

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**ANDREW J. MARSH**

A Member of the State Bar

[No. 86-O-19485]

Filed December 19, 1990

**SUMMARY**

In a default matter, the respondent was found culpable of one count of failing to perform services, failing to return unearned advance fees, and failing to communicate with his client, and a second count of failing to cooperate with the State Bar's investigation of the client abandonment charges. Both the examiner and the hearing judge mistakenly believed that the respondent had only been disciplined once previously, when in fact he had been suspended twice by the Supreme Court.

The hearing judge recommended that the respondent be placed on actual suspension until he paid restitution and for nine months thereafter, and that he be required to pass the Professional Responsibility Examination. Contrary to the examiner's recommendation, however, the hearing judge declined to place the respondent on disciplinary probation. The judge reasoned that the respondent's failure to appear in the State Bar proceeding indicated that he was not amenable to probation. (Hon. Ellen R. Peck, Hearing Judge.)

The examiner requested review, contending that the judge should have recommended that respondent be placed on probation for three years. On review, the review department modified the hearing judge's findings and conclusions. It deleted the finding of failure to communicate, because it was based on misconduct occurring prior to the effective date of the statute allegedly violated, and also deleted the conclusion that the respondent had violated his statutory duty to uphold the law by violating various Rules of Professional Conduct. The review department also deleted a finding of failure to perform services that was based on facts not charged in the notice to show cause.

On the question of discipline, the review department remanded to the hearing judge to take evidence on and consider the effect of the respondent's entire prior disciplinary record. In so doing, it stated that as a matter of policy, defaulting respondents should not necessarily be precluded from receiving probation as part of their recommended discipline. Rather, each attorney's suitability for probation should be evaluated on a case-by-case basis, bearing in mind the functions of probation in connection with public protection as well as rehabilitation.

COUNSEL FOR PARTIES

For Office of Trials: Teri Katz

For Respondent: No appearance (default)

HEADNOTES

- [1 a, b] **106.20 Procedure—Pleadings—Notice of Charges**  
**106.40 Procedure—Pleadings—Amendment**  
**270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
 Where notice to show cause failed to charge respondent with failing to perform services in a certain matter, and notice to show cause was not amended to conform to proof at hearing, review department struck hearing department's finding of culpability with respect to that matter.
- [2] **171 Discipline—Restitution**  
**1099 Substantive Issues re Discipline—Miscellaneous**  
 Typically, Supreme Court orders actual suspension for an appropriate period and until restitution is made, rather than ordering suspension until restitution is made and then for an additional fixed term.
- [3] **214.30 State Bar Act—Section 6068(m)**  
 Attorney whose failure to communicate with client occurred prior to effective date of statute requiring such communication could not be found culpable of violating that statute.
- [4] **106.30 Procedure—Pleadings—Duplicative Charges**  
**213.10 State Bar Act—Section 6068(a)**  
 When misconduct violates a specific Rule of Professional Conduct, it is unnecessary to allege the same misconduct as a violation of the attorney's statutory duty to uphold the law.
- [5 a, b] **165 Adequacy of Hearing Decision**  
**513.90 Aggravation—Prior Record—Found but Discounted**  
**802.69 Standards—Appropriate Sanction—Generally**  
**806.59 Standards—Disbarment After Two Priors**  
**1099 Substantive Issues re Discipline—Miscellaneous**  
 The Supreme Court has expressed concern with assuring that the record in disciplinary proceedings reflects the correct evidence and finding of prior discipline or lack thereof. Accordingly, where only one of respondent's two prior disciplinary proceedings was made a part of the record and weighed by the hearing judge, it was necessary for the review department to remand the matter to the hearing judge to take evidence on the other prior discipline and consider its effect on the recommended discipline.
- [6] **172.19 Discipline—Probation—Other Issues**  
**179 Discipline Conditions—Miscellaneous**  
**802.30 Standards—Purposes of Sanctions**  
**802.50 Standards—Reasonable Conditions**  
 The goals of the State Bar's probation program are: (1) public protection; (2) rehabilitation of the respondent; (3) maintaining integrity of the legal profession; (4) enforcement of restitution orders;

(5) aiding future enforcement and (6) partially alleviating discipline. These goals are to be realized by use of probation conditions which are innovative, individualized, rehabilitative and flexible and which are implemented using the efforts of volunteer probation monitor referees.

