STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

EDWARD C. BURCKHARDT

A Member of the State Bar

[No. 88-O-15079]

Filed February 4, 1991; as modified, February 8, 1991

SUMMARY

Respondent was found culpable of failure to communicate with clients, unauthorized practice of law, failure to perform competently, improper withdrawal from representation, acceptance of an illegal fee, and failure to cooperate with the State Bar's investigation of his misconduct. The hearing judge rejected culpability under Business and Professions Code section 6106, but found in aggravation that respondent had committed acts which fell within the scope of section 6106. The hearing judge found no evidence in mitigation. (Hon. Jennifer Gee, Hearing Judge.)

The examiner sought review, contending that the hearing judge erred in reaching what the examiner characterized as a conclusion that respondent did not violate section 6106 of the Business and Professions Code. The issue raised was essentially one of clarification of the interpretation of how section 6106 operates when misconduct within its ambit is found. The review department held that section 6106 is the proper basis for charging and finding culpability for acts of moral turpitude, dishonesty and corruption. It therefore found a violation of section 6106, and deleted, as duplicative, the finding in aggravation based on the same facts. The review department also added a conclusion of prejudicial withdrawal from representation, disagreeing with the hearing judge and holding that such conclusion does not require a finding of intent to withdraw. These changes did not result in any change in the discipline recommendation.

The review department also found that respondent's 13 years of practice without prior discipline was an appropriate factor in mitigation and should be given significant weight. Respondent's prior disciplinary record was discounted, as it stemmed from conduct roughly contemporaneous with that involved in the present matter. The review department adopted the recommendation of two years stayed suspension, three years probation, and one year of actual suspension consecutive to respondent's prior actual suspension. It also recommended that respondent be required to demonstrate rehabilitation and fitness to practice under standard 1.4(c)(ii) before returning to active practice.

COUNSEL FOR PARTIES

For Office of Trials: Hans M. Uthe

For Respondent: No appearance (default)

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] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record

Although party requesting review raised only one issue regarding a legal conclusion drawn by the hearing judge, review department had duty to conduct independent, de novo review of record. (Trans. Rules Proc. of State Bar, rule 453(a).) Review department therefore undertook to determine whether remainder of hearing judge's findings and conclusions were supported by record, and whether recommended discipline was appropriate. In so doing, review department held that hearing judge erred in rejecting culpability on one charge.

[2] **214.30 State Bar Act—Section 6068(m)**

Culpability for violating statutory duty to communicate with clients may only be predicated on failure to communicate after effective date of statute. Where respondent failed to respond to letter sent by client after effective date, respondent's failure to communicate continued after effective date and culpability finding was appropriate.

[3] **230.00 State Bar Act—Section 6125**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Finding that respondent was culpable of prejudicial withdrawal from representation and of failure to perform competently was based only on respondent's failure to render services while not under suspension; during suspension, respondent was precluded from practicing law, and misconduct in that connection is governed by statute precluding unauthorized practice of law.

[4] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**

Charge of prejudicial withdrawal from representation was established by clear and convincing evidence, even though respondent did continue to communicate with one of two joint clients through a certain date, where there was no evidence that respondent had communicated with either client, or taken any action on clients' behalf, during extended period of time between that date and filing of notice to show cause.

[5] **204.20 Culpability—Intent Requirement**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Rule prohibiting prejudicial withdrawal from representation may reasonably be construed to apply when attorney ceases to provide services, even in absence of intent to withdraw as counsel.

[6] **221.00 State Bar Act—Section 6106**

Conclusion that respondent was not culpable on charge of violating section 6106 would be inconsistent with Supreme Court precedent where hearing judge made factual findings that respondent lied to clients about status of their claim and wrongfully held himself out during suspension as entitled to practice law.

[7 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.30 Procedure—Pleadings—Duplicative Charges
220.10 State Bar Act—Section 6103, clause 2

As terms of art, an attorney's "oath and duties" are defined by sections 6067 and 6068. Section 6103 confirms the Supreme Court's inherent authority to impose discipline for violation of oath or duties

defined by other statutes. Accordingly, charge of violating section 6103 or finding that attorney has committed misconduct thereunder is redundant and adds nothing to charges otherwise pending. Charge of violating section 6103 "oath and duties" does not put respondent on notice of any particular misconduct without reference to other statutes defining the particular duty allegedly violated.

