STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT DANIEL CRANE AND
BRIAN DAVID DEPEW

Members of the State Bar

[Nos. 84-O-14252 and 84-O-14253 (consolidated)]

Filed August 3, 1990

SUMMARY

Crane engaged in a scheme to induce a video game manufacturer, Crane's employer, to license two video games for home computer use to a company which, unbeknownst to the video game manufacturer, was owned by Crane. DePew served as president and general counsel of Crane's company. Crane was found to have committed numerous acts of deceit and violated an ethical rule governing attorneys' business transactions with their clients. DePew was found culpable of two counts of deceit. The hearing referee recommended discipline including three years actual suspension for Crane and two months actual suspension for DePew. (Hon. Harry T. Shafer (retired), Hearing Referee.)

The review department concluded that neither respondent had violated the statute prohibiting attorneys from making misrepresentations to a tribunal in seeking to further a client's interests. Nor had either respondent violated the rule against representing clients with conflicting interests. Moreover, although Crane committed multiple acts of misconduct, the review department held that these acts did not rise to the level of a "pattern of misconduct," a characterization reserved only for the most serious instances of misconduct over a prolonged period of time.

Neither Crane nor DePew had realized that their enterprise was wrongful. When advised of their error by counsel, they made full disclosure of the facts to the video game company and disgorged the funds they had received from their activities. In light of the mitigating evidence and of the discipline imposed by the Supreme Court in cases involving comparable misconduct, the review department reduced the hearing department's recommended actual suspensions to two years for Crane and forty-five days for DePew.

COUNSEL FOR PARTIES

For Office of Trials: Stephen J. Strauss

For Respondent Robert D. Crane: David A. Clare

For Respondent Brian D. DePew: Gert K. Hirschberg

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

HEADNOTES

[1 a, b] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
The review department has an obligation to conduct an independent review of the entire record and make its own determinations of fact and conclusions of law; its findings are not limited to issues raised by the parties, and it has the power to correct errors in the hearing department's decision even when not requested to do so by the parties. (Rule 453, Trans. Rules Proc. of State Bar.)

[2 a, b] **273.00 Rule 3-300 [former 5-101]**
273.30 Rule 3-310 [former 4-101 & 5-102]
When an attorney and his wholly-owned company, which the attorney did not represent as counsel, engaged in a deceptive business transaction with a company that employed the attorney as its counsel, the attorney violated the ethical rule regarding adverse interests between attorneys in their personal capacities and their clients, but did not violate the ethical rule prohibiting representation of clients with conflicting interests.

[3 a, b] **106.90 Procedure—Pleadings—Other Issues**
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
The State Bar Court must make appropriate findings as to the manner in which an attorney's conduct violated charged rules and statutes. Conclusory language in an examiner's papers indicating that the factual findings supported a conclusion of culpability under a given statute or rule was inadequate and did not promote meaningful review. The conduct proved under each count which supports culpability of particular charged violations must be identified.

[4 a, b] **213.40 State Bar Act—Section 6068(d)**
221.00 State Bar Act—Section 6106
By acts of dishonesty in deceiving a corporation in a business transaction, attorneys violated the statute which prohibits attorneys from committing acts of moral turpitude whether committed in the capacity of an attorney or not, but did not violate the statute prohibiting attorneys from making misrepresentations to a tribunal in seeking to further a client's interests.

[5] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
Where all of attorneys' acts of dishonesty were encompassed in charge of committing acts of moral turpitude, there would be no added value in straining to find in the same conduct a violation of another statute prohibiting misrepresentations to tribunals.

[6] **273.00 Rule 3-300 [former 5-101]**
430.00 Breach of Fiduciary Duty
Attorney violated ethical rule governing business transactions with clients where he acquired (through his wholly-owned company) a licensing agreement for a product of his client-employer, without disclosing his ownership interest in the licensee; the licensee's incapacity to fulfill the terms of the license; or his negotiations for sublicenses on more profitable terms. The true identity of the licensee was a material fact which the attorney had a fiduciary duty to disclose, even though the terms of the license were revealed and may not have been unfair.

[7] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
Even if it were established that examiner had sent complaining witness's letter to hearing referee, respondent had waived any claim of prejudicial misconduct by his counsel's failure to preserve the objection at trial, and in any event no identifiable prejudice resulted from the referee's exposure to the letter's hearsay statements where the referee heard five days of testimony, including testimony on the same subject by the letter's author and by persons with personal knowledge.

[8] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
162.20 Proof—Respondent's Burden
Where respondent failed to identify any specific prejudice resulting from delay of approximately three and one half years in filing of notice to show cause after client's initial complaint, and merely made generalized reference to fading memories, delay was not a basis for the dismissal of charges.

[9 a-d] **750.10 Mitigation—Rehabilitation—Found**
755.10 Mitigation—Prejudicial Delay—Found
A delay of approximately three and one half years in the filing of a notice to show cause after the client's initial complaint, and a period of more than six years of unblemished practice between the misconduct and the disciplinary hearing, were properly considered mitigating factors.

[10] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
Although an attorney committed multiple acts of misconduct, these acts did not rise to the level of a "pattern of misconduct," a characterization reserved only for the most serious instances of misconduct over a prolonged period of time.

[11] **582.10 Aggravation—Harm to Client—Found**
Where attorney caused client corporation to enter into mutually inconsistent licenses without its knowledge, harm to client in being forced to hire counsel and pay money to resolve its conflicting obligations to licensees outweighed any profit client may have obtained from royalties paid by licensees.

[12] **159 Evidence—Miscellaneous**
615 Aggravation—Lack of Candor—Bar—Declined to Find
Court's rejection, based on documentary and other evidence, of respondent's testimony regarding his knowledge and state of mind six years earlier, did not result in finding that such testimony lacked candor or was offered in bad faith.

[13] **165 Adequacy of Hearing Decision**
Hearing referee's failure to make express findings specifying aggravating factors was not interpreted as evidence that he ignored those factors that were obvious from the record.

[14] **710.53 Mitigation—No Prior Record—Declined to Find**
750.10 Mitigation—Rehabilitation—Found
Where respondents had been in practice without prior discipline for approximately four years before the commission of their misconduct, their records were far too short to constitute significant mitigation, but it was appropriate to consider their prior clean records in conjunction with their subsequent good conduct to demonstrate the aberrational nature of their misconduct.

[15] **765.10 Mitigation—Pro Bono Work—Found**
765.59 Mitigation—Pro Bono Work—Declined to Find
795 Mitigation—Other—Declined to Find
Medical volunteer work demonstrated community service and was properly relied on in mitigation, but artistic activities were not mitigating factors.

[16] **162.20 Proof—Respondent's Burden**
740.31 Mitigation—Good Character—Found but Discounted
765.10 Mitigation—Pro Bono Work—Found
A respondent's own testimony regarding the respondent's community service may be considered as some evidence in mitigation notwithstanding that it does not meet the requirement that good character be established by a wide range of references.

[17] **725.59 Mitigation—Disability/Illness—Declined to Find**
760.52 Mitigation—Personal/Financial Problems—Declined to Find
Fact that an attorney was undergoing therapy at the time of the disciplinary hearing did not constitute relevant mitigation where attorney did not present expert testimony establishing psychological problems at time of misconduct, and did not demonstrate recovery from such problems such that they would no longer affect his fitness to practice.

[18] **715.10 Mitigation—Good Faith—Found**
730.10 Mitigation—Candor—Victim—Found
745.10 Mitigation—Remorse/Restitution—Found
It was an important mitigating factor that respondents, due to youth and inexperience, honestly believed their conduct was not wrongful, and intended no harm; were very remorseful once they realized they had acted wrongfully, and thereafter candidly discussed the facts with their principal victim and disgorged the money they had received as a result of their acts.

[19 a, b] **833.40 Standards—Moral Turpitude—Suspension**
Lengthy suspension was called for based on multiple acts of fraud, dishonesty and concealment, even though attorney did not recognize at the time that his behavior was wrongful. However, attorney's immediate restitution, clear remorse, and cooperative behavior after he realized his conduct was wrong, and his good conduct thereafter, justified imposing substantial suspension in lieu of disbarment.

[20] **1091 Substantive Issues re Discipline—Proportionality**
In conducting its review and making its own disciplinary recommendation, the review department must consider the proportionality of the recommended discipline in relation to other cases.

[21 a, b] **172.15 Discipline—Probation Monitor—Not Appointed**
175 Discipline—Rule 955
Compliance with rule 955 is customary for suspensions of two years, but is discretionary, and neither rule 955 order nor probation were necessary where respondent had not lived in California for several years, did not practice law, and had not committed any misconduct for over six years.

[22] **221.00 State Bar Act—Section 6106**
490.00 Miscellaneous Misconduct
Honesty is one of the most fundamental rules of ethics for attorneys.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
273.01 Rule 3-300 [former 5-101]

Not Found

213.15 Section 6068(a)
213.35 Section 6068(c)
213.45 Section 6068(d)
220.15 Section 6103, clause 2
273.35 Rule 3-310 [former 4-101 & 5-102]
291.05 Rule 4-210 [former 5-104]

Aggravation

Found

541 Bad Faith, Dishonesty

Declined to Find

525 Multiple Acts

Standards

802.30 Purposes of Sanctions
881.20 Business Transaction with Client—Suspension

Discipline

1015.02 Actual Suspension—2 Months
1015.08 Actual Suspension—2 Years

Probation Conditions

1021 Restitution
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

Other

106.40 Procedure—Pleadings—Amendment
142 Evidence—Hearsay

OPINION

PEARLMAN, P.J.:

This case involves an elaborate deception of a corporation, SEGA Corporation, an affiliate of Paramount Pictures, by one of its house counsel, aided by another lawyer, for personal profit in the marketing of video games for home use. Respondent Robert Daniel Crane ("Crane") had earlier been unsuccessful in interesting his employer, SEGA, to market one of its video games itself for home use. With the assistance of his friend, respondent Brian David DePew ("DePew"), Crane formed a corporation, Universal Licensing, Inc. ("Universal"), which Crane deceived SEGA into believing was an independent player in the field of marketing computer games. Crane succeeded in getting SEGA to license a video game to Universal which it in turn sublicensed for profit to another company. All of the profits went to Crane. DePew was paid a total of $3,500 by Universal for acting as its "house counsel." During the entire time, DePew was employed full time as an associate doing personal injury work for a private law firm in Los Angeles.