[7] **802.30 Standards—Purposes of Sanctions**

The fundamental purposes of attorney discipline are protection of the public and legal community and the maintenance of high professional standards and public confidence in the legal system. Rehabilitation of the attorney is also a permissible goal of discipline as long as the rehabilitative sanction does not conflict with the primary aims of attorney discipline. Unlike the criminal justice system, punishment is not one of the objectives of attorney discipline.

[8 a-c] **107 Procedure—Default/Relief from Default**

**172.19 Discipline—Probation—Other Issues**

**802.69 Standards—Appropriate Sanction—Generally**

**1099 Substantive Issues re Discipline—Miscellaneous**

As a matter of policy, not all attorneys who fail to participate in disciplinary proceedings should be precluded from receiving discipline containing probation conditions. Defaulting attorneys do present a problem for the hearing department in that the cause of their misconduct is not always evident on the record, thus making it difficult to determine which probation conditions or duties would further the goals of discipline. Nonetheless, the view that an attorney's default is prima facie evidence that the attorney is not amenable to probation runs contrary to the duty to consider each case on its own merits to determine appropriate discipline, and also precludes the use of probation monitoring as an effective means of public protection.

[9] **802.69 Standards—Appropriate Sanction—Generally**

**1099 Substantive Issues re Discipline—Miscellaneous**

In determining recommended discipline, matters should be considered on a case-by-case basis, balancing the relevant factors, including the facts, gravity of misconduct and mitigating and aggravating evidence, and considering them in light of the objectives of attorney discipline.

[10] **801.20 Standards—Purpose**

**802.69 Standards—Appropriate Sanction—Generally**

**1091 Substantive Issues re Discipline—Proportionality**

Despite the need to examine cases on an individual basis to determine appropriate discipline, it is also a goal of disciplinary proceedings that there be consistent recommendations as to discipline, a goal that has been achieved in large measure through the application of the Standards for Attorney Sanctions for Professional Misconduct.

[11] **172.19 Discipline—Probation—Other Issues**

**176 Discipline—Standard 1.4(c)(ii)**

**179 Discipline Conditions—Miscellaneous**

**802.69 Standards—Appropriate Sanction—Generally**

**1099 Substantive Issues re Discipline—Miscellaneous**

Probation is not mandated in all cases where an actual suspension is imposed. When a lengthy period of actual suspension is recommended, imposing the provisions of standard 1.4(c)(ii) in lieu of a probation grant may serve adequately to protect the public and test the attorney's rehabilitation. Probation may not be indicated by virtue of the nature of the misconduct, the passage of time since the misconduct or clear evidence of the attorney's rehabilitation.

- [12] **172.15 Discipline—Probation Monitor—Not Appointed**  
 Appointment of probation monitor may not be necessary where only routine, simple periodic reporting conditions are recommended, or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination.
- [13] **172.19 Discipline—Probation—Other Issues**  
**1099 Substantive Issues re Discipline—Miscellaneous**  
 A respondent should not be admitted to disciplinary probation when there is clear evidence that the respondent will not comply with its conditions.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

- 213.91 Section 6068(i)
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]

##### Not Found

- 213.15 Section 6068(a)
- 214.35 Section 6068(m)
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

#### Aggravation

##### Found

- 511 Prior Record
- 541 Bad Faith, Dishonesty
- 591 Indifference
- 611 Lack of Candor—Bar

#### Standards

- 802.40 Sanctions Available

## OPINION

STOVITZ, J.:

The issue raised on review is one of first impression: whether probation is an appropriate discipline where, as in this case, the respondent attorney has defaulted. The State Bar Court hearing judge rejected probation; the State Bar's examiner representing the Office of Trial Counsel argues that it should be imposed in this case. Upon independent review of the record, we modify the decision to delete the culpability findings on Business and Professions Code section 6068, subdivisions (a) and (m), and to strike an uncharged violation that respondent failed to perform real estate work. We remand this matter to the hearing judge to provide the examiner with an opportunity to introduce additional evidence concerning a prior disciplinary case the record of which was not introduced by the examiner and therefore not considered by the hearing judge; and for the hearing judge to modify, if appropriate, her recommendation as to the discipline in this case.

