. 3.)

On October 2, 1984, a lawyer representing the Palacios sent a letter to clients seeking to resolve

their dispute. (Exh. 7.) Casillas gave the letter to respondent. Respondent told the clients not to worry; that he would answer it. However, respondent did not work on the matter. He did tell the clients about ten times that he had prepared or was preparing a draft of a lawsuit and that all it needed was the clients' signature on it. (R.T. pp. 24-25, 27-28.)

At some point, the clients learned that respondent's strategy was to pursue the labor claim first for back wages. If that were successful, Respondent would then pursue the civil matter. (R.T. p. 28.)

In March 1985, respondent represented Klein in obtaining a favorable outcome on the labor claim. After getting that resolved, respondent was to seek a writ of attachment against Palacios' property in order to seek to collect the claim. (R.T. pp. 30-31, 35-36.)

Between March and July 1985, the clients tried at least three times a week to reach respondent but they were not successful. Since Casillas was related to one of the Palacios, she had heard family talk that Palacios might file bankruptcy. (R.T. pp. 30-31, 35-36.)

At some unstated time which appears to be between March and June 1985, respondent told Klein that he was in the process of pursuing the civil action against Palacios and Klein gave respondent \$350 more which he said he needed for fees for services for this work. (R.T. pp. 35-36; exh. 9.)

In June 1985, the clients had difficulty locating respondent. Even the law office secretary at the firm of Alexander and Hughes did not know respondent's whereabouts. In July 1985, clients received a very apologetic letter from respondent that he was unable to meet with them. The letter referred to the past week or so as the "most miserable" of his existence, related various health problems, nausea and dizziness he had suffered and scheduled a meeting a few days later with the clients. (R.T. pp. 33-35, 39; exh. 8.) Respondent kept his promise to meet with the clients and repeated that he was very sick and he cried during the meeting; but told the clients they should not worry because Mr. Alexander was ready to go in immediately and do everything that needed to be done to represent the clients. (R.T. pp. 34-35.)

Between July 18 and August 5, 1985, the clients were again unable to reach respondent but they were able to set up a meeting with Alexander, partner of the firm of Alexander and Hughes. At this meeting, respondent was also present. During this meeting, which took place sometime between August 5 and August 14, 1985, Alexander laid out an entire course of action that he would take to pursue the labor claim and the civil action against Palacios. During this meeting, respondent never denied Alexander's statement that he (respondent) had never been a partner of the firm. Alexander apologized to the clients for the inaction of his office, referred to the conduct of the office as having been "totally remiss and negligent" for having done absolutely nothing to proceed in the matter of the civil claim against Palacios. (R.T. pp. 43-46.)

After another month or two passed without hearing any word from respondent or Alexander, the clients returned to Alexander's office and confronted him again. On this occasion, the clients saw respondent in the office but he was in the process of calling the clients to tell them that he (respondent) would not be able to attend the meeting. Alexander told the clients that they could ask that someone else take over their representation and he let the clients look at the file. Casillas, an accountant, saw that all the papers had just been thrown into two boxes and that the so-called "file" was a "mess." She saw no evidence that any work had been done and no draft of any suit, correspondence that had been sent by respondent or his office or any other work. On September 8, 1985, the clients wrote to the firm of Alexander and Hughes stating that no services had been performed on their behalf with regard to pursuing the civil claim against Palacios and requested the refund of \$2,850 given Respondent.² (R.T. pp. 47-51; exh. 9.)

According to Casillas, she never received any refund nor any further contact from respondent. She testified that Klein attempted unsuccessfully to pursue the labor award earlier rendered in her favor by

hiring a new attorney who handled bankruptcy matters but the new attorney told her that nothing further could be done and Alexander had told her the same thing in August or September of 1985, since the Palacios did file bankruptcy as Casillas had predicted. (R.T. pp. 53-54.)