Trouble came when Crane thereafter sublicensed an enhanced version of the same game to a different company, just prior to leaving SEGA's employ. DePew, acting as Universal's counsel and at Crane's direction, compounded the earlier deception in an attempt to obtain SEGA's consent to the new sublicense. Shortly thereafter, at DePew's suggestion, Crane and DePew met with a copyright lawyer to seek his assistance with the copyright problem posed by the two potentially conflicting sublicenses. The lawyer they consulted dramatically changed the focus of their concern. He advised them that the deception they had perpetrated posed grave problems and advised them to come forward and divulge the scheme to SEGA. Apparently, until then neither Crane nor DePew realized the seriousness of their deception and the consequences that might ensue to their licenses to practice law.

The events in question occurred in the fall of 1983 and early spring of 1984. Since then both respondents entered into a settlement agreement with SEGA and Paramount which has apparently been fully complied with to date. SEGA and Paramount reserved the right to pursue the matter criminally or in disciplinary proceedings. Thereafter, general counsel for Paramount complained to the State Bar. Meanwhile, Crane moved out of state and is currently not working as an attorney and DePew went on to become a partner in his Los Angeles law firm with no further incidents of misconduct.

We review here the recommendation of retired judge Harry T. Shafer sitting as referee over a five day hearing involving several witnesses and extensive exhibits.[1] The referee recommended that Crane receive an actual suspension of three years as part of a longer stayed suspension and that DePew receive an actual suspension of two months for his role in the scheme also as part of a longer stayed suspension. Both the State Bar examiner and DePew seek review—the examiner contending, among other things, that the recommended discipline is too lenient and that both respondents should be disbarred and DePew contending, among other things, that the discipline recommended for him is too harsh because he only played a minor role in the deception perpetrated by Crane. Crane does not seek review, but opposes the examiner's request for disbarment.

We make a number of changes in the findings of facts and conclusions of law, and, in light of case law involving comparable offenses, reduce the recommended actual suspension for Crane to two years and of DePew to forty-five days. Our exposition of the procedural history and facts follows.

I. PROCEEDINGS BELOW

The consolidated notice to show cause filed on February 25, 1988, contained 12 detailed counts, each incorporating by reference the allegations in the preceding counts and all relating to the same course

1. The volumes of reporter's transcripts in this matter are not consistently numbered. We have adopted the following convention for citing them: I R.T. = December 9, 1988; IIA R.T. = March 28, 1989; IIB R.T. = March 29, 1989; III R.T. = March 30, 1989; V R.T. = March 31, 1989; VI R.T. = June 2, 1989. (There is no volume IV.)

of conduct. All 12 counts charged Crane with violating Business and Professions Code sections 6068 (a), 6068 (c), 6068 (d), 6103 and 6106.[2] In counts one, three, four, six, seven, eight, ten, eleven and twelve Crane was also charged with violating former Rules of Professional Conduct rules 5-101 and 5-102(A).[3] DePew was charged only in counts four, nine, eleven and twelve with violating the same provisions of the Business and Professions Code as Crane was charged with violating.

In his decision, the referee did not expressly correlate his conclusions as to statutory and rule violations with particular factual findings, but concluded that Crane violated Business and Professions Code sections 6068 (a), 6068 (d), 6103 and 6106 and Rules of Professional Conduct 5-104 [sic] and 5-102(A) and that DePew violated sections 6103, 6106 and 6108 [sic] of the Business and Professions Code and rules 5-104 [sic] and 5-102(A) of the Rules of Professional Conduct. The referee made no finding of a violation of Business and Professions Code section 6068 (c), charged in all counts. His factual findings with respect to each count will be set forth after a summary of the charged misconduct.

The Charges and Findings

Count One

The factual allegations in count one charged Crane with convincing his employer SEGA to license Universal to manufacture and distribute one of SEGA's more popular games, "Zaxxon", for use with a Commodore home computer system in return for a $5,000 advance and additional $5,000 guaranteed payment against a 6 percent per unit royalty. Crane was charged with wilfully failing to disclose to SEGA that he owned Universal and that Universal did not have the ability to pay the down payment or the capability of manufacturing and distributing the disks. The first count further alleged that Crane had simultaneously undertaken preliminary discussions with a number of computer software companies and knew or had reason to know that the "Zaxxon" property had significantly more value than that represented by the Universal-SEGA agreement. In performing such acts, Crane was charged with knowingly acquiring pecuniary interests adverse to a client and thereby entering into unfair business transactions with his client; failing to disclose fully in writing the terms of the business transactions in a manner and in terms which should have been reasonably understood by the client; failing to give the client an opportunity to seek the advice of independent counsel and failing to obtain informed written consent. (Notice to show cause, pp. 2-4.)

With respect to count one, the referee expressly or impliedly found that Crane committed all of the misconduct alleged except the charge of failure to disclose that Universal did not have the ability to pay the down payment or manufacture and distribute the disks. (Decision pp. 3-4.) The implied findings that Crane failed to give the client an opportunity to seek the advice of independent counsel and to obtain informed, written consent, both follow from the finding that "[b]y failing to disclose orally or in writing to SEGA that Crane owned Universal, Crane knowingly acquire[d] pecuniary interests adverse to his employer and client, SEGA and therefore the transactions he entered into were unfair to his employer and client and in a conflicting stance with the interests of SEGA." (Decision pp. 3-4.)

Count Two

Count two charged Crane with modifying SEGA's standard form licensing agreement without SEGA's knowledge in order to permit sublicensing by Universal. By such acts, Crane was alleged to have wilfully sought to deceive and defraud SEGA of the maximum value of its licensing rights and to have wilfully deceived and defrauded the sublicensee, Synapse Software, Inc. ("Synapse") by failing to reveal that Universal did not lawfully have the right

2. The original notice to show cause alleged violation of section 6108 (d) in counts eleven and twelve, which apparently was the result of a clerical error. The examiner amended the notice to show cause during trial to substitute section 6068 (d) for section 6108 (d) in these counts.

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

to sublicense "Zaxxon". (Notice to show cause, pp. 4-5.)

With respect to the allegations of count two, the referee found that Crane sought to defraud and deceive SEGA of its corporate interests in obtaining the maximum value of its interests in the video game. He further found that Synapse was deceived but failed to find that Crane wilfully sought to deceive Synapse as charged. (Decision p. 4.)

Count Three

Count three charged Crane with using the pseudonym "Steve Kness" in acting as a representative of Universal in negotiating the sublicense between Universal and Synapse. It further charged him with misrepresenting to SEGA in October of 1983 that Universal had reported to him its inability to manufacture the "Zaxxon" disks and that Crane had "saved the deal" by finding a sublicensee, thereby obtaining SEGA management's approval of the sublicense. Finally, count three charged that Crane then documented the sublicense with a letter from Universal, written by himself, using the name "Steve Kness" and addressed to himself at SEGA. (Notice to show cause, pp. 5-6.) The referee found that the essential allegations of count three were proved. (Decision pp. 4-5.)[4]

Count Four

Count four charged Crane with subsequently enlisting the services of DePew to pose as general counsel of Universal at a meeting with Synapse and charged both Crane (using the pseudonym of Steve Kness) and DePew with negotiating an agreement between Synapse and Universal by which Universal received an advance of $50,000 against a per unit royalty of 16 percent for the sublicense. They were both charged with deceiving and defrauding SEGA by arranging to have SEGA approve the sublicense in October of 1983 without informing SEGA of its financial terms. (Notice to show cause, pp. 6-7.)

The referee's findings on count four are the greatest focal point of dispute among the parties and read as follows: "Crane solicited the services of DePew who agreed to act as General Counsel and President of UNIVERSAL and indicia of same, including printing and distribution of business cards evidencing same happened. DePew accompanied Crane to visit SYNAPSE in the San Francisco area and was paid $1,000 by Crane for making said trip and attending a meeting with SYNAPSE representatives. Thereafter, SYNAPSE entered into a sublicensing arrangement with UNIVERSAL. DePew had expressed reservations to Crane about the concept of usurpation of corporate opportunity as being involved in the proposal by Crane about his subterfuge in concealment from SEGA of the inherent conflict of interest involved as well as the unfairness of [sic] SEGA. However, these expressions by DePew were more by way of 'devil's advocacy' rather than an attempt to dissuade Crane. DePew's claimed assumption that Crane had the consent of SEGA to sublicense to UNIVERSAL and subsequent sublicense to SYNAPSE is not supported in any way and is entirely unrealistic and at the least indicated gross negligence." (Decision p. 5.)

