

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALBERT S. LAZARUS

A Member of the State Bar

[No. 86-O-14113]

Filed March 11, 1991

SUMMARY

Respondent was charged with numerous statutory and rule violations based on his handling of a single check issued in partial settlement of a personal injury case. He properly deposited the check into his trust account, but failed to notify his client of its receipt. A year later, after withdrawing from the case, he unilaterally determined to apply the funds to attorney's fees and costs which were the subject of a lien agreement with the client. The hearing referee found respondent culpable only of failing to notify his client promptly of the receipt of the funds, and recommended a public reproof. (Diane L. Karpman, Hearing Referee.)

The State Bar requested review, arguing for at least three months actual suspension primarily on the basis that the record supported additional culpability findings. The review department found no act of moral turpitude, but modified the referee's findings to include culpability for failure to render an appropriate accounting to the client. It increased the recommended discipline to two months suspension, stayed, and one year of probation with periodic auditing of respondent's client trust account.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: David A. Clare

HEADNOTES

[1] **166 Independent Review of Record**

In analyzing disputed facts in a matter on review, the review department defers to the hearing department's explicit credibility findings premised on personal observation of the demeanor of the witnesses.

- [2 a-c] **280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]**
 Where attorney's reluctance to inform client of arrival of partial settlement check was prompted by concern that client would demand payment rather than allowing funds to be held to satisfy medical and attorney's fee liens, this explanation did not excuse attorney's delay in informing client of receipt of funds and was not a defense to culpability for violating rule requiring prompt notice to clients of receipt of client funds.
- [3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
 Even though party requesting review did not challenge certain of hearing department's conclusions as to culpability, review department reviewed these determinations as part of its independent de novo review of the record. (Rule 453(a), Trans. Rules Proc. of State Bar.)
- [4] **213.10 State Bar Act—Section 6068(a)**
 It would not have been proper to find an attorney culpable of violating his duty to uphold the law, where there was no such violation separate and distinct from other charged statutory violations or violations of the Rules of Professional Conduct.
- [5] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
 An attorney's accounting regarding the funds belonging to his client that he had received, which was transmitted solely to the client's new counsel, did not satisfy the attorney's duty to render appropriate accounts to his client, since the attorney was not directed by the client to render the account to her new counsel and since the obligation ran directly to the client. Nevertheless, the possibility that the attorney was relying on the new counsel to transmit the accounting to the client precluded clear and convincing proof of a violation.
- [6] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
 An attorney's belated accounting of client funds was deficient in that it did not explain why it had not been made at the time the attorney originally forwarded the client's file to the client's new attorney.
- [7] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
 Any objection that a client raised to attorney's fees and costs, upon client's receipt of accounting of settlement funds, would have to be resolved prior to attorney's withdrawal of funds from trust account to pay fees and reimburse advanced costs.
- [8] **220.30 State Bar Act—Section 6104**
 An attorney who receives a medical payment draft made payable to the client, simulates the client's signature on the draft, and deposits it in the attorney's trust account does not thereby corruptly or wilfully and without authority appear as attorney for a party to an action or proceeding. Merely signing the back of a check does not constitute an appearance.
- [9] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
 Given the deference to be accorded to the referee's findings on issues of fact and credibility, the party requesting review does not advance his or her cause very effectively by ignoring those

findings, especially when no contention is advanced that the findings are not supported by the evidence.

- [10] **199 General Issues—Miscellaneous**
 204.90 Culpability—General Substantive Issues
 273.00 Rule 3-300 [former 5-101]

Absent unconscionable circumstances in its creation, an agreement granting an attorney express authority to sign a client's name on documents is clearly not contrary to public policy. Indeed, it is essential that express authority be obtained by an attorney seeking the power to sign the client's name to documents on the client's behalf.

- [11 a, b] **273.00 Rule 3-300 [former 5-101]**

The inclusion in a fee agreement of a special power of attorney, authorizing the attorney to sign the client's name on settlement drafts and other documents, does not create a conflict of interest in and of itself such that it requires compliance with the ethical rules governing attorneys' business transactions with clients. The attorney does not acquire any adverse interest by virtue of the special power of attorney, and the rules governing attorney-client business transactions have never been interpreted to apply in such circumstances.

- [12] **106.20 Procedure—Pleadings—Notice of Charges**
 192 Due Process/Procedural Rights
 273.00 Rule 3-300 [former 5-101]

Where an attorney was not charged in the notice to show cause with violating the ethical rules governing attorneys' business transactions with clients, then even if compliance with those rules were required under the facts, the attorney could not be found culpable of violating those rules. It is a fundamental constitutional and statutory requirement that an attorney must be given notice of all charges and a reasonable opportunity to prepare his defense thereto.