In November 1988, two months before the notice to show cause issued, a State Bar Office of Trial Counsel attorney (not the examiner in the case) met with respondent regarding this complaint. In that conversation, respondent admitted that he had received advance fees and costs, that he cashed the check and spent the proceeds for his own use instead of depositing the monies in a client trust account. Respondent also stated that he did not have a client trust account in August 1984, and that he did not have one at the present time (November 1988). Respondent stated that he did not incur any costs on behalf of his clients except "maybe \$50.00." (Exh. 10.)

After presenting the above evidence, the examiner recommended to the hearing referee that respondent be suspended for three years, stayed on conditions of probation including actual suspension for one year. (R.T. pp. 63-64.)

3. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS

a. The Referee's Initial Decision.

The referee filed his initial decision on July 21, 1989. In substance, he made the following ultimate findings and drew the following conclusions from those findings:

Respondent knew of misrepresentations that had been made that he was a junior partner of the firm of Alexander and Hughes. (Finding 3.) In August 1984, clients retained respondent, not the firm of Alexander and Hughes. (Finding 4.) Respondent received \$2,000 in advance attorney fees and \$500 in advanced costs, deposited all of those monies in his

2. Effective February 4, 1989, Alexander's resignation was accepted by the Supreme Court with disciplinary charges pending. (Bar Misc. No. 5995.)

personal bank account and converted the entire sum. (Findings 5-6.) Respondent failed to perform the services for clients for which retained and failed and refused to promptly communicate with them regarding the status of their matters. (Findings 7-8, 10.) In July 1985, respondent "falsely and fraudulently" represented that work for the clients was ready about June 18, 1985. (Finding 9.) Respondent failed and refused to refund his clients the \$2,500 of advanced fees and costs despite the clients' demands. (Finding 10.)

In mitigation, the referee found that respondent had no prior record of discipline in 14 years of practice. In aggravation, the referee found that respondent did not cooperate with the clients or the State Bar, his misconduct was compounded by bad faith and misrepresentations to clients and his failure to perform services caused his clients irreparable harm since the limitations periods on their claims expired. (Hearing referee's decision, p. 5.)

The referee concluded that respondent violated rule 2-111(A)(2),³ [1 - see fn. 3] wilfully violated rule 8-101(A) and violated his oath and duties as prescribed by Business and Professions Code sections 6068 (a) and 6103. The referee did not relate his conclusions to the specific findings (see, e.g., *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968); however, he did briefly indicate the manner in which respondent committed the cited violations. Although the referee found and concluded that respondent had misrepresented his status as a law firm partner, he failed to conclude that that act was one of dishonesty or moral turpitude. (Bus. & Prof. Code § 6106.) Further, although the referee found that respondent had failed to refund unearned fees paid in advance, the referee drew no conclusion as to whether that act violated rule 2-111(A)(3) even though the referee had concluded that respondent violated rule 2-111(A)(2). Finally, although the referee found that respondent failed to refund to the clients costs he did not earn, the referee drew no conclusion as to whether that act was a wilful violation of rule 8-101(B)(4).

The referee stated that while this case was not "extraordinarily egregious," disbarment was appropriate when viewed in the context of respondent's misrepresentations of his status and the absence of any compelling mitigating circumstances. (Decision, p. 7.)

b. The Referee's Modifications to His Decision.

On August 4, 1989, the examiner requested that the referee reconsider his decision. The examiner urged that the referee's findings warranted additional conclusions of law and that his recommendation of disbarment was excessive under case law. The examiner reasserted his earlier recommendation for probationary suspension including one year actual suspension and he cited decisions of the Supreme Court in support of his position.