[8 a, b] **221.00 State Bar Act—Section 6106**
Charging a violation of section 6106 is the basis for imposing discipline for acts of moral turpitude. An attorney cannot be disciplined under section 6106 except based on an explicit determination that the attorney committed an act within its scope. The source of precise definition of such acts is not any specific statutes and rules, but case law and common understanding. The scope of section 6106 includes any act of moral turpitude, dishonesty, or corruption, whether or not violative of any civil or criminal statute.

[9] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
Charge of violating section 6106 put respondent on notice, to which respondent was entitled, that misconduct charged involved moral turpitude, dishonesty or corruption as described by statute and case law.

[10] **710.10 Mitigation—No Prior Record—Found**
Thirteen years of practice without discipline, before engaging in first act of misconduct, is appropriate factor in mitigation; such factor was appropriately considered even though respondent had prior disciplinary record, because such record stemmed from conduct roughly contemporaneous with that involved in subsequent disciplinary matter.

[11] **513.10 Aggravation—Prior Record—Found but Discounted**
Aggravating force of prior disciplinary record was diminished by fact that it involved misconduct occurring at same time as that in subsequent matter, and therefore did not constitute prior warning to respondent of the wrongful nature and possible disciplinary consequences of respondent's conduct.

[12] **221.00 State Bar Act—Section 6106**
543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted
Where hearing judge's finding of aggravation for conduct surrounded by bad faith, dishonesty and concealment reflected same conduct that review department relied on as basis for finding respondent culpable of acts of moral turpitude, finding in aggravation was deleted as duplicative.

[13] **805.59 Standards—Effect of Prior Discipline**
Guideline that discipline for second offense should in most instances be more severe than that imposed for first offense was not appropriate where offenses were contemporaneous.

[14] **107 Procedure—Default/Relief from Default**
176 Discipline—Standard 1.4(c)(ii)
Requirement that respondent comply with standard 1.4(c)(ii) before returning to active practice after suspension was particularly appropriate where respondent defaulted in disciplinary proceeding, indicating a need for an affirmative showing of fitness prior to resuming practice.

[15 a, b] **175 Discipline—Rule 955**

Where respondent was already on actual suspension from prior matter and had been ordered to comply with rule 955 in that connection, review department recommended that Supreme Court again order compliance with rule 955 only if respondent's suspension in second matter was neither concurrent with nor immediately consecutive to suspension in first matter.

[16] **173 Discipline—Ethics Exam/Ethics School**

Where respondent had been ordered to pass Professional Responsibility Examination in connection with recently-imposed prior discipline, review department deemed it unnecessary to require such passage in subsequent disciplinary matter.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
290.01 Rule 4-200 (former 2-107)

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client
586.11 Harm to Administration of Justice
591 Indifference

Discipline

1013.08 Stayed Suspension—2 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1022.50 Probation Monitor Not Appointed
1030 Standard 1.4(c)(ii)

OPINION

PEARLMAN, P.J.:

In this matter, in which respondent is in default, the State Bar examiner has requested review of a decision by Hearing Judge Gee (hereafter "decision") recommending that respondent be suspended for two years, stayed, with three years of probation and one year of actual suspension consecutive to that imposed in an earlier matter. **[1a]** The sole issue which the examiner has requested us to address is whether the hearing judge erred in reaching what the examiner characterizes as a conclusion that respondent did not violate section 6106 of the Business and Professions Code.[1] However, in light of our duty to conduct an independent, de novo review of the record (rule 453(a), Trans. Rules Proc. of State Bar), we have also undertaken to satisfy ourselves that the remainder of the hearing judge's findings and conclusions are supported by the record, and that the recommended discipline is appropriate.

We hereby adopt the hearing judge's decision, with a number of modifications not affecting the degree of discipline recommended. These modifications include our conclusion that section 6106 was violated.

STATEMENT OF FACTS

Respondent was admitted to practice in California in 1972. (Exh. 2.) The three-count notice to show cause in this matter was filed on December 18, 1989. Respondent was properly served with the notice to show cause, and his default was duly entered following his failure to file an answer. The hearing judge held a hearing at which documentary evidence and declarations were admitted to supplement the admissions deemed to have been made by virtue of respondent's default. (Rule 552.1(d)(iii), Trans. Rules Proc. of State Bar.) The hearing judge's factual findings are supported by the evidence and deemed admissions, and we hereby adopt them. A brief summary of respondent's misconduct follows.

Count One (White).