- [13 a, b] **194 Statutes Outside State Bar Act**
 490.00 Miscellaneous Misconduct

Sections 2450, et seq., of the Civil Code did not mandate a different format for special powers of attorney than the one which the respondent used, where those statutes were not enacted until two years after the power of attorney was executed by the client and one year after it was acted upon by the respondent, and where section 2456 of the Civil Code, enacted simultaneously with section 2450, expressly provides that any form that complies with the requirements of any other law may be used in lieu of the form set forth in section 2450.

- [14] **193 Constitutional Issues**

Statutes affecting a substantive right are generally construed prospectively to avoid a declaration of unconstitutionality.

- [15 a, b] **221.00 State Bar Act—Section 6106**
 490.00 Miscellaneous Misconduct

An attorney's simulation of a client's endorsement on a check, pursuant to an express power of attorney, without expressly indicating the representational capacity of the signature, does not constitute an attempt to deceive the bank and is not an act of moral turpitude. An attorney may not endorse a client's name to a check without express authority to do so, but the representative capacity of the signature need not be indicated on the check.

[16 a, b] 194 Statutes Outside State Bar Act

Under Commercial Code section 3403, a properly authorized agent may simply sign the principal's name on a check endorsement rather than indicating that the agent is signing as agent. Absent evidence to the contrary, the expectations of the bank must be presumed to be in accord with this statute.

[17] 221.00 State Bar Act—Section 6106

280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]

Moral turpitude is not demonstrated simply by an attorney's failure to notify a client that a medical payment draft has arrived and that the attorney has endorsed it for the client. Although this conduct clearly violates the rule requiring attorneys to notify clients promptly upon receipt of client funds, it does not amount to dishonesty or other misconduct in any way characterizable as moral turpitude.

[18] 106.20 Procedure—Pleadings—Notice of Charges

221.00 State Bar Act—Section 6106

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

420.00 Misappropriation

Where a notice to show cause alleged that the respondent attorney had misappropriated funds to his own use and purposes, and charged the attorney with acts of moral turpitude in violation of section 6106, but did not charge the attorney with a breach of the ethical rule concerning the proper handling of client trust funds, and the notice to show cause did not clearly put the attorney on notice of a charge that he had violated the trust funds rule, the attorney therefore could not be found culpable of violating that rule in light of the mandate that the attorney be given adequate notice of all charges and a reasonable opportunity to respond thereto.

[19 a-c] 106.20 Procedure—Pleadings—Notice of Charges

192 Due Process/Procedural Rights

561 Aggravation—Uncharged Violations—Found

Attorney could not be found culpable of misconduct where not given adequate notice of charges, but this did not preclude consideration of such misconduct for other purposes, including aggravation. Evidence of uncharged misconduct may not be used as an independent ground of discipline, but may be considered for other relevant purposes. Right to notice of charges is not violated by use of uncharged misconduct in aggravation where evidence of such misconduct was necessarily elicited in cause of proving other charges; evidence was used in aggravation only; and facts were based on respondent's own testimony.

[20] 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where a client was never entitled to receive certain funds which were the subject of two liens, and where, by the time demand for the funds was made, the client's attorney had clearly become entitled to receive the funds to satisfy his lien, there was no basis for finding a violation of the ethical rule requiring that funds to which a client is entitled must be paid to the client promptly as requested by the client.

[21] 280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]

545 Aggravation—Bad Faith, Dishonesty—Declined to Find

555 Aggravation—Overreaching—Declined to Find

561 Aggravation—Uncharged Violations—Found

575.90 Aggravation—Refusal/Inability to Account—Declined to Find

Under the Standards for Attorney Sanctions for Professional Misconduct, greater discipline may be imposed for a violation of an attorney's duty to render appropriate accounts than might otherwise

be appropriate if the attorney's misconduct was surrounded by bad faith, dishonesty, concealment, or overreaching, as well as for other violations of the State Bar Act or Rules of Professional Conduct or refusal or inability to account for improper conduct toward trust funds.

[22 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**

Under California law, absent an enforceable contractual lien, an attorney commits a trust account violation by unilaterally determining his or her fee and withdrawing trust funds to satisfy the fee, even though the attorney may be entitled to a fee in the withdrawn amount. Fact that small claims court eventually found in favor of attorney on fee dispute was not a defense to such violation; client should not have had to sue attorney after fees were taken.