On October 23, 1989, the hearing referee ruled on the examiner's reconsideration request. He concluded that respondent wilfully violated rules 2-111(A)(2) and 8-101(B)(3). He also concluded that respondent violated Business and Professions Code section 6106 on account of his having falsely misrepresented to his clients the status of their matter—a subject not charged in the notice to show cause. However, he declined to conclude that respondent violated rule 8-101(B)(4), because he concluded that there was no evidence as to what portion of the \$500 paid to respondent as costs were not used for that purpose. Since the referee found that the evidence showed respondent pursued the labor claim of Klein, he concluded that respondent performed some services for clients and was unable to determine if any part of the \$2,000 in fees had been earned. Therefore, the referee could not conclude that respondent violated rule 2-111(A)(3).

As to the recommendation of discipline, the referee considered the authorities cited by the examiner, incorrectly referred to the decision in *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 as ordering

3. [1] Although the referee's initial decision of July 21, 1989, referred to "rule 1-111 (A) 2)" he meant rule 2-111(A)(2). (See referee's ruling on request for reconsideration, filed October 23, 1989, p. 1.) From his comments on page 6, lines 4-6 of the July decision, we regard his conclusion that respon-

dent violated rule 2-111(A)(2) as wilful, although not expressly so stated. (See Bus. & Prof. Code, § 6077; rule 1-100, Rules Prof. Conduct [only "wilful violations" of the rules are grounds for discipline].)

disbarment and, while unable to conclude whether or not respondent misappropriated any of the \$2,000 in advance fees, concluded that he (the referee) was not comfortable reducing his earlier recommendation of disbarment, believing that if that reduction were to be made in this case, the Supreme Court should be the body to do it.

The examiner's request to us for review followed.

4. DISCUSSION

a. The Scope of Our Review.

We begin our analysis with the principles governing our review. [2] Our review is independent; that is, we treat the findings of the hearing referee as recommendations to us and we may make findings or draw conclusions at variance with those of the hearing referee. (Trans. Rules Proc. of State Bar, rule 453(a).) The type of review we conduct requires that we: 1) independently examine the record; and 2) reweigh the evidence and pass upon its sufficiency. (See *Stuart v. State Bar* (1985) 40 Cal.3d 838, 843.)

As to any matter resolving issues concerning testimony, we properly give great weight to the hearing referee who saw and heard the witnesses. (Trans. Rules Proc. of State Bar, rule 453(a); see *Sands v. State Bar* (1989) 49 Cal.3d 919, 929.) Here there are no real conflicts in testimony. The testimony of the only witness, Casillas, one of the clients, was consistent with the documentary evidence.

More significantly, since this case proceeded by way of default entered for respondent's failure to answer the notice to show cause, the charges of that notice are deemed admitted. (Rules Proc. of State Bar, rule 552.1(d)(3).) In the hearing below, the documentary and testimonial evidence was consistent with the admitted charges and served to explain them.

b. The Appropriate Findings and Conclusions.

Upon our independent record review, except for the points we note, we conclude that findings of fact 1-11 of the hearing referee as contained on pages 1-5 of his *original* decision filed July 21, 1989, are

supported by the record. Except for the following few changes below, we adopt those findings as our own.

To finding of fact 3 (decision, p. 2), we add the following phrase at the end of the text of that finding: "and he personally misrepresented that he was a partner of that law firm." This amended finding is established by respondent's admission by default of the third paragraph of the notice to show cause as well as the testimony of Casillas at the hearing.

To finding of fact 4 (decision, p. 2), we add the following sentence: "That retainer agreement covered respondent's representation only as to the clients' claims against the Palacios arising from the business venture."

To finding of fact 5 (decision, p. 3), we add the following sentence: "The costs and fees clients advanced respondent covered respondent's representation only as to the clients' claims against the Palacios arising from the business venture."

Our amendments to findings 4 and 5 are established by respondent's own retainer agreement with the clients, supplemented by Casillas' testimony.

[3] From finding of fact 9 (decision, p. 4), we delete the last sentence: "At that time Respondent falsely and fraudulently represented that 'everything' regarding the claims of Ms. Casillas and Ms. Klein against Palacios had been ready to go on or about June 18, 1985." While Casillas' testimony was to the effect that at this meeting, respondent did tell her that he had done work in the matter, the notice to show cause did not charge him with deceiving his clients in this manner. Especially in the case of a default, as here, where the accused attorney has no opportunity to learn of or rebut matters which arise during the hearing, we are most reluctant to consider, even for the purpose of aggravation, conduct which could have been, but was not charged in the notice to show cause.