### 1. FACTS

#### A. Introduction

Respondent Andrew J. Marsh was admitted to practice law in California on January 9, 1957. As we shall discuss *post*, he has two prior disciplinary suspensions.

In the instant proceeding, a two-count notice to show cause charged respondent with misconduct involving one client (count one) and failure to cooperate with the State Bar (count two). Respondent failed to answer the notice and his default was entered on September 6, 1989. On October 30, 1989, a default hearing was held. At that hearing, the judge granted the examiner's motion to deem admitted the misconduct alleged in the notice. (Bus. & Prof. Code, § 6088; rule 552.1(c), Trans. Rules Proc. of State

Bar.) In addition, the examiner offered documentary evidence, the testimony of one witness and argument relating to the asserted misconduct. The facts concerning the misconduct as found by the hearing judge and adopted by us are at pages 3-10 of the hearing judge's corrected decision.<sup>1</sup> We summarize those facts as follows.

#### B. Abandonment of Client

Prior to January 1985, Jose Larios Aguilar was arrested and charged with first degree murder. (Exhibits 7-8 [attachment A], hereinafter "declaration"; R.T. pp. 15-16.) Soon after Aguilar's arrest, respondent met with Aguilar to discuss representing him in the case. Aguilar did not retain respondent for his trial and instead was represented by Joseph Lax. Aguilar was convicted of involuntary manslaughter and because he was then on probation for previous state and federal criminal matters, the conviction violated his probation as well. Aguilar was sentenced to three years in prison for the involuntary manslaughter, two years for the use of a firearm in the commission of the offense, and three years for violation of state probation.

Although Lax believed an appeal of the manslaughter conviction had merit (R.T. p. 17) and did prepare the notice of appeal for Aguilar's signature which was filed October 22, 1985 (exh. 5), Lax did not want to handle the appeal. On October 29, 1985, Lax sent respondent a copy of the notice of appeal and notice of application for bail pending appeal and order (exh. 6), so that respondent could represent Aguilar on the appeal. Lax also advised respondent to file an appeal of the violation of state probation. (Exh. 4.)

Aguilar sent his sister on his behalf to meet with respondent and to pay him \$3,000 as a partial payment of fees to represent Aguilar on the state appeals, in his federal probation violation case and on an unrelated real estate matter.<sup>2</sup> [1a - see fn. 2] Aguilar's

1. The first decision in this case was filed on March 12, 1990. A corrected decision, rectifying a typographical error, was filed the same day and is the decision we review.

2. [1a] The notice to show cause did not charge the respondent with failing to perform any work on the Yorba Linda real estate matter, nor was the notice amended to conform to proof at the hearing. Consequently, we strike this finding from the decision. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 654.)

sister met respondent on February 22, 1986, and received a receipt for \$3,000. (Declaration, exh. A.) Shortly thereafter, respondent visited Aguilar in prison to discuss his case and Aguilar gave him a letter from the federal authorities offering to allow his federal sentence to run concurrently with his state incarceration. (Declaration at p. 2.)

Aguilar never heard from respondent again. When advised by the state Court of Appeal that it had no record of an attorney appearing on his behalf, Aguilar wrote on April 6, 1986, from prison that respondent was his attorney and provided respondent's address. (Declaration, exh. B.) The Court of Appeal appointed Mary G. Swift as counsel for Aguilar in the summer of 1986. She was unable to contact respondent concerning the case nor could she obtain from him the record on appeal, which the court had forwarded to respondent as counsel for Aguilar. (Exh. 9.)

Aguilar wrote a number of letters to respondent receiving no response and finally wrote to the federal authorities concerning his federal probation violation. As a result, he stated, "the Judge sent for me . . ." (Declaration at p. 3.) Mr. Lax represented Aguilar at the federal probation violation proceedings, having heard through Aguilar's sister that respondent had failed to appear at an earlier scheduled court proceeding and that a federal public defender had been appointed. (R.T. pp. 27-29.) Lax later met respondent and asked him why he was not working on the Aguilar matter. Respondent told Lax that he needed more money to continue to work on the case. (R.T. p. 24.)