[23 a, b] **277.40 Rule 3-700(C) [former 2-111(C)]**

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

Where an attorney in a contingent fee case has a contractual lien for the attorney's fees, but withdraws before completion of the case, this renders uncertain both the amount, if any, which the attorney is entitled to be paid, and the attorney's entitlement to enforce the lien; they depend on whether the attorney had justifiable cause for withdrawing. Thus, in the event of such a withdrawal, the attorney's right to enforce the lien and the extent of the attorney's recovery cannot be determined unilaterally by the attorney. If the attorney and client cannot reach a new agreement, then the attorney's sole recourse is to an independent tribunal with the funds remaining in trust in the interim.

[24] **221.00 State Bar Act—Section 6106**

545 Aggravation—Bad Faith, Dishonesty—Declined to Find

An attorney's trust account violation, which consisted of unilaterally determining his fee and withdrawing trust funds to satisfy the fee, did not amount to an act of moral turpitude, because there was no evidence the attorney acted dishonestly in his payment to himself of a reduced fee taken in the good faith belief of a claim of right.

[25] **277.40 Rule 3-700(C) [former 2-111(C)]**

Where an attorney began to doubt his client's credibility and therefore believed he could not give the client effective representation, the attorney's difficulty in working with the client justified his consensual withdrawal.

[26] **801.30 Standards—Effect as Guidelines**

The Standards for Attorney Sanctions for Professional Misconduct are not to be applied in talismanic fashion and do not mandate a particular result.

[27] **801.49 Standards—Deviation From—Generally**

824.59 Standards—Commingling/Trust Account—Declined to Apply

1091 Substantive Issues re Discipline—Proportionality

Violations of the ethical rule governing placement of client funds in a trust account have not always resulted in actual or even stayed suspensions.

[28] **174 Discipline—Office Management/Trust Account Auditing**

824.54 Standards—Commingling/Trust Account—Declined to Apply

1093 Substantive Issues re Discipline—Inadequacy

An attorney's lengthy delay in notifying his client of receipt of a check in partial settlement of her case, and his failure to render a timely and appropriate accounting upon his withdrawal, which was aggravated by unilateral payment to himself of his fees, merited more than a public reproof. The

attorney's handling of trust account records was required to be reviewed by an accountant for some period of time to ensure protection of other clients. However, in view of mitigating circumstances, subsequent corrective measures, and lack of harm to the client or her doctor, no actual suspension was necessary to protect the public. The Review Department recommended two months' stayed suspension, with one year's probation, periodic auditing of the attorney's trust account, and a professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability

Found

- 280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 220.35 Section 6104
- 221.50 Section 6106
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.55 Misappropriation—Valid Claim to Funds

Aggravation

Declined to Find

- 582.50 Harm to Client

Mitigation

Found

- 710.10 No Prior Record
- 715.10 Good Faith
- 720.10 Lack of Harm
- 730.10 Candor—Victim
- 735.10 Candor—Bar
- 750.10 Rehabilitation
- 791 Other

Discipline

- 1013.02 Stayed Suspension—2 Months
- 1017.06 Probation—1 Year

Probation Conditions

- 1022.50 Probation Monitor Not Appointed
- 1024 Ethics Exam/School
- 1026 Trust Account Auditing

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1979 and has no prior record of discipline. The one-count notice to show cause charged respondent with numerous statutory and rule violations based on his conduct in connection with the handling of a single check issued in 1983 for \$839.39 in partial settlement of a personal injury case. He properly deposited the check into his trust account, but failed to notify his client of its receipt. A year later, after withdrawal from the case, he unilaterally determined to apply the funds to attorney's fees and costs which were the subject of a lien agreement with the client.

The referee found respondent culpable only of violating the notice provision of former rule 8-101(B)(1)¹ and recommended a public reproof. The examiner argues for a period of at least three months actual suspension primarily on the basis that the record supports a finding, not made by the referee, that the respondent committed an act involving moral turpitude. We find no act of moral turpitude. However, we do modify the findings to include a violation of former rule 8-101(B)(3) as charged; and to increase the discipline by recommending two months suspension, stayed, on condition of one year of probation, including periodic auditing of his client trust account, coupled with a requirement that respondent take and pass, within one year of the effective date of the Supreme Court's order in this matter, the California Professional Responsibility Examination.

STATEMENT OF FACTS

With very few exceptions, the facts in this matter are not in dispute. The few disputed points of fact were addressed specifically in the referee's decision ("decision"). [1] She resolved them on the basis of explicit credibility determinations, which were premised on her personal observation of the demeanor of the witnesses. (See, e.g., decision, ¶¶ 4-7, 15, 40-

41.) Accordingly, in analyzing the disputed facts in this matter, we defer to the referee's findings. (See, e.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968 fn. 2; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 121.)