Count Five

Count five charged Crane with delaying the $5,000 down payment to SEGA from Universal until after receipt of the $50,000 down payment from Synapse to Universal in November of 1983, using the pseudonym of Steve Kness and backdating the letter of transmittal to make the payment appear timely. It further charged him with wilfully creating the false impression at SEGA that the check had been received in the ordinary course of business and thereafter arranging for assistance from SEGA to Synapse in the development of the "Zaxxon" floppy disk without revealing the terms of Synapse's sublicense agreement with Universal. (Notice to show cause, pp. 7-9.) The referee found that Crane used the pseudonym Steve Kness but made no findings with

4. The referee made one specific finding which appears in error. He found that Crane "misrepresented to SEGA that Universal did not have the ability to manufacture ZAXXON, but had found a sublicensee." (Decision p. 4.) There is no evidence in the record that such representation was, in fact, a misrepresentation. The alleged deception was in his initial representation that Universal did have the capability of manufacturing Zaxxon itself as charged in count one.

respect to the allegation of backdating. He did find that Crane received the sum of $50,000 from Synapse which was never disclosed to SEGA until the scheme unraveled. (Decision p. 5.)

Count Six

Count six charged Crane with defying the express disapproval of SEGA in preparing a November 1983 letter amendment to the Universal License which added "Super Zaxxon" to the license which Crane signed under his own name on behalf of SEGA and under the pseudonym "Steve Kness" on behalf of Universal. (Notice to show cause, pp. 9-10.) The referee found these allegations to be true. (Decision p. 6.)

Count Seven

Count seven charged Crane with using a second pseudonym "Bruce Blumberg" in negotiating the sublicense of "Super Zaxxon" by Universal to Human Engineered Software Corporation ("HES") for a $100,000 advance against a 16 percent royalty all without SEGA's knowledge or consent; and signing the sublicense with two fictitious signatures after he had been laid off by SEGA in January of 1984. Crane allegedly knew or should have known that the HES sublicense conflicted with the Synapse sublicense. (Notice to show cause, pp. 10-11.) The referee found that HES paid $25,000 as a down payment to Universal for a sublicense negotiated by Crane using the pseudonym Bruce Blumberg in January of 1984 after Crane had left SEGA and without SEGA's knowledge or approval. The referee further found that Crane had knowledge of the similarity of "Super Zaxxon" with "Zaxxon." (Decision p. 6.)

Count Eight

Count eight charged Crane with using the pseudonym "Bruce Blumberg" in a letter from Universal to SEGA falsely stating that Universal had received SEGA's approval of the HES sublicense agreement; and falsely informing SEGA attorney Bob Kupec that Crane had approved the HES sublicense before he left SEGA's employ. (Notice to show cause, p. 12.) The referee found these allegations to be true. (Decision p. 6.)

Count Nine

Count nine charged Crane with hiring DePew and paying him a $2,500 fee to make telephone calls and write letters to SEGA demanding its approval of the HES sublicense. It charged Crane with misrepresenting that he had previously communicated SEGA's willingness to approve the HES sublicense to "Blumberg" of Universal and that "Blumberg" had in turn assured Crane that Universal had acquired the rights to "Super Zaxxon" under the November 21, 1983 agreement. It charged both Crane and DePew with conspiracy to defraud SEGA of its interest in "Super Zaxxon" and to defraud HES into continuing to pay Universal for an unauthorized sublicense to "Super Zaxxon." (Notice to show cause, pp. 12-14.)

The referee found as follows: "Crane engaged DePew (for a fee of $2,500) to make phone calls and to write letters to SEGA demanding approval of HES sublicense. DePew's arguments that his participation at that time (re: HES sublicense) was solely as an attorney seeking to validate a copyright issue, while not conspiratorial, betray either a naivete (not accepted by the Hearing Officer) or is another manifestation of deeper involvement amounting to gross negligence." (Decision p. 7.)

Count Ten

Count ten charged Crane with amending the SEGA-Universal license on his last day of work at SEGA to include two other games, "Carnival" and "Turbo", without the knowledge or approval of the management of SEGA. No sublicense was alleged to have been entered into pursuant thereto. (Notice to show cause, pp. 14-15.) On this count, the referee found that "Crane continued his efforts, up to the date of his departure from the employ of SEGA, to amend Sega-Universal license to include other games, all without the knowledge and/or consent of Sega." (Decision p.7.)

Counts Eleven and Twelve

Count 11 charged Crane and DePew with "failing to employ only such means as are consistent with the truth" and wilfully seeking to deceive and deceiving and defrauding SEGA, Synapse and HES by acts

of artifice, omissions and false statements of material facts. Count 12 charged Crane and DePew with an ongoing conspiracy to defraud SEGA, Synapse and HES to the financial detriment of such companies. (Notice to show cause, pp. 15-16.) With respect to both counts, the referee found that "The acts of Crane were wilful, untruthful and designed to deceive Sega. The acts of DePew were tantamount to gross negligence." (Decision p. 7.)

Findings in Mitigation

The referee found as factors in mitigation that neither Crane nor DePew had any prior instances of professional misconduct; that Crane has been promptly meeting his repayment obligations in accordance with his settlement agreement with SEGA, that Crane has handled monies and other responsibilities for his subsequent employer, Delta Airlines, had suffered family losses and is presently undergoing therapy in an endeavor to maintain his marriage. With respect to DePew, the referee found that he has maintained his relationship with the same law firm since his admission to the State Bar in 1979 and is now a partner; he has written plays and does volunteer work for medical convalescent facilities and has no civil judgments or (criminal) convictions against him. (Decision p. 8.)

II. FACTS

Most of the facts are undisputed except as to the state of mind of both respondents in committing the acts of misconduct and the state of knowledge of DePew. With the exception of the finding below as to DePew's state of mind and knowledge, we agree with all of the referee's essential findings of fact and restate the facts here in somewhat more detail. Crane and DePew met and became friends while both were in law school and were working as law clerks for the same Los Angeles firm. (IIA R.T. pp. 82-85.) DePew was admitted to the California bar in November 1979, and Crane in December 1980. After their respective graduations from law school, DePew stayed with the firm and Crane did not, but the two men remained friends and continued to see one another socially. (IIA R.T. p. 82.)

In 1982, after working for a year attending depositions in asbestos cases, Crane went to work for SEGA Corporation, an affiliate of Paramount Pictures and subsidiary of Gulf & Western. (IIA R.T. pp. 76-77, 83-85.) SEGA's principal business was the development and marketing of video arcade games, but it also licensed its arcade game properties to home video game companies, and to manufacturers of other types of goods such as novelty clothing. (IIA R.T. p. 97.) Although Crane was employed in SEGA's legal department, he spent a considerable part of his time marketing the license opportunities offered by SEGA to novelty manufacturers. (IIA R.T. p. 97.)

Perceiving what he believed to be a good business opportunity for his employer, Crane attempted to interest SEGA's management in marketing licenses for its arcade games to companies that could produce versions of the games on floppy disks and distribute them for use on home computers. (IIA R.T. p. 145.) His efforts were firmly rebuffed. (*Id.*)

Crane thereupon decided to form his own business for the purpose of selling licensed SEGA games to the home computer market, in order to exploit a business opportunity which he perceived his employer to have abandoned. (IIA R.T. pp. 149-155.) He hired an attorney to form a corporation, Universal Licensing, Inc. ("Universal"), of which he was to be the sole stockholder and only employee. (IIA R.T. pp. 121-126.)[5] On September 13, 1983, while the formalities of the incorporation were in process, and without revealing that Universal was his own company, Crane submitted a proposal from Universal to SEGA to license the SEGA games "Zaxxon" and "Carnival" for use on home computers. (Exh. 46.) SEGA accepted the proposal, as to Zaxxon only, on September 15, 1983. (Exh. 12.) Under the SEGA-Universal license agreement, Universal agreed to pay SEGA a guaranteed minimum compensation of $10,000, with a $5,000 down payment against future royalties of 6 percent. (Exh. 12B.)

5. Originally, the corporation was to be called Universal Marketing, Inc. This was changed to Universal Licensing, Inc. when it was discovered that the other name was already reserved with the California Secretary of State's office.

Crane had already succeeded in obtaining the Zaxxon license before DePew became directly involved in the matter, although they did discuss it before then. (IIA R.T. pp. 139-143.) There is a sharp dispute (as discussed in more detail below) between Crane and DePew concerning whether Crane told DePew, when they first discussed the licensing idea, that Crane had concealed from SEGA the fact that its licensee, Universal, was Crane's company. There is also some dispute (again, discussed below) concerning other aspects of Crane and DePew's initial conversations regarding Crane's venture. It is uncontroverted, however, that DePew ultimately agreed to serve as incorporator, agent for service of process, president, secretary, and general counsel of Universal. (See exhs. 6, 7; IIA R.T. pp. 202-205.) DePew received no equity interest in Universal, and had no real operating responsibility or authority as to the company; however, he was compensated for the time he devoted to Universal's affairs. (IIA R.T. pp. 165-166, 245-249.)

Soon after beginning to formulate his new venture, Crane determined that it would not be economically or practically feasible for him (as Universal) to produce and distribute the computer game disks directly. (IIA R.T. pp. 217-222.) He therefore decided to proceed by sublicensing the Zaxxon game to an existing computer software company, a procedure which was permitted under the terms of Universal's license from SEGA. (IIA R.T. p. 221.)[6] He located a potential sublicensee, Synapse Software, Inc. ("Synapse"), which was located in the San Francisco Bay Area. (IIB R.T. p. 53.)