In sum, the factual findings we adopt show that the clients retained respondent in 1984 to prosecute their civil action against the Palacios and advanced

them \$2,000 in fees and \$500 in costs. They also hired respondent to pursue a labor claim of Klein against Palacios. Respondent performed no services with regard to the civil matter and, after getting a judgment in the labor claim, did not pursue the matter further despite being requested to do so by Klein. At times, he also failed to promptly communicate with his clients and he misrepresented to them his status as a law firm partner. He failed to keep the \$500 of costs advance in a required trust account and converted it instead of using it for the clients' benefit. He also failed to earn any part of the \$2,000 in advance fees and returned none of it to the clients.

We turn now to the proper conclusions to draw from the factual findings of respondent's misdeeds. At the outset, we observe that respondent's misconduct toward his clients was indeed serious. It shows that respondent violated several of the minimum standards of attorney conduct in this state.

[4a] The referee below adopted no conclusions on whether respondent's conduct violated rule 6-101(A)(2) as charged. The examiner urges that respondent's conduct did violate that rule. We agree. It is clear from the findings of the referee below which we have amended and adopted (decision, findings 7-10) that respondent wilfully violated the rule. (E.g., *Farnham v. State Bar* (1988) 47 Cal.3d 429, 439-446.) [5] His failure periodically to communicate with his clients, standing alone, would warrant discipline. (*Mephram v. State Bar* (1986) 42 Cal.3d 943, 949-950.) [4b] Respondent's attention was repeatedly directed to his clients' legal needs for which he accepted significant advance fees and costs and he failed to provide the promised services for a period of a year. Such delay appears to have substantially prejudiced the clients' legal rights because of the bankruptcy of the defendant.

[6] We also agree with the examiner that, contrary to the referee's conclusion, respondent's acts show that he wilfully violated rule 2-111(A)(3) by refusing to return to the clients their unearned fees and we so conclude based on the referee's findings 5, 7, 10 and 11 which we have adopted as amended. (*Slavkin v. State Bar* (1989) 49 Cal.3d 894, 903.) The referee declined to so conclude based on his belief that it appeared that respondent performed some

services and the referee could not determine the amount of the \$2,000 in advance fees unearned. (Referee's ruling on reconsideration, pp. 1-2.) When we examine the entire record, we see that while respondent appears to have performed some services in handling Klein's labor claim, it is also clear from respondent's own retainer agreement covering the \$2,000 clients advanced him that that sum was *solely for the civil matter*. It is equally clear that he performed no services in that matter. Contrary to the referee's conclusion, we do not conclude that respondent violated rule 2-111(A)(2). (See *Slavkin v. State Bar, supra*.)

[7a] The examiner is also correct that respondent's misconduct shows his wilful violation of rule 8-101(B)(4) by failing to promptly pay at the clients' request, the \$500 they had given him as costs, which he never used as directed. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 817.) This conclusion follows from the referee's findings 5, 6, 7, 10 and 11 which we have adopted as amended. The referee declined to conclude that respondent violated rule 8-101(B)(4) because there was no evidence as to what portion of the \$500 respondent did not expend. As in the case of the \$2,000 advanced fees, his receipt of the \$500 in costs was solely for the civil action, not the labor claim. His own admission to the State Bar that he misused these costs, coupled with Casillas' testimony that respondent did no work in the civil case, and failed to refund the costs justifies the conclusion that respondent wilfully violated rule 8-101(B)(4). This same conduct also justified our conclusion that, as charged, respondent wilfully violated rule 8-101(B)(3) since he has never accounted to the clients for the costs he received from them.