Respondent was admitted to the State Bar in June 1979. (Decision, ¶ 1; I R.T. pp. 77-78; exh. 4.) The complaining witness, Filomena Vinzon, hired respondent to represent her in connection with a traffic accident that took place in May 1982. (Decision, ¶ 2; I R.T. pp. 17, 79.) She signed a one-page retainer agreement prepared by respondent's office and presented to her in her home by a representative of respondent. (I R.T. pp. 18-19, 96-97; exh. 1.) The retainer agreement contained a special power of attorney authorizing respondent to sign Vinzon's name on drafts and other documents. Vinzon, who is a schoolteacher and graduated from college in the Philippines, testified that she had read the retainer agreement before signing it, though at the time of the hearing she could not recall all of the contents. (I R.T. pp. 32-33, 40-42, 48.) The referee disbelieved Vinzon's testimony that she was unaware, when she signed the retainer, of the special power of attorney it contained. (Decision, ¶¶ 4-7, 40-41.)

In January 1983, Vinzon's insurance company issued a draft in the amount of \$839.39 for her medical expenses, which respondent deposited into his trust account, having simulated Vinzon's endorsement signature. (I R.T. pp. 79-82; exh. 2.) Respondent kept the funds in his trust account throughout his representation of Vinzon, but did not notify Vinzon that he had received the draft until over a year later. (Decision, ¶ 8.)

In the fall of 1983, respondent informed Vinzon that he no longer wished to handle her case, and she should hire a new lawyer. She subsequently retained attorney Gil Siegel to take over her case from respondent, and respondent forwarded the file to Siegel in November 1983 with a cover letter. (Decision, ¶¶ 9-11; I R.T. pp. 22-23, 51-53, 102; exh. 3.)

1. Unless noted otherwise, all references herein to Rules of Professional Conduct are to the former rules which were in

effect at the time respondent committed the acts at issue in this matter.

In February 1984, respondent sent Siegel a letter notifying Siegel about the receipt of the medical payment draft, and explaining respondent's intended handling of it to cover \$621.70 in costs and to apply the balance to his attorney's fees which he calculated as \$335.75 based on 40 percent of the recovery. He determined that the effect was to leave a negative balance of \$118.08.² (Exh. 6, D.) When Siegel spoke by telephone with respondent about the draft,³ respondent informed Siegel (and testified at the hearing in this matter) that respondent had received the draft, signed Vinzon's name to the back of the draft, and deposited it in his trust account, and that when their relationship terminated, respondent applied the proceeds of the draft to costs and fees owed him by Vinzon. (I R.T. pp. 57, 62-63, 88-89.) Respondent took this action based on rights which respondent believed were given to him by the terms of his retainer agreement with Vinzon. (I R.T. pp. 56-57, 62-63, 79-82, 94-95, 100, 118-119, 121-124.) [2a] Respondent admitted he had not told Vinzon that the draft had arrived. He explained that he was concerned that if Vinzon knew this fact, she would demand that the money be paid to her rather than held for satisfaction of the liens by application to her medical bills or respondent's fees and costs.⁴ (I R.T. pp. 91-93.)

Respondent offered as an alternative to his payment of fees and costs to himself out of the trust funds in his possession to return the money to Siegel in exchange for a separate payment for his costs and fees. (I R.T. p. 89.) Siegel did not respond to the alternative suggestion, but told respondent that he did not think respondent should remove the money from the trust account (I R.T. pp. 63, 88) and that he

thought Vinzon would cause respondent a lot of trouble (I R.T. p. 89). The referee nonetheless found that with respect to respondent's proposed withdrawal, "Siegel concurred that respondent had the right to do so." The record does not support this finding. Rather, both Siegel and respondent testified that respondent claimed that he was entitled to do so and Siegel did not address the issue. (I R.T. pp. 63, 88-89.) We therefore modify finding 17 in this regard. Respondent proceeded to apply the funds in his trust account to the fees and costs covered by his contractual lien.

The State Bar does not dispute that Vinzon owed respondent attorney's fees and costs, and, at one point toward the end of the hearing, conceded that no evidence had thus far been introduced that the matter involved misappropriation. (II R.T. p. 158.) Respondent testified that he had waived all of his fees in connection with the matter except for his share of the funds he had actually collected in the form of the medical payment draft. (I R.T. pp. 127-128.) The referee credited respondent's testimony that he applied the medical payment funds to his legitimate costs and fees. (Decision, ¶ 18.)