#### C. Failure to Cooperate With State Bar Investigation

A State Bar investigator contacted respondent by mail twice in 1987 in connection with the investigation of the Aguilar representation. Investigator Ysabel Naetzel wrote to respondent on August 11, 1987, advising him that a complaint had been filed against him and seeking information and an explana-

tion within two weeks. (Exh. 10, attached exh. A.) No response was received and investigator Naetzel again wrote to respondent on August 31, 1987. (Exh. 10, attached exh. B.) In that letter, she advised him of his duty to cooperate with the State Bar under Business and Professions Code section 6068 (i) and again asked for his reply within two weeks. She received no reply to this letter. Both letters were sent to respondent's State Bar membership address and neither was returned as undeliverable. (Exh. 10 at p. 2.)

#### D. Hearing Judge's Findings, Conclusions and Recommendation

The hearing judge found that respondent had (1) failed to perform services contrary to rule 6-101(A)(2)<sup>3</sup>; (2) withdrawn his services without protecting his client from foreseeable prejudice, in violation of rule 2-111(A)(2); (3) failed to return unearned fees, contrary to rule 2-111(A)(3); (4) failed to communicate with his client, contrary to section 6068 (m); (5) violated section 6068 (i) by failing to cooperate in the State Bar investigation; and (6) violated section 6068 (a) by virtue of the three rule violations in connection with his Aguilar representation.

The hearing judge did not find any evidence in mitigation of respondent's misconduct. As evidence in aggravation, she found respondent's actions concerning his client Aguilar to be in bad faith. (Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iii); hereafter "standards".) She also found that respondent was indifferent toward rectifying the harm his misconduct caused his client (std. 1.2(b)(v)) and failed to cooperate with the State Bar in its disciplinary proceedings. (Std. 1.2(b)(vi).) The hearing judge also sought to weigh respondent's prior record of discipline as an aggravating factor (stds. 1.2(b)(i) and 1.7), but weighed the effect of only one, rather than two prior disciplinary suspensions.

Exhibit 11 is a certified copy of a portion of the State Bar's computerized public record of

3. Unless otherwise noted, all references to rules are to the Rules of Professional Conduct of the State Bar in effect

January 1, 1975, to May 26, 1989, and all references to sections are to the Business and Professions Code.

respondent's membership status. That document shows that effective August 27, 1979, the Supreme Court suspended respondent from the practice of law for three years, stayed, with three years probation and an actual suspension for six months and passage of the Professional Responsibility Examination. (Bar Misc. No. 4154.) That suspension predated by less than a year the one disciplinary suspension considered by the hearing judge as a prior record, *In the Matter of Andrew Marsh* (Bar Misc. No. 4244).<sup>4</sup> (Exh. 12, p. 14.)

The one prior discipline record which was considered by the hearing judge resulted in respondent's two year suspension stayed on conditions including a three-month actual suspension. The record of that discipline showed respondent's failure to perform legal services and communicate with clients in a personal injury case between 1975 and 1977. (Exh. 13.) Because the examiner did not introduce in evidence the records of respondent's first prior suspension, we have no knowledge of respondent's misconduct therein. We know only that it resulted in discipline more severe than his second prior which the judge considered.<sup>5</sup>

The hearing judge's recommended discipline, was a nine-month suspension to commence after respondent pays Aguilar \$3,000 in restitution with respondent to be suspended until restitution is made;<sup>6</sup> [2 - see fn. 6] notifications to clients, courts and counsel under subsections (a) and (c) of rule 955, California Rules of Court; and successful passage of

the Professional Responsibility Examination within one year. The recommendation was based in large measure on the single prior misconduct the judge considered and the respondent's default in the instant case. She found imposition of a term of probation inappropriate because of respondent's failure to appear and participate in the disciplinary proceedings. Regarding probation, the judge wrote as follows in her decision: "Respondent's failure to appear in these proceedings is prima facie evidence that he is not amenable to probation at this time. Respondent's non-appearance has deprived the Court of the opportunity to evaluate what probationary conditions might be adequate to protect the public, and in his absence, I cannot speculate what they should be. [¶] The public, the courts, and the profession are not protected by meaningless grants of probation to attorneys who have demonstrated that they are unwilling to participate in the process." (Decision at p. 24.)