Frank and Charylann White hired respondent in June 1987 to represent Frank White in a criminal matter and to represent both of them in a government tort claim. (Decision, findings of fact ¶ 2; exhs. 7, 8.) From August 31, 1987, to May 18, 1988, respondent was suspended from the practice of law for nonpayment of his State Bar membership fees. (Decision, findings of fact ¶ 3; exh. 4.) Respondent was notified of his suspension by certified mail. (Decision, findings of fact ¶ 4; exh. 4.) Notwithstanding his suspension, respondent continued to hold himself out as an attorney, and continued to represent Frank White in the criminal matter until White's sentencing on March 24, 1988. (Decision, findings of fact ¶ 5; exhs. 7, 8.)

In addition, respondent failed to file a government tort claim on behalf of the Whites, and falsely told the Whites on more than one occasion that he had done so. (Decision, findings of fact ¶¶ 6, 8; exhs. 7-10.) After March 1988, respondent failed to respond to Charylann White's repeated efforts to communicate with him. (Decision, findings of fact ¶ 7; exh. 7.) However, respondent continued to communicate with Frank White at least through the summer of 1988. (Decision, findings of fact ¶ 8; exh. 8.)

In count one, respondent was charged with violating sections 6068 (a), 6068 (m), 6103, 6106, and 6125, and former rules 2-111(A)(2) and 6-101(A)(2) of the Rules of Professional Conduct.[2] The hearing judge found respondent culpable of violating sections 6068 (m) (failure to communicate with client) and 6125 (unauthorized practice of law) and rule 6-101(A)(2) (failure to perform competently). Her ruling as to section 6106 is discussed *post*. She rejected culpability on the remaining charges.

Count Two (Barr).

David Barr hired respondent in July 1985 to assist him in probating the will of Barr's deceased father. (Decision, findings of fact ¶ 9; exh. 11.) Barr sent respondent an advance fee of $170 and the

1. All further statutory references herein are to the Business and Professions Code unless otherwise noted.

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

original of Barr's father's will. (Decision, findings of fact ¶ 10; exh. 11.) Thereafter, respondent failed to respond to Barr's repeated efforts to communicate with him, and failed to probate the will as he had promised to do. (Decision, findings of fact ¶¶ 11, 12; exhs. 11, 12.)

In count two, respondent was charged with violating sections 6068 (a), 6068 (m), and 6103, and rules 2-111(A)(2), 6-101(A)(2), and 2-107(A). The hearing judge found respondent culpable of violating section 6068 (m) and rules 2-111(A)(2) (improper withdrawal from representation), 6-101(A)(2), and 2-107(A) (acceptance of illegal fee), but rejected culpability on the remaining charges.

Count Three (Failure to Cooperate).

An investigator for the State Bar, and subsequently the examiner, made several efforts to contact respondent in connection with the investigation of the charges in counts one and two. Respondent did not respond to any of these efforts and did not cooperate in any way with the State Bar's investigation in this matter. (Decision, findings of fact ¶¶ 13-15; exhs. 5, 6.)

In count three, respondent was charged with violating sections 6068 (a), 6068 (i), and 6103. The hearing judge found culpability only as to section 6068 (i) (failure to cooperate with State Bar disciplinary investigation).

DISCUSSION

The hearing judge rejected culpability under sections 6068 (a) and 6103, on all counts, on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919. The relevant holdings of *Baker* and *Sands* have been reiterated by the Supreme Court in several subsequent opinions. (See, e.g., *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618; *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060; *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 523, fn. 2.) We concur in the hearing judge's conclusions as to these charges.

We also concur in the hearing judge's conclusions that respondent violated sections 6068 (m) (as to counts one and two),[3] **[2 - see fn. 3]** 6068 (i) (as to count three), and 6125 (as to count one), and rules 2-111(A)(2) (as to count two), 6-101(A)(2) (as to counts one and two), and 2-107(A). These charges are supported by clear and convincing evidence in the record which fully justifies the hearing judge's legal conclusions. **[3]** In finding respondent culpable of violating rules 2-111(A)(2) and 6-101(A)(2), we rely only on his failure to render services while *not* under suspension. During his suspension he was precluded from practicing law and his misconduct in connection therewith is governed by section 6125.