[7b] Also justified is the referee's conclusion which we adopt that respondent's conduct was a wilful violation of rule 8-101(A). That rule on its face commands that all funds held for a client's benefit, including the costs respondent received, be placed in a proper trust account. Respondent admitted during the State Bar investigation that he did not do so. (See referee's findings 5, 6 and 11, which we have adopted as amended.)

[8] Finally, we conclude that respondent committed acts of dishonesty in violation of Business and

Professions Code section 6106 but not for the reasons given by the referee that he deceived his clients that he had performed services for them. As we have discussed, that conduct was uncharged and we have deleted the referee's finding. Rather, our conclusion that respondent acted dishonestly rests on the referee's findings 3, 5-6, 10 and 11 which we have adopted as amended showing, respectively, respondent's misrepresentation concerning his partnership status and his conversion of advance fees and costs without performing any services. [9] The latter conduct has been regarded most seriously by our Supreme Court. (E.g., *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791; *Nizinski v. State Bar* (1975) 14 Cal.3d 587, 595; *Hulland v. State Bar* (1972) 8 Cal.3d 440, 449.) As the Court stated in *Hulland*, *supra*: "Surely the legal profession is more than a mere 'money getting trade' [citation]; it at least requires the rendition of services for any payment received. 'Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses.'" (*Ibid.*)

c. The Appropriate Degree of Discipline.

[10] We recommend professional discipline not to punish, but to protect the public, courts and legal profession, to preserve public confidence in the profession and to maintain professional standards. (See Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds."), std. 1.3; e.g., *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117.)

[11] Although only one matter is involved, as we have noted, respondent's misdeeds were serious. His misappropriation of client trust funds (advanced costs), standing alone could result in our recommendation of a minimum of one-year actual suspension. (Std. 2.2(a); see also *Pineda v. State Bar* (1989) 49 Cal.3d 753, 759.) Moreover, his admitted abdication of trust account responsibilities could, itself, warrant recommendation of at least a three-month actual suspension. (Std. 2.2(b).) His deceit of his clients was inexcusable as was his failure to perform any services for his clients in the civil matter against Palacios despite receiving substantial advanced fees and costs.

We find, as did the referee below, that in mitigation, respondent has practiced for more than a 14-year period with no prior record of discipline. (See std. 1.2(e)(i); *In re Rivas* (1989) 49 Cal.3d 794, 802.) [12] While we note from the record that apparently respondent reported to his clients that he was ill during the summer of 1985, he provided no details of its duration or extent or how that illness might have accounted for his misdeeds. (See *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) We therefore decline to consider any evidence of illness to be mitigating here.

However, in aggravation we find, as did the referee, that respondent's failure to perform services harmed the clients. (Std. 1.2(b)(iv).) We also find that respondent has not cooperated with his clients and acted in bad faith toward them. (Std. 1.2(b)(vi).) Indeed, his failure, at this late date to make any restitution of the fees and costs he clearly did not earn or use properly defies understanding and is most reprehensible. [13] We decline to adopt the referee's finding that respondent did not cooperate with the State Bar. He admitted many of the serious charges against him during the bar's investigation. What he did not do is to participate in the proceedings against him, thus making it difficult for the referee below and for us to tailor more precisely a disciplinary sanction that might best assure public protection. [14] We also decline to adopt the referee's findings in aggravation that respondent made misrepresentations to his clients. We have already adopted such a finding of culpability and do not believe it appropriate to assign aggravation to the identical conduct. However, we do find in aggravation that respondent's misconduct involved multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

We have given consideration to the referee's recommendation of disbarment. [15] However, we believe it excessive when viewed in the context of decisions of the Supreme Court. We also believe that the referee's recommendation may have been guided by his mistaken understanding that the Supreme Court's decision in *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 imposed disbarment rather than the two-year actual suspension which the Court in fact ordered. (See referee's ruling on reconsideration, p. 3.)