## 2. DISCUSSION

### A. Findings and Conclusions

Before addressing the issues of discipline raised on review, we first adopt necessary changes to the hearing judge's findings and conclusions. [3] First, we delete the conclusions that respondent violated section 6068 (m) by failing to communicate with Aguilar and that his conduct overall violated section 6068 (a). (Conclusions A4 and A5; decision, pp. 16-17.) The former is inconsistent with *Baker v. State Bar* (1989) 49 Cal.3d 804, 815, in that the record

4. In fact, the Disciplinary Board's decision in the second case referred to the first case then pending in the Supreme Court and the hearing panel made an alternative recommendation in light of the pending matter. (Exh. 12, p. 14.)

5. Although the examiner introduced in evidence respondent's computerized State Bar public record, she appeared to misread the exhibit which listed respondent's two prior disciplinary suspensions. She thought that respondent's other prior proceeding only showed a dismissal of a referral proceeding under rule 955, California Rules of Court. (R.T. pp. 11-12.) While such a proceeding was dismissed, respondent had been disciplined as stated above, had been ordered to comply with rule 955 as part of that discipline and that discipline was separate from the one other prior discipline considered by the judge. (Compare exh. 11 with exh. 12.) Another circumstance supporting our conclusion that the examiner

mistakenly assumed that respondent had only one prior disciplinary suspension is the absence of any reference in the examiner's briefs or the judge's decision to standard 1.7(b), providing for disbarment, absent the most compelling mitigation, if culpability is found in a case where respondent has been twice previously disciplined. (See *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; but see *Arm v. State Bar* (1990) 50 Cal.3d 763, 788-789.)

6. [2] Although we express no opinion at this time on the propriety of an open-ended period of suspension until restitution followed by a fixed term of suspension, we note that this order of discipline is the converse of the phraseology typically used by the Supreme Court in such matters: an appropriate period of actual suspension and until restitution of the specified amount is made and satisfactory proof is provided to the State Bar Court.

demonstrates that respondent failed to communicate with his client prior to the summer of 1986, when the Court of Appeal appointed another attorney to represent Aguilar. Therefore, section 6068 (m) is not an appropriate basis for discipline since it was not in effect at the time of his misconduct. (Stats. 1986, ch. 475, § 2, pp. 1772-1773, eff. January 1, 1987; see also *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 902-903.)

[4] If, as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of section 6068, subdivision (a). (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; see also *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561-562 [no factual basis in record for finding of culpability under section 6068 (a)].)

[1b] The culpability findings and conclusions (decision, finding 10, conclusion A.1.a. and A.1.b.) suggest that respondent failed to perform legal services contrary to former rule 6-101(A)(2) because he did not do any work on the Yorba Linda real estate matter. Since the notice to show cause did not charge a failure to perform services in any civil matter, nor was the notice amended at the hearing (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1151-1152), we delete from the cited finding and conclusions any reference to respondent's performance of services in that civil matter. (See decision, pp. 5 and 10.)

#### B. Issues Concerning Probation

[5A] Although we must remand this matter to the hearing judge to take evidence on and consider the effect of respondent's other disciplinary suspension on her ultimate recommendation, in the event that she should deem a stayed suspension appropriate discipline, we shall discuss the issue of probation raised by the examiner. The examiner requested review of the decision on the ground that the discipline was insufficient because the recommendation did not include a period of probation, with conditions. As noted, *ante*, the hearing judge had rejected probation.

The examiner urges imposition of a three-year probation period in addition to the recommended

sanction. She argues that otherwise the respondent can benefit by defaulting. If defaulting results in removing respondent from the ongoing scrutiny which probation would require, respondent will benefit if probation is not granted. In her view, respondent has avoided bar scrutiny into his conduct as a suspended attorney by his noncooperation and default.