[1b, 4] The examiner has not requested that we revisit the hearing judge's rejection of culpability as to the rule 2-111(A)(2) charge in count one. Nonetheless, we have examined the record, and have concluded that the hearing judge was incorrect in holding, on the basis of respondent's continued communications with Frank White through the summer of 1988, that the rule 2-111(A)(2) charge was not established by clear and convincing evidence as to this count. There was no evidence that respondent had communicated with either Frank or Charylann White, or taken any action on their behalf, after the summer of 1988. His inaction and failure to communicate between mid-1988 and the date of filing of the notice to show cause (December 18, 1989) are clear and convincing evidence of a violation of rule 2-111(A)(2).

[5] In so concluding, we disagree with the hearing judge's statement that "A conclusion that rule 2-111(A)(2) was willfully violated requires evidence of the [r]espondent's intent to withdraw from the

3. [2] Respondent's culpability for violating section 6068 (m) may only be predicated on his failure to communicate with clients after the effective date of the statute, i.e., January 1, 1987. (*Baker v. State Bar, supra*, 49 Cal.3d at p. 815.) As to count one, respondent's attorney-client relationship with the Whites commenced in 1987. As to count two, respondent failed to answer a letter Barr wrote to him in March 1987. (Decision, ¶ 11; exh. 11.) Thus, respondent's failure to communicate with Barr did continue into 1987.

client's employment. [Citations.]" (Decision, conclusions of law ¶ 8 [citing *Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5, and *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979].) *Baker* held that rule 2-111(A)(2) "may reasonably be construed to apply when an attorney ceases to provide services, even *absent* formation of an intent to withdraw as counsel for the client." (*Baker*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5, emphasis supplied.)

Guzzetta held that where, after the alleged withdrawal, the attorney "continued to advise [his client]," recommended action for his client to take, and reviewed papers for his client, the attorney did not violate rule 2-111(A)(2). The reason for this holding, however, was that the attorney had not in fact ceased to provide services, not a requirement of a showing that the attorney intended to withdraw. (*Guzzetta*, *supra*, 43 Cal.3d at p. 979.) Under *Guzzetta*, the hearing judge was correct in holding that the evidence of respondent's continued communications with his client demonstrated that he had not in fact withdrawn as of the summer of 1988; however, as already noted, the record demonstrates that he did effectively withdraw thereafter.

With respect to the section 6106 charge in count one—the issue as to which the examiner requested review—the hearing judge noted the similarity in construction of sections 6103 and 6106 of the Business and Professions Code and held that "As with [s]ection 6103, [s]ection 6106 also does not prescribe attorney conduct. It is a statement of the sanction appropriate for conduct found to involve moral turpitude, dishonesty or corruption. Thus, it, too, is not a section [r]espondent can violate. However, [r]espondent's conduct in [c]ount 1 involved dishonesty. . . . Thus, I conclude that [r]espondent's conduct in [c]ount 1 falls within the scope of conduct described by section 6106." (Decision, conclusions of law ¶ 5.)

[6] As already noted, in seeking review, the examiner characterizes this conclusion as a holding that respondent was not culpable on the section 6106 charge. Such a conclusion would be inconsistent with controlling Supreme Court precedent based on the hearing judge's factual findings, amply supported by the record, that respondent lied to the Whites about the status of their tort claim, and wrongfully held himself out during his suspension as entitled to practice law.

However, due consideration was given by the hearing judge to the acts of moral turpitude which she found to have occurred, and we view the issue raised here as essentially one of clarification of the interpretation of how section 6106 operates when misconduct within its ambit is found. As the hearing judge's decision notes, there is a structural similarity between sections 6103 and 6106. Section 6103 provides that an attorney may be disciplined for a violation of the attorney's oath and duties, but does not define such oath and duties. Similarly, section 6106 provides that an attorney may be disciplined for acts of moral turpitude, dishonesty, or corruption, but does not specifically define such acts.

There, the similarity ends. While we understand the temptation to construe both statutes similarly based on a careful reading of their wording, neither statute can be read out of context. **[7a]** As terms of art, an attorney's "oath and duties," referred to in section 6103, are specifically defined by sections 6067 and 6068 of the Business and Professions Code. When the Supreme Court finds that an attorney has violated the attorney's professional oath or has breached one of these statutes that define an attorney's duties, its inherent authority to impose discipline up to and including disbarment for such violations is confirmed in section 6103. (See also Bus. & Prof. Code, § 6100.)[4] There is thus never any reason to charge a section 6103 violation for breach of an attorney's duties because the duties breached are elsewhere defined and subject to discipline; a section 6103 charge adds nothing to the charges otherwise pending. (*Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.)