In order to reach agreement on the terms of a sublicense, it was necessary for a representative of Universal to meet with the Synapse management in person. (IIB R.T. pp. 60-61.) For this purpose, Crane and DePew travelled together to the Bay Area. On the way, Crane briefed DePew concerning the video game industry and the sublicense negotiations. (IIB R.T. pp. 252-253; *see id.* p. 72.) In meeting with Synapse, DePew had no real negotiating authority; his task was simply to convey Crane's proposal to Synapse, and to ascertain Synapse's response for later transmission to Crane.[7] (IIB R.T. pp. 69-70, 173-175, 244; III R.T. pp. 80-82.) DePew gave Synapse a business card, provided to him by Crane, describing him as Universal's general counsel, and he saw himself as acting as Universal's counsel in meeting with Synapse. (IIB R.T. pp. 61, 244; III R.T. p. 90.)

The payment terms of the Universal-Synapse sublicense were significantly more favorable than the payment terms of the SEGA-Universal license. Crane did not reveal this fact to SEGA. (IIB R.T. pp. 14, 55.) After receiving Synapse's initial $50,000 advance royalty payment, Crane used a cashier's check to pay SEGA the $5,000 advance owed to SEGA by Universal, and prepared a backdated letter to make it appear that the payment had been made earlier. (IIA R.T. pp. 238-240; exh. 44.) He deposited the remainder of Synapse's payment in Universal's bank account, and used some of the money to pay Universal's expenses.

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6. Exhibits 12A and 12B contain a clause (numbered 12(g)) which permitted sublicensing with SEGA's prior approval. Such approval was granted with respect to the Synapse sublicense. (Exh. 24.)

7. There is a factual dispute concerning what Crane told Depew concerning why Crane himself could not attend the meeting with Synapse. Crane testified that he simply waited in a restaurant while the meeting took place, and that he made it clear to Depew that he was staying away from the meeting in order to conceal his identity, because he did not want Synapse to know that the owner of Universal also worked for SEGA. (IIB R.T. pp. 68-72.) Depew denied knowing this, and testified that his understanding was that Crane did not attend the Synapse meeting simply because he had other business to attend to in the area. (III R.T. pp. 67-73.)

The referee did not make a specific factual finding on this issue. However, the significance of this factual dispute is marginal at best, because Depew *admitted* that he knew Crane was using pseudonyms in dealing with *sublicensees*; he only denied knowing that Crane had used pseudonyms and concealed his identity in dealing with *SEGA*. (Compare IIB R.T. pp. 229-236 with III R.T. pp. 4-6, 10-11.) Thus, even if the referee believed Depew's version of why Depew thought Crane did not attend the Synapse meeting, this still does not absolve Depew of knowing acquiescence in Crane's deception of Synapse regarding Crane's connection with Universal. However, as we discuss *post*, Depew's testimony denying that he had knowledge in March of 1984 of Crane's concealment of his identity from Sega must be disbelieved in light of the documentary evidence.

DePew signed the sublicense agreement with Synapse on behalf of Universal, and sent related correspondence to Synapse on October 14, 1983. (Exhs. 13, 24.)[8] After that date, DePew did not become involved with Universal again until March 20, 1984, and did not hear about its affairs from Crane in the interim.[9] (III R.T. pp. 32-35, 38-40, 55-56, 92-94.)

Meanwhile, Crane decided he wanted to add to the SEGA-Universal license the rights to another game, "Super Zaxxon," which was an enhanced version of Zaxxon. In order to do so, Crane prepared a letter dated November 21, 1983, which was addressed to himself and purportedly authored by "Steven Kness" at Universal, requesting that Super Zaxxon be included in the existing license agreement. He then signed the letter under his own name as SEGA's representative, indicating acceptance of Universal's request. (Exh. 36.) Crane did not tell SEGA until much later that he had amended the SEGA-Universal license to include Super Zaxxon. (IIB R.T. pp. 83-85, 91.)

Crane left his job at SEGA on January 14, 1984. (IIB R.T. p. 103.) Just prior to leaving his employment, on January 13, 1984, Crane prepared a letter from himself at SEGA to "Steven Kness" at Universal, purportedly forwarding proposed amendments to the SEGA-Universal license agreement that would add the rights to the games "Carnival" and "Turbo." (Exh. 32.) Crane's plan was to seek to sublicense these games as well, but he was not successful in locating a sublicensee. (IIB R.T. pp. 97-102.) Thereafter, on behalf of Universal, he reached an agreement to sublicense Super Zaxxon to Human Engineered Software Corporation ("HES"). Crane used the pseudonym "Bruce Blumberg" in forwarding proposed sublicense agreements to HES. (Exhs. 25, 27.) Crane did not tell HES that SEGA was unaware of his connection with Universal, or that no one at SEGA apart from himself had been aware of or approved the sublicense of Super Zaxxon to HES. (IIB R.T. pp. 114-115.)

The executed sublicense agreement between Universal and HES was dated February 14, 1984. (Exh. 64.) Shortly thereafter, Crane received a $25,000 advance royalty payment from HES, which he deposited in Universal's bank account. (IIB R.T. pp. 112, 114.)

Crane then tried to coerce SEGA into consenting to the HES/Super Zaxxon sublicense through the artifice of writing a letter on Universal letterhead to himself at SEGA, dated February 22, 1984, which he signed using the pseudonym "Bruce Blumberg." (Exh. 30.) The letter purported to memorialize earlier conversations between "Blumberg" and Crane in which Crane, while still a SEGA employee, had given SEGA's approval to the Super Zaxxon license and the HES sublicense. In the letter, "Blumberg" requested that SEGA formally signify its consent to the Universal-HES sublicense for Super Zaxxon by returning an executed copy.

Some time after signing the sublicense agreement in mid-February, HES apparently became concerned as to the status of SEGA's consent. Accordingly, on March 20, 1984, a representative of HES called Universal's telephone number, which was actually an answering service, and ended up speaking with DePew as a result. (III R.T. pp. 129-131.) DePew immediately called Crane, who explained the situation to him; this was the first time DePew had heard that Crane had obtained the rights to Super Zaxxon. (III R.T. p. 131.)

On Crane's advice, DePew then called Robert Kupec, Crane's former supervising attorney at SEGA, who told him that SEGA was refusing to consent to the Super Zaxxon sublicense on the ground that Zaxxon and Super Zaxxon were too similar to be sublicensed to two different sublicensees without

8. Depew was paid $1,000 for his services to this point, although there is a dispute as to how the amount of this fee was determined. (IIA R.T. pp. 247-250; III R.T. p. 22.)

9. Crane had the only key to Universal's post office box, which was its only address. (IIA R.T. pp. 194-96, 199.) He evidently received the executed sublicense agreement returned to Universal by Synapse, and on November 2, 1983, he forwarded a copy to himself at SEGA, authoring the cover letter under one of his pseudonyms (Steven Kness). (Exh. 26.)

creating copyright problems. (III R.T. pp. 133-137, 161.) DePew requested that Kupec send copies of the Zaxxon and Super Zaxxon copyright registration papers to Universal, at the post office box address. (III R.T. pp. 136-137.)[10]

Two days later, on March 22, 1984, Kupec and DePew each wrote to the other. (Exhs. 18, BB.) After these letters crossed in the mail, DePew heard nothing further from Kupec. (III R.T. p. 161.) DePew's letter was prepared jointly by Crane and DePew, typed on Universal letterhead, and signed by DePew. (IIB R.T. pp. 119-120, 124-125; III R.T. pp. 137-143.) It stated, among other things, that Crane, while at SEGA, had consented to Universal's sublicensing Super Zaxxon as a separate property from Zaxxon. (Exh. 18.) Around this time, DePew received an additional $2,500 from Crane as an advance fee for his services in connection with the HES/Super Zaxxon matter.

When Kupec did not forward copies of the Zaxxon and Super Zaxxon copyright documents as requested, DePew became concerned that the matter might lead to litigation involving copyright issues which he would not be competent to handle. He therefore suggested to Crane that they consult Michael Sullivan, a business litigation attorney with experience in copyright matters whom DePew knew and respected. (IIB R.T. pp. 193-194, 213-214; III R.T. pp. 101-104.) They arranged to meet with Sullivan at a local Hamburger Hamlet restaurant; the meeting took place in late March 1984. (VI R.T. pp. 64-65.)

Both Crane and DePew testified that the purpose of their consultation was to obtain Sullivan's assistance in enforcing Universal's rights under its license; neither of them thought that they might need Sullivan's help in defending themselves against the consequences of any wrongdoing. (IIB R.T. pp. 121-122, 194, 213-214.) However, when Sullivan learned that Crane had obtained the license from SEGA without disclosing that Universal was Crane's company, he made it clear to Crane and DePew that there was a serious problem with what had happened, and that his mission would have to be "containment" (of liability exposure) rather than enforcement of Universal's supposed rights. (VI R.T. pp. 66-69.) Sullivan testified that Crane appeared to be genuinely shocked and deeply distressed when he was finally made to understand the wrongfulness of what he had done, and that DePew also appeared surprised. (VI R.T. pp. 74-75, 102-103, 106-107.)

Sullivan persuaded Crane to reveal the facts fully to SEGA and to Paramount, its affiliated company. Crane and DePew met separately with attorneys for SEGA and Paramount and each gave extensive statements concerning the Universal, Synapse, and HES transactions. In the resulting settlement, Crane agreed to disgorge to SEGA all the money that remained in Universal's bank account (some $47,000), and to pay SEGA $250.00 per month for five years; as of the time of trial, he had made all the payments thus far. (IIB R.T. pp. 132-133, 166.) DePew paid over to SEGA the $3,500 he had received from Crane in payment for his services to Universal. The problem created by the conflicting licenses of Zaxxon to Synapse and Super Zaxxon to HES was resolved by an agreement among SEGA, Synapse, and HES whereby SEGA agreed to pay $200,000 to HES in exchange for its agreement to withhold Super Zaxxon from the market for a specified time period so that Synapse could have priority in attempting to market Zaxxon. (Exhs. 21, 22, 23.)