In *Lawhorn*, *supra*, 43 Cal.3d 1357, the attorney's negligence and inexperience surrounded his misappropriation of about \$1,355 in trust funds. (*Id.* at pp. 1366-1367.) Only one transaction was involved and the attorney restored the funds with interest about five months later. (*Id.*) The Court imposed a two-year actual suspension as part of a longer probation. (*Id.* at pp. 1368-1369.) Other recent decisions of the Supreme Court have also declined to disbar even in cases where more than one matter was involved of the type in *Lawhorn* or here. Among representative cases, see *Pineda v. State Bar* (1989) 49 Cal.3d 753 (five years suspension stayed, two years actual; court would have disbarred but for mitigation; seven client matters over eight-year period including misappropriation); *Gold v. State Bar* (1989) 49 Cal.3d 908 (three years suspension stayed, thirty days actual; two matters of failing to perform services and failing to communicate properly with his clients with deceit in one of the matters—25 years of practice and no prior record [three justices would have followed the review department recommendation to actually suspend for 90 days]); *Carter v. State Bar* (1988) 44 Cal.3d 1091 (two years suspension stayed, six months actual; two matters of abandonment with misrepresentation); *Slavkin v. State Bar* (1989) 49 Cal.3d 894 (three years suspension stayed, one year actual and until rehabilitation proven; two matters [one abandonment, the other deceit to get a loan] occurring over a short time but surrounded by alcohol and cocaine problems showing need for closely supervised probation); *Levin v. State Bar* (1989) 47 Cal.3d 1140 (three years suspension stayed, six months actual; two matters involving deceit [one involved settlement of client's injury claim without permission and failure to properly account for funds]; no prior discipline); and *Segal v. State Bar* (1988) 44 Cal.3d 1077 (three years suspension stayed, one year actual suspension; four matters of failure to perform services and giving an NSF check with a prior suspension for NSF checks).

The foregoing decisions represent a range of discipline from thirty days actual suspension to two years actual depending on an evaluation of the unique facts in the individual case in light of the goals of imposing discipline. One distinguishing factor is that in almost all cases where our Supreme Court has issued an opinion, the attorney participated at trial in the State Bar Court and most often also participated

before the review department. Here, respondent has done neither.

As we shall set forth in full below, we believe the appropriate discipline to recommend is that respondent be suspended from practice for three years, stayed, on conditions of a three-year probation with actual suspension for the first year and until he restores the \$2,500 of unearned advance fees and costs to his clients, together with interest. [16] If he is suspended for more than two years, we will recommend he be ordered to make the showings required by standard 1.4(c)(ii).

5. RECOMMENDATION OF THE REVIEW DEPARTMENT

For the foregoing reasons, we recommend that respondent, Jess Trillo, be suspended from the practice of law in the State of California for a period of three (3) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for said period of three (3) years upon the following conditions:

1. That respondent shall be suspended from the practice of law in the State of California during the first year of his period of probation and until he:

a) makes restitution jointly to Hortense Casillas and Alberta Lee Klein in the total amount of \$2,500, plus interest at the rate of ten per cent per annum from September 1, 1984, until paid in full; and

b) furnishes satisfactory evidence of said restitution to the Office of the Clerk, State Bar Court, Los Angeles; if the State Bar Client Security Fund has repaid Casillas or Klein any portion of the \$2,500, respondent shall repay that principal amount to the Fund;

2. If under condition 1 above, respondent is actually suspended from the practice of law in this state for two years or more, that suspension shall continue until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;

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

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

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

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

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

5. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

6. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall co-

operate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

7. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

8. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, or her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

9. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

10. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of three (3) years shall be satisfied and the suspension shall be terminated;

Further, during the first year of his probation, or if respondent should be actually suspended in excess of one year, during the period of his actual suspension, we recommend that respondent be required to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners, and provide proof thereof to the Office of the Clerk, State Bar Court;

Finally, we recommend that respondent be required to comply with rule 955, California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P.J.,
NORIAN, J.