4. Section 6077, on the other hand, makes an attorney subject to discipline for violations of the Rules of Professional Conduct, and gives the State Bar the authority to impose reprovals or recommend suspensions of up to three years for such violations.

[8a] In the case of section 6106 (unlike section 6103), charging violation of the statute is the basis for imposing discipline for acts of moral turpitude. While the statute is general in language, the source of precise definition is not any specific statutes and rules, but case law and common understanding. (Cf. *In re Kelley* (1990) 52 Cal.3d 487, 493-495 [discussing standards for imposition of discipline after conviction of crime involving moral turpitude or "other misconduct warranting discipline"]; *In re Fahey* (1973) 8 Cal.3d 842, 849-850; *In re Higbie* (1972) 6 Cal.3d 562, 569-570.) Thus, there is at least one major difference between sections 6103 and 6106. **[7b]** Because an attorney's "oath and duties" are defined elsewhere in the State Bar Act, it is redundant for the State Bar Court or the Supreme Court to determine in a disciplinary decision or opinion whether an attorney has committed misconduct within the scope of section 6103. (See *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.) A finding that the attorney violated specified sections of the State Bar Act will suffice as a basis for the recommendation or imposition of discipline. **[8b]** In contrast, because the scope of section 6106 includes any act of moral turpitude, dishonesty, or corruption, whether or not violative of any civil or criminal statute, an attorney cannot be disciplined under that section except on the basis of an explicit determination that he or she has committed an act within its scope.

The Supreme Court has therefore repeatedly drawn a distinction between section 6103 which "defines no duties" and section 6106, violation of which may be charged in the notice to show cause and proved. (See *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815; *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931; *Sugarman* v. *State Bar*, *supra*, 51 Cal.3d at p. 618.) **[9]** Respondent was entitled to be put on notice of the charges against him (*Van Sloten* v. *State Bar* (1989) 49 Cal.3d 921, 929) and the charge of violating section 6106 served to put him on notice that the misconduct with which he was charged involved moral turpitude, dishonesty or corruption as described by the statute and the case law. **[7c]** In contrast, a charge of violating an attorney's "oath and duties" as set forth in section 6103 does not put a respondent on notice of any particular misconduct without reference to the other statutes defining the particular duty he allegedly violated.

In this matter, the hearing judge correctly found that respondent committed the acts of dishonesty charged against him. However, rather than concluding that he was "culpable of violating section 6106," she held that he had committed an act which "falls within the scope of conduct described by [s]ection 6106," and, accordingly, constitutes ground for discipline. (Decision, conclusions of law ¶ 5.)

While the examiner is correct that Supreme Court precedent clearly holds that a section 6106 violation did occur, it results in no difference in the outcome of this case. In effect, the determination that an attorney "violated section 6106" is merely a convenient shorthand for the statement that the attorney "committed an act of moral turpitude, dishonesty, or corruption in violation of section 6106." The hearing judge reached an equivalent result by a different route. She included such findings as part of her findings in aggravation. It is readily apparent from her decision, and from her order denying reconsideration, that she took respondent's acts of dishonesty into consideration in determining the appropriate discipline. Thus, while we rephrase the conclusion that respondent "committed acts within the scope of [i.e., made disciplinable by]" section 6106 to a conclusion that respondent "violated section 6106," as the examiner correctly urges, as discussed more fully below, we do not consider such change to have any effect on the judge's disciplinary recommendation.

RECOMMENDED DISCIPLINE

The hearing judge found no evidence in mitigation (decision, p. 10), although she did note that respondent was a member of the bar for some 13 years before engaging in the first act of misconduct that is at issue in this matter. (Decision, p. 15.) **[10]** Thirteen years of practice without prior discipline is an appropriate factor in mitigation. (See *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 798-799; *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596 [significant weight given to more than ten years of practice prior to first act of misconduct].) We deem it to have been appropriate for the hearing judge to consider this factor in mitigation, because although respondent does have a prior disciplinary record, it stems from conduct roughly contemporaneous with that involved

in the present matter. (*Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259.)

In aggravation, the hearing judge noted the existence of a prior disciplinary record for misconduct which was very similar to that involved in the present matter (failure to perform services, practice while suspended, and failure to cooperate with the State Bar), and which was committed during the same time period.