She contends that the hearing judge applied the standards for imposing criminal probation in this case, rather than precepts for attorney discipline. When mitigation is shown or where it will serve the "ends of justice," the criminal probation system properly considers such factors as the defendant's willingness and ability to comply with probation imposed. (Pen. Code, § 1203, subd. (b).) In contrast, probation in the attorney discipline system, while presumably rehabilitative, is applied primarily as an additional measure to protect the public, courts and the legal profession. (See stds. 1.3 and 1.4(c)(i).) Rather than characterizing disciplinary probation as a "privilege" (decision at p. 24), the examiner sees it as a burden on the attorney. In her view, it is particularly important to require probation and reporting conditions in cases where it is not evident what caused the attorney's misconduct. Without some type of monitoring, the examiner argues, the disciplinary system cannot gauge whether the actual suspension has adequately protected the public and the respondent is fit to resume the practice of law.

The origin and use of probation as a means of attorney discipline have not yet been addressed by this review department. Nor has the subject been addressed by the California Supreme Court. Prior to 1963, attorney discipline short of disbarment consisted of actual suspensions, imposed by order of the Supreme Court, and public or private reprovings, imposed by the State Bar. (Bus. & Prof. Code, §§ 6077 and 6078.) The first reported California Supreme Court decision ordering a term of probation in an attorney discipline case was *Di Gaeta v. State Bar* (1963) 59 Cal.2d 116. In that case, the Court reviewed a challenge to the reasonableness of a recommendation of the Board of Governors of the State Bar (the predecessor body to the Disciplinary Board and the State Bar Court) to suspend an attorney from the practice of law for six months, but to stay the effect of the suspension order upon certain

probation conditions. (*Di Gaeta v. State Bar, supra*, 59 Cal.2d at p. 120.) The conditions provided for restitution to the victims of the attorney's misconduct within three months, and an actual suspension from law practice of three months and until restitution was paid (but not to exceed six months total actual suspension). (*Ibid.*) The Court sustained the recommended sanction and rejected the attorney's challenge that the discipline was excessive. (*Ibid.*)

In increasing numbers of cases thereafter, the Board of Governors of the State Bar recommended, and the Supreme Court imposed, stayed orders of suspension subject to probation conditions. Initially, the probation conditions required self-declarations filed with the State Bar, usually on a quarterly basis, and the program was administered without any formalities or policy guidelines. By 1981, after the creation of the State Bar Court, disciplinary cases in which an actual suspension was ordered without probationary conditions were rare. In that year, the Board of Governors recognized the inadequacies of the informal probation program and in response created the probation department within the State Bar Court by adopting additions and amendments to the Rules of Procedure of the State Bar, effective February 1, 1982. (Rules Proc. of State Bar, rules 100, 101, 103.1, 110, 230, 262, 573, 610, 611, 612 and 613.) [6] The State Bar committed itself to expand the probation program and to achieve six goals for the operation of probation. As set forth in the Board's resolution, they are: (1) the protection of the public; (2) the rehabilitation of the respondent; (3) the integrity of the legal profession; (4) the enforcement of restitution orders; (5) an aid to future enforcement; and (6) the partial alleviation of discipline. (Resolution of the Board of Governors of the State Bar, dated January 16, 1982.) Those goals were to be realized through the use of conditions of probation which were "innovative, individualized, rehabilitative, and flexible" and to be implemented with the efforts of volunteer probation monitor referees. (*Ibid.*) This is the system presently in use.

[7] While the fundamental purposes of attorney discipline are the protection of the public and legal community and the maintenance of high professional standards and public confidence in the legal profession, rehabilitation of the member is also a permissible goal of discipline as long as the rehabilitative sanction does not conflict with the primary aims. (Std. 1.3.) The Supreme Court has noted the rehabilitative aim of probation in disciplinary matters (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 319; *In re Nevill* (1985) 39 Cal.3d 729, 738, fn. 10),<sup>7</sup> as well as noting implicitly the benefit of probation monitoring. (*Rodgers v. State Bar, supra*, 48 Cal.3d at p. 319.) Unlike the criminal justice system, punishment is not one of the objectives of attorney discipline. (*Id.* at p. 318.)