After the settlement was reached, on October 1, 1984, Paramount's senior in-house counsel wrote a letter of complaint to the State Bar. The bar apparently first contacted both Crane and DePew about the complaint sometime between October 1984 and August 1985, but did not file the notice to show cause in this matter until February 25, 1988.[11]

After receiving the decision from the referee below, the examiner filed a request for reconsidera-

10. There is a direct conflict in the testimony regarding whether Crane was present in Depew's office when Depew made the call to Kupec. (Compare III R.T. pp. 53-54, 67 with IIB R.T. pp. 127-130.) However, this conflict is not material to any of the issues which we are called upon to resolve in this proceeding.

11. The record in this proceeding contains neither the State Bar's letters of inquiry to respondents nor their replies, but DePew's counsel represented these facts to the State Bar Court both at the hearing level and on review, and the State Bar examiner has not denied them.

tion on September 5, 1989, which was opposed by respondent DePew in its entirety as untimely. The referee denied reconsideration except for a minor modification of the heading on page one, which was changed to read "Finding [sic] of Fact" instead of "Preliminary Observations."[12]

III. DISCUSSION

Pursuant to rule 450 of the Rules of Procedure of the State Bar, respondent DePew has sought review of the referee's decision on the grounds that (1) the recommended level of discipline is excessive; (2) the referee did not give due consideration to the evidence in mitigation; (3) the referee's culpability findings exceeded the charges, and (4) the examiner engaged in prejudicial misconduct. The examiner has sought review pursuant to rule 450 upon the following grounds: (1) the referee erroneously found culpability as to certain violations that were not charged or proved; (2) the decision does not consider aggravating factors; (3) there is no clear and convincing proof of compelling mitigating circumstances, and (4) the recommended discipline does not comply with the Standards for Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar, div. V; hereafter "standard(s)" or "std.") and is insufficient to protect the public. **[1a]** It is our obligation to conduct an independent review of the entire record and make our own determinations of fact and conclusions of law. (Rule 453, Rules Proc. of State Bar; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9.) Our findings are not limited to issues raised by the parties. (*Id.*) We have already described most of the facts in great detail and will proceed to identify which facts support culpability with respect to each count.

First, the referee found both respondents culpable of violating section 6103 of the Business and Professions Code, and found Crane culpable of violating section 6068 (a). As Crane points out, these findings are invalid under *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.[13] Moreover, at least as to count one of the notice to show cause, the section 6068 (a) charge was dismissed by the examiner during trial. (VI R.T. p. 9.)

Second, the referee found both respondents culpable of violating former rule 5-104, which prohibits payment of clients' expenses. As the examiner notes, violation of this rule was not charged in the notice against either respondent and no evidence was introduced on this subject. All of the parties agree that this finding must be stricken as to both respondents. **[2a]** Indeed, it appears obvious that the referee must have intended to find a violation of former rule 5-101 instead of 5-104. The decision of the referee otherwise fails to find Crane culpable of violating former rule 5-101 (business transactions with client), even though Crane's obvious violation of this rule

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12. While the examiner sought disbarment of Crane and at least lengthy suspension of DePew he also sought to relate the findings to the statutory and rule violations charged in each count and to correct the decision by deleting the findings that each respondent violated rule 5-104 and that DePew violated rule 5-102(A), since such conduct was not charged. Crane's counsel joined in the request to delete the determination of culpability under rule 5-104.

13. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of sections 6068 (a) and/or 6103 of the Business and Professions Code. (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 893, 898; *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1143-1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision.

Moreover, prior to *Layton* and *Hartford*, the Court reaffirmed in other cases the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903; *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

We are reluctant to assume that the Court intended, in *Layton* or *Hartford*, to overrule sub silentio decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as applied in text *ante*, pending further clarification from the Supreme Court.

In any event, the validity or invalidity of the findings of violation of Business and Professions Code sections 6068 (a) and 6103 in this matter does not affect our recommendation as to discipline. For that reason, we are reluctant to delay the resolution of this matter any further by awaiting further clarification of the issue from the Supreme Court.

constitutes the very heart of his misconduct.[14] **[1b - see fn. 14]**

Third, the referee found that both respondents had violated former rule 5-102(A), prohibiting the representation of clients with conflicting interests. As to DePew, violation of this rule was neither charged nor proven. While DePew undoubtedly committed misconduct of other kinds, it is beyond dispute that his only attorney-client relationship in this matter was with Crane and his wholly-owned company, Universal, which obviously did not have conflicting interests. Thus, the finding must be stricken as to DePew.

[2b] We also strike it against Crane. A violation of rule 5-102(A) *was* charged against Crane in all but three counts without any indication of how his alleged misconduct came within the ambit of that rule. Nor does it appear applicable. Rule 5-101 covers adverse interests between attorneys in their personal capacities and their clients; rule 5-102(A) covers an attorney's representation of conflicting client interests. Crane did not *represent* Universal as its attorney, Depew did. Crane's adverse interests are covered by a determination of culpability under rule 5-101.

Fourth, the referee found DePew culpable of violating section 6108 of the Business and Professions Code. Section 6108 deals with the format for complaints to the State Bar, and does not set forth any requirement for proper professional conduct. The examiner explained that the reference to section 6108 in counts 11 and 12 of the original notice to show cause was a typographical error, and during the trial, he amended it in both places to refer to section 6068 (d), which requires attorneys to employ only means consistent with truth. (VI R.T. pp. 10-11.) The examiner sought to have such finding stricken on reconsideration but was unsuccessful.

Finally, although the referee did not find DePew culpable of violating section 6068 (d), he did find Crane so culpable.

[3a] The examiner has not offered any assistance to this court in making appropriate findings as to the manner in which the respondents' conduct allegedly violated any of the charged rules or statutory provisions.[15] Nothing in either of his briefs on review addresses the specific evidence which supports a finding of culpability under any of the charges. His request for reconsideration below merely asked the referee to state in conclusory fashion that "the findings in count one" support culpability under sections 6068 (a), 6068 (d), 6103 and 6106, "the findings in count two" support culpability under section 6068 (a), and so on. As repeatedly explained by the Supreme Court, most recently in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816, such conclusory language is inadequate and does not promote meaningful review.

[3b] We must nonetheless undertake the task of identifying what conduct proved under each count supports culpability of the particularly charged statutory or rule violations. First, we reject culpability under sections 6068 (a) and 6103 based on the holdings in *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815, and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931. Although Sands was found culpable of rule violations and violation of Business and Professions Code section 6106, the Supreme Court specifically rejected Sands's culpability for willful violation of his oath and duties as an attorney to support the law within the meaning of Business and Professions Code section 6068 (a) on three of four counts.[16] **[4a]** Also, we do not find Crane or DePew culpable of violating section 6068 (d) on any of the charges. That section appears directed at attorneys who make mis-

14. **[1b]** Under rule 453(a) of the Rules of Procedure we have the power to make this determination even though the examiner has not requested that the referee's erroneous finding of an uncharged and unproven violation of former rule 5-104 be construed as (or modified to) a finding of a violation of former rule 5-101 as to Crane. We do not make such a finding as to DePew since DePew was neither charged with nor found culpable of violating former rule 5-101. His only client was Universal.

15. On review, the examiner does repeat his prior request to the referee that the erroneous section 6108 finding be stricken. We strike that finding.

16. The only count in *Sands* on which section 6068 (a) was held to be violated was the count which involved a prior felony conviction of a hearing officer for accepting bribes. Based on the convicted hearing officer's testimony, Sands was found to have violated his oath and duties by passing concealed $100 bills to the hearing officer over lunch on four occasions at which they discussed matters regarding his clients. The charges here are far more comparable to the other three counts in which no violation of section 6068 (a) was found.

representations to a tribunal in seeking to further a client's interests.[17] **[4b - see fn. 17]** No case has been cited to us which would make it applicable here and the examiner has failed to articulate what conduct of either respondent violates 6068 (d) as opposed to section 6106. **[5]** Indeed, since all of the acts of dishonesty are covered by section 6106, we see no added value in attempting to strain to find a section 6068 (d) violation by some unspecified part of the same conduct.

Crane's Culpability

We conclude that Crane violated Business and Professions Code section 6106, as charged in count one, by his deceit of SEGA in failing to disclose his ownership of Universal and its inability to carry out its obligations as a licensee. **[6]** He also violated former rule 5-101 by causing a licensing agreement to be entered into between his client-employer SEGA and his wholly owned company, Universal, by which Crane knowingly acquired a pecuniary interest adverse to SEGA without disclosing his ownership interest in Universal or its incapacity to fulfill the terms of the license agreement or his negotiations for sublicensing by Universal on more profitable terms. Even though the terms of the license were revealed and may not have been unfair in and of themselves, the true identity of the licensee was itself a material fact which Crane had a fiduciary duty to disclose. (See, e.g., *Bate* v. *Marsteller* (1959) 175 Cal.App.2d 573, 580-581, 583 [brokers who indirectly purchased majority interest in property from sellers without fully disclosing nature and extent of their participation breached fiduciary duty and were not entitled to commission even though terms of sale were revealed to and accepted by sellers].)