At the time of the hearing judge's decision, the record in the prior matter consisted of our recommendation, which the Supreme Court had not yet adopted, that respondent be suspended for two years, with the suspension stayed on condition of one year's actual suspension and two years probation on specified conditions. (Exh. 13.) We take judicial notice that on November 29, 1990, the Supreme Court issued an order adopting this recommended discipline. **[11]** We also concur with the hearing judge that the aggravating force of this prior discipline is diminished by the fact that it involved misconduct occurring at the same time as that in the present matter, and therefore did not constitute a prior warning to respondent of the wrongful nature and possible disciplinary consequences of his conduct.[5]

The hearing judge also found other aggravating factors consisting of multiple acts of misconduct; conduct surrounded by bad faith, dishonesty and concealment; harm to his clients and the administration of justice; and indifference toward rectification of the misconduct. (Standard 1.2(b)(ii), (iii), (iv), & (v), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (hereafter "standards").) **[12]** As indicated above, we interpret the finding of aggravation for conduct surrounded by bad faith, dishonesty and concealment to reflect the same conduct in count one that is properly the basis for the finding of a section 6106 violation. There is no basis for such a finding in aggravation on count two. In adopting a section 6106 violation in count one as requested by the examiner, we at the same time delete this finding in aggravation as duplicative. (See *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.)

Balancing the mitigating and aggravating factors, the hearing judge's recommended discipline appears well within the appropriate range under the standards and Supreme Court precedent. (See, e.g., *Hawes* v. *State Bar*, *supra*, 51 Cal.3d 587; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548; *Stevens* v. *State Bar* (1990) 51 Cal.3d 283; *Shapiro* v. *State Bar*, *supra*, 51 Cal.3d 251; *Young* v. *State Bar* (1990) 50 Cal.3d 1204.) Indeed, the examiner has not argued otherwise.

[13] Standard 1.7(a) indicates that discipline for a second offense should in most instances be more severe than that imposed for the first offense. We do not treat this guideline as appropriate here because the offenses were in fact contemporaneous. In any event, we are recommending more severe discipline by including an additional year of probation, and (if the Supreme Court imposes at least a total of two years actual suspension in the combined matters), by recommending that respondent be required to demonstrate rehabilitation under standard 1.4(c)(ii) before returning to active practice. **[14]** The requirement of a standard 1.4(c)(ii) hearing appears particularly appropriate in light of respondent's default in this matter, which indicates, under the circumstances, a need for an affirmative showing of fitness prior to resuming practice. (See *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299-300.)

We therefore adopt the hearing judge's decision and recommendation as to discipline, as set forth in our formal recommendation, *post*, with the modifications indicated above and with one further modification. **[15a]** In the event that actual suspension is ordered by the Supreme Court in this case and that it either is concurrent with or (as we recommend) is consecutive to and commences immediately after the actual suspension imposed in the prior case, we

5. Because of many varying factors, including that complaining witnesses vary widely in the degree of timeliness with which they contact the State Bar to allege attorney misconduct, it is not always possible for the Bar to charge all of an attorney's contemporaneous misconduct in a single notice to show cause.

recommend that respondent not be required to comply again with rule 955 of the California Rules of Court. **[16]** We also deem it unnecessary to require that respondent pass the Professional Responsibility Examination. He has already been ordered by the Supreme Court to fulfill both of these conditions in connection with his prior discipline.

FORMAL RECOMMENDATION

It is hereby recommended that respondent be suspended for two (2) years; that this suspension be consecutive to the suspension previously imposed by the Supreme Court (No. S015724, order filed Nov. 29, 1990); that execution of the order for such suspension be stayed, and that respondent be placed on probation for a period of three (3) years (concurrent with his previously imposed probation [*id.*]) on the following conditions:

1. That during the first full year of said period of probation, respondent shall be suspended from the practice of law in the State of California and that said full year of suspension shall be consecutive to the actual suspension previously imposed by the Supreme Court (No. S015724, order filed Nov. 29, 1990). In the event that the combined actual suspension in these two matters is two years or longer, it is recommended that the suspension continue until respondent 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;

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

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

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

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

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

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

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

6. That, except to the extent prohibited by the attorney/client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor

referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

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

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

[15b] If (and only if) respondent serves an actual suspension in this matter which is not concurrent with or immediately consecutive to an actual suspension previously imposed by the Supreme Court, we further recommend that respondent be required to comply with the provisions of rule 955, subdivisions (a) and (c), California Rules of Court within thirty (30) and forty (40) days, respectively, of the effective date of the Supreme Court order in this matter.

We concur:

NORIAN, J.
STOVITZ, J.