[8a] We are not prepared as a matter of policy to preclude all attorneys who fail to respond to disciplinary charges from receiving discipline containing probation conditions. [9] In determining the nature and degree of discipline, our Supreme Court instructs us that we must examine the facts in each case and consider the gravity of the misconduct, including the mitigating and aggravating evidence, in light of the purposes of discipline. (*In re Aquino* (1989) 49 Cal.3d 1122, 1129.) These relevant factors are balanced on a case-by-case basis. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.) [10] Nevertheless, the Supreme Court has often expressed the need to assure consistency in disciplinary cases. (See *In re Naney* (1990) 51 Cal.3d 186, 190; *In re Lamb* (1984) 49 Cal.3d 239, 245.) This has been achieved in large measure through the application of the Standards for Attorney Sanctions for Professional Misconduct, adopted as part of the Rules of Procedure of the State Bar Court. (*Ibid.*; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11, 268.)

[8b] Defaulting attorneys do present a problem for hearing judges at the time disciplinary sanctions are fashioned and imposed. As both the hearing judge in her decision and the examiner in her brief

7. However, the Court noted in *In re Nevill*, "The rules [of procedure of the State Bar concerning probation] do not provide for revocation of probation when the *rehabilitative*

*objective of probation* is not being met despite compliance with the probation conditions." (*In re Nevill, supra*, 39 Cal.3d at p. 738, fn. 10, emphasis added.)

acknowledge, the record of a default hearing often does not reveal the source of a member's misconduct so as to enable the State Bar to determine which, if any, probation conditions or duties would further the goals of discipline.

[8c] Despite the problems occasioned by defaulting attorneys, we are not of the view that when a default order is entered in a case, it in and of itself constitutes "prima facie evidence that he [respondent] is not amenable to probation at this time." (Decision at p. 24.) That finding runs contrary to the duty of the State Bar Court to consider each case on its own merits to determine the appropriate discipline. It also, as the examiner has noted, precludes the use of an effective means to safeguard the public—the monitoring of the respondent's practice by an experienced probation monitor to assure that the respondent has "reformed his conduct to the ethical strictures of the profession." (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.)

In this case, attorney Lax testified that he had seen respondent about six or seven weeks before the October, 1989, disciplinary hearing. Lax believed respondent was still practicing law, as Lax saw him "in and out of courtrooms" in the Ventura courthouse. (R.T. pp. 25-26.) If, on remand, the judge deems stayed suspension appropriate, she should consider whether on the facts probation would be appropriate for public protection.

[11] We do not construe probation to be mandated in all cases where an actual suspension is imposed. Where a lengthy actual suspension is recommended, the provisions of standard 1.4(c)(ii) may adequately protect the public and test the attorney's rehabilitation. Probation may not be needed or appropriate by virtue of the nature of the misconduct, the passage of time since the commission of the violations or clear evidence of an attorney's successful rehabilitation. [12] Even where probation is recommended, use of a probation monitor may not be necessary where only routine, simple, periodic "reporting" conditions are recommended or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination. [13] We would also agree that a respondent should not be admitted to disciplinary probation where there is

clear evidence that he or she will not comply with its conditions. In this case, respondent has apparently complied satisfactorily with past probation orders and the present record does not clearly demonstrate that he will not comply with probation. It is the facts in the given case which must guide the appropriate discipline.

[5b] As we stated earlier, a significant matter of aggravation, respondent's additional prior record of disciplinary suspension, was not made a part of the record nor weighed by the hearing judge.

The Supreme Court has expressed its concern with assuring that the record reflects the correct evidence and finding of prior discipline or lack thereof. (*In re Mostman* (1989) 47 Cal.3d 725, 741.) We act on the Court's concern by ordering this matter remanded to the hearing judge.

### 3. DISPOSITION

With the changes to the judge's findings and conclusions set forth above, we remand this matter to the hearing judge to take evidence on the nature of respondent's prior suspension in Bar Misc. No. 4154 and for a discipline recommendation considering the effect, if any, that the additional prior discipline should have on the degree of discipline. (See std. 1.7(b); *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *Arm v. State Bar* (1990) 50 Cal.3d 763, 788-789.) If suspension is again recommended, then the issue of probation should be readdressed in light of the principles set forth in this opinion.

We concur:

PEARLMAN, P.J.  
NORIAN, J.