On count two, we likewise determine that Crane violated section 6106 by wilfully deceiving the sublicensee into believing that Universal had the right to sublicense Zaxxon before any permission was obtained from SEGA to do so.

On count three, we determine that Crane violated 6106 by his deceptive use of the pseudonym "Steve Kness" in dealing with Synapse and with SEGA.

On count four we determine that Crane violated section 6106 by arranging for DePew to pose as general counsel of Universal as well as president and secretary of Universal, thereby concealing from all parties with whom he interacted the lack of any employees and Crane's involvement as sole principal. The examiner failed to prove that SEGA was defrauded into approving the sublicense without having its financial terms disclosed. SEGA agreed to approve the sublicense without knowing its terms.

On count five we determine that Crane committed an act of dishonesty in violation of section 6106 by backdating the documentation of the $5,000 down payment to SEGA.

On count six we determine that Crane violated section 6106 by deceiving HES into believing Universal had SEGA's authorization to add "Super Zaxxon" to its license and by using the pseudonym "Steve Kness" in signing the letter amendment on behalf of Universal.

On count seven we determine that Crane committed acts of dishonesty in violation of section 6106 by using the pseudonym "Bruce Blumberg" in negotiating the sublicense of "Super Zaxxon" by Universal to HES and by entering into the sublicense on behalf of Universal with knowledge that SEGA had not authorized Universal to add "Super Zaxxon" to its license.

On count eight we determine that Crane committed an act of dishonesty in violation of section 6106 by again using the pseudonym "Bruce Blumberg" in a letter from Universal to SEGA falsely indicating that Blumberg, on behalf of Universal, had negotiated with "Crane" and thereby had received SEGA's approval of the HES sublicense, failing to disclose that Blumberg and Crane were one and the same person.

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17. Section 6068 (d) requires an attorney "[t]o employ, *for the purpose of maintaining the causes confided to him or her* such means only as are consistent with truth, *and never seek to mislead the judge or any judicial officer* by an artifice or false statement of fact or law." (Emphasis added.) **[4b]** Section 6106, by contrast, expressly covers acts of moral turpitude whether committed in one's capacity as an attorney or not.

On count nine we similarly find that Crane committed acts of dishonesty in violation of section 6106 by misrepresenting to Kupec of SEGA that Crane made actual representations to Universal that SEGA would approve the sublicense without revealing that Crane was the owner of Universal and that the documents relied on were signed by Crane, acting on both sides of the transaction, hiding his dual role with pseudonyms.

On count 10 we determine that Crane committed an act of dishonesty in violation of section 6106 by altering the Universal-SEGA license without knowledge or consent of SEGA management, to include two additional games, "Carnival" and "Turbo" when he knew he was not authorized to do so.

We dismiss counts 11 and 12 as unsupported by the facts. As to count 12, we find that there was no conspiracy to defraud.

In sum, we conclude that Crane violated section 6106 by acts of dishonesty charged and proved in counts one through ten as set forth above, and violated former rule 5-101 by failing to disclose fully and obtain written consent of his client to his adverse business interest and to permit the client to obtain independent legal advice, proved in counts one, three, four, six, seven, eight and ten.

DePew's Culpability

The single most difficult issue raised by this proceeding is the question of the degree of DePew's culpability, as measured by the extent of his contemporaneous awareness of Crane's wrongdoing. On this point, the testimony of the two respondents is in direct and irreconcilable conflict, yet each adhered to his version of the story even after hearing the other's testimony.

Crane maintained very positively that he had explained to DePew all along, from their first conversation about Crane's licensing venture, that SEGA did not know and must not find out that Universal was Crane's company. DePew maintained equally positively that Crane never told him this, and that he had believed until the Hamburger Hamlet meeting that SEGA was aware of Crane's connection with Universal.[18]

Regrettably, the referee did not expressly resolve this evidentiary conflict in his decision although the referee's decision reflects skepticism regarding some of DePew's more self-serving testimony about his state of mind. (See decision p. 5, lines 17-20; *id.* p. 7, lines 4-8.)

The referee's decision also contains findings, repeated in several places, that DePew was "at least" culpable of gross negligence. (Decision, findings of fact, counts 4, 9, 11, and 12.) We take the referee's skepticism one step further. We find that DePew must have been aware that Crane had concealed his connection with Universal from SEGA. DePew had a full-time job elsewhere with no expertise in handling business transactions, video game licensing or any other matters involving copyright law. At Crane's request he pretended to be house counsel, president and secretary of Universal, an entity in which he had no beneficial interest. DePew also admitted he knew sublicensees were to be deceived. (IIB R.T. pp. 229-36, 239-240.) The deception of SEGA had to be known to him as well.

By his own admission, DePew repeatedly discussed with Crane the propriety of Universal taking a corporate opportunity from SEGA which SEGA had turned down. It strains credulity that Crane and DePew would have repeatedly discussed this subject if Depew thought Crane had SEGA's informed consent to take the rejected opportunity by forming

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18. There is a similar dispute concerning whether Depew overtly agreed with Crane's conclusion that his plan was not wrongful because Sega had voluntarily passed up the opportunity Crane was pursuing, and would profit from Crane's efforts. Crane's position was that he expressly sought out Depew for his advice on the matter, and that after some discussion, Depew seemed to agree with Crane that it would be all right to proceed. Depew's testimony was essentially that he repeatedly told Crane that his plan was probably tortious, but that Crane refused to be talked out of it, and eventually Depew gave up. This evidentiary conflict is less important, however, because it is undisputed that Depew did eventually agree to assist Crane in his activities; in light of that decision on Depew's part, any mental reservations he may have had are of little consequence.

Universal. There would have been no need for DePew to play "devil's advocate" if SEGA knew and consented to Crane forming a new company to license "Zaxxon".

We find irrefutable evidence that DePew must have known SEGA was ignorant of Crane's involvement in Universal in the March 22, 1984 letter which Crane and DePew jointly prepared and DePew alone signed and sent to Crane's former supervising attorney at SEGA, Robert Kupec. (Exh. 18.) At oral argument, DePew's counsel insisted that DePew was still unaware as of writing the letter that SEGA knew nothing of Crane's relationship to Universal. In the letter, DePew repeatedly refers to prior negotiations between Universal and SEGA, referring to Universal as "we" and SEGA as represented by "Mr. Crane," and stating: "Mr. Crane indicated that Sega had no intentions of marketing Super Zaxxon . . . . [¶][W]e then began discussions on sublicensing Super Zaxxon to a third party with Mr. Crane's assurances that he would consent to our sublicensing . . . . [¶]In late December we again spoke to Sega . . . . Mr. Crane again assured us that any sublicense agreement ultimately consummated by Universal would receive the approval and consent of Sega . . . . It was on the basis of this reassurance and several conversations and communications with Sega that Universal proceeded . . . . [¶]By the time this agreement was consummated, Universal learned that Mr. Crane was no longer with Sega, and that Universal was now required to deal with an entirely different individual . . . . [N]umerous assurances [were made] from Sega through its legal counsel, Mr. Crane . . . . [¶]Mr. Crane has indicated to us that Super Zaxxon and Zaxxon are separately copyrighted . . . . [¶]As your own records will no doubt reflect, Sega, through Robert Crane, has already provided consent by means of representations to Universal by Mr. Crane that we, Universal, had the 'go ahead' to negotiate with third parties for the sublicensing of Super Zaxxon."

This letter only makes sense if DePew thought Kupec was *unaware* of Crane's ownership and control of Universal. Only under such circumstances could the letter accomplish its stated aim of convincing Kupec to grant written consent to Universal to sublicense "Super Zaxxon" based on Universal's detrimental reliance on "Mr. Crane's repeated assurances" purportedly binding SEGA. We conclude that DePew violated section 6106 by acts of dishonesty alleged and proved in counts four and nine.

We further conclude that the examiner failed to prove any violation by Crane or DePew of sections 6068 (a), 6068 (c), 6068 (d) or 6103. He also failed to prove any violation of rule 5-102(B).

Other Issues Raised by DePew

1. Alleged Prejudicial Misconduct of Examiner

DePew argues that this entire matter should be dismissed with prejudice because the examiner allegedly attached the complaining witness's original letter to the State Bar to his motion to continue trial and notice in lieu of subpoena, and sent them to the referee, without including the letter in his service of those documents on Crane's and DePew's counsel. This argument is unavailing for several reasons.

First, the record does not establish that the document in question in fact was attached to the examiner's motion.[19] **[7]** Second, even if we assume the examiner did send the letter to the referee, DePew's counsel waived any objection to its use.[20] Moreover,

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19. The examiner denied including it with the set of motion papers sent to the clerk for transmittal to the referee. (It is not attached to the copy of those papers that is included in the copy of the file sent to the review department.) The document was part of the discovery file in the case, having been produced to DePew's counsel in response to a request for production of documents. However, it is entirely unclear from the record how it found its way into the papers transmitted to the referee.

20. As the examiner points out, the subject of the letter came up at several points during the proceedings, and although DePew's counsel expressed objections to the means by which he believed the letter had reached the referee, he at no point moved to strike the letter from evidence, moved to disqualify the referee because he had read it, or took any other steps to preserve the argument for review. When the letter was offered in evidence, DePew's counsel did not object to its admission. (V R.T. p. 142; exh. 121.)

DePew's counsel argues that his waiver of the point was "coerced" or "forced" because the referee had already read the document before the problem came to light. DePew's counsel could still have made an objection that would have protected his record.

the referee's familiarity with the letter did not result in any identifiable prejudice to DePew. DePew's counsel has not pointed to any specific finding which he asserts is based on the letter rather than on the evidence introduced at trial. By the time the referee had listened to five days of trial testimony, during which he actively and repeatedly questioned the witnesses himself, it is difficult to believe that his view of the case remained seriously affected by hearsay statements in a letter he had read months earlier. The letter merely contains hearsay statements by the general counsel of Paramount concerning what Paramount learned about Crane and DePew's conduct during its interviews with them. This same subject matter was testified to at length by the author of the letter at the hearing—without any objection by DePew's counsel. (V R.T. pp. 4-142.) Indeed, we have determined upon de novo review that all of the referee's findings of fact are amply supported by documentary evidence and/or by Crane's and/or DePew's own sworn testimony, based on personal knowledge.

2. Laches

[8] The State Bar did not file the notice to show cause in this proceeding until about three and a half years after receiving the initial complaint. DePew therefore argues that laches compels dismissal of this proceeding. However, other than a generalized reference to fading memories, DePew does not point to any *specific* prejudice to DePew that he claims resulted from the delay.

Absent a showing of specific prejudice, delay in State Bar disciplinary proceedings is not a basis for dismissal of the charges. (*Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 310; *Yokozeki* v. *State Bar*, *supra*, 11 Cal.3d at p. 450.) **[9a]** As noted *post*, the delay in this case may be considered as a mitigating factor, as can respondents' period of practice without further complaint prior to the institution of this proceeding. (*Rodgers*, *supra*, 48 Cal.3d at pp. 316-317; *Yokozeki*, *supra*, 11 Cal.3d at p. 450.) But DePew's argument that the proceeding should be entirely dismissed due to the delay is without merit.

Aggravation

Unfortunately, as the examiner's brief points out, the referee's decision fails to contain any specific findings and conclusions one way or the other as to aggravating circumstances. The examiner argues that the following types of aggravating circumstances are supported by the record:

(1) multiple acts/pattern of misconduct (standard 1.2(b)(ii));

(2) acts surrounded by dishonesty, concealment, and other disciplinary violations (standard 1.2(b)(iii));

(3) lack of candor in the State Bar proceeding (DePew only) (standard 1.2(b)(vi));[21] and

(4) significant harm to a client, the public, or the administration of justice (standard 1.2(b)(iv)).

With respect to item one, the examiner treats each count of the notice to show cause as a separate violation, and argues on that basis alone that this matter involves multiple violations or a pattern of misconduct. This argument puts too much emphasis on the examiner's own discretion in drafting the notice to show cause. The examiner could have chosen to charge only count 10 which incorporates the rest of the counts by reference and still have obtained the same result. **[10]** The evidence in this matter clearly shows multiple acts of misconduct by Crane, assisted at two separate junctures by DePew. Crane's fraud does not rise to the level of a pattern of misconduct under Supreme Court precedent. The Supreme Court has limited this characterization to "'only the most serious instances of repeated misconduct over a prolonged period of time.'" (*Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1217, quoting *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367; see also *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14; *Olguin* v. *State Bar* (1980) 28 Cal.3d 195, 201.)

However, with respect to item two, the examiner is correct. Crane's acts were surrounded by

21. The examiner's reference to standard 1.2(b)(v) appears to be a typographical error.

dishonesty and concealment. The examiner is also correct in pointing out evidence to support a finding under standard 1.2(b)(iv). **[11]** SEGA, which was Crane's client, was seriously harmed by Crane's misconduct; because of Crane's actions in creating mutually inconsistent licenses without SEGA's knowledge, SEGA was forced to hire counsel to deal with the situation, and to pay a considerable sum of money to resolve its conflicting obligations to Synapse and HES. This harm appears to outweigh any profit SEGA may have obtained from the royalties paid it by Synapse and HES. The examiner has not proved the amount of financial harm since he has not offset SEGA expenditures by the royalties it received.

[12] With respect to item three, we hesitate to make a finding that DePew lacked candor in his testimony before the referee when the referee himself declined to do so. Nor are we inclined to remand for this purpose. The issue of candor relates only to the part of his testimony which involves his recollection of his knowledge and state of mind at the time of the events six years ago. Thus, while we reject his recollection in light of documentary and other evidence, we decline to assume that it was offered in bad faith. This does not affect our finding that at the time of the events in question, he acted dishonestly in violation of section 6106.

[13] Finally, although we accept the examiner's arguments concerning specification of aggravating factors, we do not interpret the referee's failure to make such express findings as evidence that he ignored the aggravating factors that were obvious from the record. In any event, we have taken such factors into account in arriving at our recommended degree of discipline.

Mitigation

The referee's findings in mitigation include some factors that are not properly considered mitigating, and omit factors that should have been considered.

Crane was admitted to practice in 1980, and DePew in 1979. The relevant events occurred in late 1983 and early 1984. **[14]** Respondents' records of practice without prior discipline, cited by the referee, were far too short to constitute significant mitigation in and of themselves under Supreme Court precedent. (See, e.g., *In re Demergian* (1989) 48 Cal.3d 284, 294 [misconduct began about four years after admission; "A blemish-free record of such relatively short duration is entitled to little weight in mitigation."].) However, it is appropriate to consider such prior blemish-free record in conjunction with subsequent conduct to demonstrate the aberrational nature of the misconduct. **[9b]** Thus, the referee properly considered DePew's career since his misconduct, during which time DePew's partner testified that DePew has become a valued partner in his firm (VI R.T. p. 60) and DePew has practiced law actively without experiencing any civil judgments, criminal convictions, or further disciplinary complaint. (Standard 1.2(e)(viii); see *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-317; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 450 [noting in mitigation that "[Respondent] has successfully continued his practice, . . . after the transaction in question, without additional charges being lodged against him, and apparently has the confidence of his colleagues in his current practice."].) **[15]**DePew's medical volunteer work was also properly relied on as demonstrating a record of community service. DePew's artistic activities are not mitigating factors recognized by the standards or Supreme Court precedent.[22] **[16 - see fn. 22]**

[17] We also do not consider as a relevant mitigating factor the fact that Crane "is presently undergoing therapy in an endeavor to maintain his marriage." (Decision p. 28.) As noted by the examiner, Crane neither established psychological problems at the time of the events in question by expert testimony, nor demonstrated that he had

22. **[16]** As the examiner points out, DePew's community service was established only by his own testimony (which the examiner neglects to mention was uncontroverted). This is apparently a reference to the requirement in standard 1.2(e)(vi) that good character be established by a "wide range of references." However, DePew's testimony regarding his community service may be considered as some evidence in mitigation notwithstanding that it does not meet the criteria for character evidence set forth in the standard.

recovered from them to the point where they would no longer affect his fitness to practice law. On the other hand, the referee properly considered as a factor in mitigation Crane's agreement (to which he had adhered) to make restitution of his profits to SEGA. (*Waysman* v. *State Bar* (1986) 41 Cal.3d 452.)

[9c] There are other mitigating factors established in the record and not mentioned in the referee's decision. Crane testified that since his misconduct, he had performed satisfactorily as in-house counsel for an airline, handling transfers of tens of thousands of dollars without incident. (He ultimately had to leave his legal employment, however, after a transfer to Atlanta, due to his inability to obtain admission to the Georgia bar during the pendency of these proceedings.) As with DePew, this evidence of post-misconduct rehabilitation is properly considered in mitigation, as is the State Bar's unexplained delay in bringing these proceedings.[23] **[9d - see fn. 23]** Also, the referee failed to mention DePew's voluntary restitution to SEGA of the $3,500 he had received from Crane for his services to Universal.

[18] Most importantly, both respondents, and most notably Crane, testified repeatedly and convincingly that while they recognized afterwards that what they had done was wrong, they honestly believed at the time that it was not, and they did not intend to do any harm; rather, they believed SEGA would benefit from their conduct by receiving royalties from Universal. SEGA had previously declined to market the games for home use and would not have entered that market on its own initiative. Both respondents were very remorseful once they realized they had acted wrongfully. (See standard 1.2(e)(vii).) Both respondents' original lack of appreciation for the wrongfulness of their acts might be attributed to their youth and inexperience. Their subsequent understanding and regret was confirmed by the testimony of Michael Sullivan, the attorney DePew brought in for consultation, who originally persuaded them to come forward with their story. Crane in particular demonstrated great remorse for his misconduct. In addition, promptly upon Sullivan's intervention, both respondents candidly discussed the facts with the principal victim of their misconduct, reached a settlement with the parties involved, and disgorged the money they had received as a result of their acts. (See standard 1.2(e)(vii).)

Recommended Discipline

[19a] Crane committed multiple acts of fraud, dishonesty and concealment which under standard 2.3 shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law. Lengthy suspension is clearly called for based on the magnitude of his scheme and the harm which it caused. Even giving weight to Crane's apparent lack of recognition of his wrongdoing until the Sullivan meeting followed by his prompt corrective steps, we believe substantial discipline is warranted for Crane because of his very serious acts whether or not known to be wrong.

Crane does not disagree. His counsel argues only that mitigating factors ought to justify a three-year suspension instead of disbarment. His counsel likens Crane's actions to those of Donald Segretti in his Watergate crimes. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 888.) Segretti received two years' actual suspension after he was found to have engaged in multiple "acts of deceit designed to subvert the free electoral process." (*Id.* at pp. 887-888.) He was 30 at the time, had no prior record of misconduct, showed remorse and cooperated with investigating agencies. One similarity between the two cases is the misguided attitude with which the wrongful acts were performed. Segretti, at the time he acted, utterly failed to appreciate the magnitude of his misconduct, treating his misdeeds as if they were college pranks. Crane, likewise, "was incredibly naive" (VI R.T. p. 124) and apparently thought his deception was not

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23. **[9d]** Respondents' misconduct occurred during a limited period of time more than six years ago. Delay in prosecution is a factor to consider in determining appropriate discipline. (See *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 132; see also standards 1.2(e)(viii), 1.2(e)(ix).)

outside the scope of permissible business practice. He learned otherwise when Sullivan advised him of the seriousness of his acts. As with Segretti, Crane belatedly came to the realization that his acts were contrary to the fundamental honesty that is required of all attorneys. While Segretti's acts affected the public at large, Segretti did not have a profit motive and was not acting as an attorney when he committed the election crimes for which he was convicted. Here, in contrast, Crane did act as an attorney defrauding his own client for profit. The number of people affected by Segretti's misconduct was far greater; the relationship of Crane's misconduct to the practice of law was far greater.

[19b] To Crane's credit, however, when he realized that it was wrong, he disgorged all profits, candidly disclosed all of his misconduct and made all payments in accordance with his settlement agreement. His immediate restitution and clear remorse coupled with his cooperative behavior and good conduct thereafter amply justify imposing a substantial suspension in lieu of disbarment.

[20] In conducting our review and making our own recommendation of discipline it is likewise our duty to consider the proportionality of the recommended discipline in relation to other cases. (*Snyder* v. *State Bar* (1989) 49 Cal.3d 1302, 1310.)[24] In *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, the California Supreme Court had before it a similar undisclosed conflict-of-interest for personal gain compounded by active deceit of both opposing counsel and the probate court in connection with the handling of a conservatorship. The former Review Department of the State Bar Court recommended disbarment. The Supreme Court noted that "No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court." (*Id.* at p. 315.) Nonetheless, after balancing all of the mitigating and aggravating factors it imposed two years actual suspension. The court noted in mitigation Rodgers's lengthy blemish-free prior record of practice and his subsequent continued practice "without suffering additional charges of unethical conduct, thus demonstrating an ability to adhere to acceptable standards of professional behavior. . . . [¶] Balanced against these mitigating factors are a host of aggravating circumstances." (*Id.* at p. 317.) The aggravating circumstances were significant harm to the conservatee; consistent attempts to conceal his wrongful acts and evasive testimony at the hearing demonstrating lack of candor and insight into the wrongfulness of his actions. (*Id.*) The Supreme Court compared the case to others noting that violation of rule 5-101 had on one occasion in the past resulted in discipline as severe as two years' actual suspension (*Beery* v. *State Bar* (1987) 43 Cal.3d 802) but that in most cases the Court considered comparable, it had imposed less discipline. In no comparable case had it ordered suspension longer than two years or disbarment. (*Rodgers*, *supra*, 48 Cal.3d at p. 318.)

We deem Crane's misconduct equally reprehensible to that of Rodgers, but his mitigation to be stronger. No justifiable basis appears for imposing a lengthier suspension on Crane than was imposed in *Rodgers*. We are unaware of any case of similar nature which has resulted in three years' suspension. Nor do we consider the additional year to be necessary here. Indeed, three years' actual suspension is not commonly ordered by the Supreme Court for any offense. In *Weller* v. *State Bar* (1989) 49 Cal.3d 670 the Court did impose that sanction on an attorney with a record of two prior disciplinary offenses who once again misappropriated client trust funds. The *Segretti* and *Rodgers* facts are far more comparable to the current facts than those in *Weller*. Like those respondents, Crane had no prior record of misconduct. The likelihood of his repeating the misconduct is low. Recently, in *Friedman* v. *State Bar* (1990) 50 Cal.3d 235 the Supreme Court ordered three years' actual suspension of an attorney with no prior record. However, his lack of prior discipline was offset by repeated untruths in the course of the State Bar investigation and an attempt

24. As indicated above, Crane has not argued the three-year actual suspension recommended by the referee is excessive. We decline to speculate whether this is due to Crane's present circumstances as a nonresident of the state employed in a nonlegal capacity. The appropriate length of actual suspension is nonetheless an issue before us as part of our de novo review of the record.

to manufacture evidence—none of which is true of Crane. To the contrary, the record shows Crane to have been cooperative and truthful throughout the proceeding. We also are able to protect the public by requiring a standard 1.4(c)(ii) hearing prior to Crane's resumption of practice. We therefore recommend two years of actual suspension as sufficient discipline.

In addition to two years' actual suspension, we recommend that Crane be required to take and pass the Professional Responsibility Examination ("PREX"), comply with standard 1.4(c)(ii), and complete restitution if he has not already done so prior to resuming the practice of law. **[21a]** Neither compliance with California Rules of Court, rule 955[25] **[21b - see fn. 25]** nor probation terms appear warranted since Crane has not lived in the state for several years and does not practice law. Nor has he committed any acts of misconduct in over six years. Compliance with standard 1.4(c)(ii) in our view will sufficiently protect the public.

With respect to DePew, as all parties recognize, his acts of misconduct were far more limited. He was liable for two counts of deceit in agreeing to front for Crane as house counsel, president and secretary of Universal (count four) and in misrepresenting the nature of the negotiations between Crane and Universal to Kupec (count nine). He did not deceive any client, but he did act deceptively on behalf of a client for remuneration ($3,500) which he disgorged to SEGA immediately upon being advised by his own consultant, Sullivan, that his conduct was wrongful. Moreover, it is undisputed that Crane dictated all of DePew's actions which were performed for Crane's benefit.

Had DePew acted only out of gross negligence, as the referee concluded, in view of his clean prior and subsequent record no actual suspension might be warranted. But this finding of the referee is puzzling in light of DePew's admission that he knew Synapse and HES were deceived by Crane's pseudonyms. DePew also had to know that SEGA was being tricked by Crane's pseudonyms and use of self-authorized sublicensing agreements. He clearly did not act out of mere negligence. Neither the examiner's call for lengthy suspension or disbarment, nor DePew's counsel's argument for no suspension is warranted under such circumstances. We undertake a balanced consideration of the relevant factors. (See *McCray* v. *State Bar* (1985) 38 Cal.3d 257, 293.) This takes into account the lengthy delay in prosecution and the opportunity it provided DePew to continue practicing without further incident. We also take into account the need to protect the integrity of the bar and retain public confidence. (See standard 1.3.)

[22] Honesty is one of the most fundamental rules of ethics for attorneys. (*Tomlinson* v. *State Bar* (1975) 13 Cal.3d 567, 577; *Gold* v. *State Bar* (1989) 49 Cal.3d 908, 914.) In *Gold*, an attorney made misrepresentations as to two different matters, in one case fabricating a settlement. The Supreme Court concluded, inter alia, that he committed acts of moral turpitude in violation of section 6106. It nonetheless reduced the recommended 90-day actual suspension to 30 days based on mitigating circumstances, including absence of a prior record of discipline over many years of practice.

Here, the length of practice is much shorter than in *Gold* but DePew does have other mitigation including prompt return of all fees earned in the misguided venture. In *Wren* v. *State Bar* (1983) 34 Cal.3d 81, the Court likewise found Wren to have violated section 6106 by serious misrepresentations to a client and by fabricating the status of an unfiled lawsuit. Wren's conduct was compounded by attempting to mislead the State Bar by giving false and misleading testimony before the hearing panel. The court ordered 45 days actual suspension.

Here, we do not have a finding of false and misleading testimony, but we do have highly questionable recollection of the extent of his knowledge of wrongdoing at the time. We also have evidence that to this day respondent does not fully appreciate

25. **[21b]** We recognize that compliance with rule 955 is customary for suspensions of this length but the rule does make such an order discretionary. From these facts, it appears unnecessary.

the significance of his misbehavior. (See, e.g., *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1100 [Supreme Court noted respondent's "apparent lack of insight into the wrongfulness of his actions" and found that one prior imposition of discipline and several aggravating factors justified six months suspension].) Here, DePew had some insight and remorsefulness but not complete understanding of the impropriety of his conduct. Consideration of the integrity of the profession, the need to maintain high professional standards and public confidence in the legal profession warrants actual suspension even if DePew no longer poses a danger to the public. (Cf. *In re Basinger* (1988) 45 Cal.3d 1348, 1360.)

Forty-five days suspension will afford DePew the opportunity to reflect on his professional obligations and gain insight into the wrongfulness of his past conduct. We also recommend that he take and pass the PREX within one year, but do not consider probation necessary in light of the isolated nature of the offense and his satisfactory conduct over more than six years following its occurrence.

IV. FORMAL RECOMMENDATION

For the reasons stated above, we recommend as follows. First, as to respondent Robert Daniel Crane, we recommend: (1) that he be suspended from the practice of law in this state for a period of two years from the effective date of the Supreme Court's order herein, and until he (a) has completed the restitution to SEGA required by the settlement agreement (exhs. 21, 22, 23) and has provided satisfactory evidence of said restitution to the Probation Department, State Bar Court, Los Angeles, and (b) 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; and (2) that prior to the expiration of his actual suspension, he take and pass the Professional Responsibility Examination, and furnish satisfactory proof thereof to the Probation Department, State Bar Court, Los Angeles.

Second, as to respondent Brian David DePew, we recommend (1) that he be suspended from the practice of law in this state for a period of forty-five (45) days from the effective date of the Supreme Court's order herein, and (2) that he be required to take and pass the Professional Responsibility Examination, and furnish satisfactory proof thereof to the Probation Department, State Bar Court, Los Angeles, within one year of the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.