When Vinzon's case finally settled in 1986, she discovered that the January 1983 medical payment draft had been issued and that respondent had received and negotiated it. (I R.T. pp. 23-24, 54-56; exh. 2.) Sometime before September of 1986 Vinzon called respondent to discuss the matter. (I R.T. pp. 25-26, 135.) On September 8, 1986, respondent sent Vinzon a copy of the February 1984 letter from respondent to Siegel, which explained respondent's treatment of the January 1983 insurance payment. (I

2. Siegel denied receiving this letter until a copy of it was sent to him as an enclosure to a subsequent letter in October 1986. However, Siegel admitted that the 1984 letter was correctly addressed, except that the city was erroneously given as Los Angeles rather than Beverly Hills. (I R.T. pp. 59-60, 71-72.) The same address error was made on an earlier letter which Siegel admitted he had received despite the incorrect address. (I R.T. pp. 72-73; exh. 3.) Respondent testified that the February 1984 letter was mailed on or about the date on the letter, that it was not returned by the Post Office, and that he was never informed that it had not been received. (I R.T. pp. 83-85, 124-125; exh. D.) The referee found that the letter was sent in February 1984 as indicated by its date. (See decision, ¶¶ 8, 12-15.)

3. The date of this telephone conversation is one of the disputed facts. Respondent testified that the conversation occurred in 1984, around the time he sent the February 1984 letter; Siegel testified that it occurred in 1986, after he and Vinzon found out about the 1983 insurance company draft. (I R.T. pp. 55-56, 87, 125-126.) The referee found that the conversation occurred in 1984. (Decision, ¶ 16.) In any event, there is no dispute about the substance of the conversation. (Decision, ¶ 17; I R.T. pp. 88-89, 127.)

4. The referee found that the doctor's fees were not payable either at that time or directly out of those particular proceeds, but only out of trust funds disbursed upon final settlement of the case. (Decision, ¶ 23.)

R.T. pp. 26-30, 58-61, 124-125, 135; exh. 5, 6.)⁵ Vinzon then complained to the State Bar. (I R.T. pp. 47-48.)⁶ Siegel withheld from the settlement proceeds sufficient funds to pay the doctor, but at Vinzon's insistence, pending resolution of the matter, he retained the funds in his trust account rather than paying the money to the doctor. (I R.T. pp. 61-62.)

DISCUSSION

A. Culpability.

The notice to show cause charged respondent with having violated Business and Professions Code sections 6068 (a), 6103, 6104 and 6106, and former Rules of Professional Conduct 8-101(B)(1), 8-101(B)(3), and 8-101(B)(4). [2b] The referee found respondent culpable of only one of these charges, concluding that respondent violated former rule 8-101(B)(1) by failing to notify Vinzon in a timely manner of the receipt of the medical payment draft. (Decision, ¶ 21.) The referee properly did not consider respondent's explanation for this conduct to be a defense to the violation. (*Id.*; see, e.g., *Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 976.)

Respondent did not request review and acknowledges the correctness of the referee's finding that he violated rule 8-101(B)(1). Respondent admittedly failed to inform his client for over a year that the medical payment draft had been received and then did so only indirectly through her new counsel. Apparently, the client herself remained unaware of respondent's prior receipt of the medical payment draft until mid-1986 when the entire case settled. [2c] We adopt the referee's conclusion that respondent violated rule 8-101(B)(1) by his inexcusable delay in informing the client of the receipt of the medical payment draft.

On review, the examiner requests that we find respondent culpable of several additional violations

not found by the referee, to wit, violations of sections 6104 and 6106 of the Business and Professions Code, and rule 8-101(B)(4). [3] The examiner has not challenged the referee's conclusions that respondent was not culpable of violating sections 6068 (a) and 6103 of the Business and Professions Code, or rule 8-101(B)(3). Nonetheless, we review those determinations as part of our independent de novo review of the record. (Rule 453(a), Trans. Rules Proc. of State Bar.)

We agree with the referee's rejection of the section 6103 violation. (See *Baker v. State Bar* (1989) 49 Cal.3d 803, 815; *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617.) [4] As to section 6068 (a), however, the referee's decision appears to contemplate that it would have been proper to find a section 6068 (a) violation if any of the other charged Business and Professions Code sections had been violated. (See decision, ¶ 35.) On this point, we modify the referee's decision, and hold that no section 6068 (a) violation occurred in this matter that is separate and distinct from the charged statutory violations or charges of violation of the Rules of Professional Conduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059-1060; *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 903; *Baker v. State Bar*, *supra*, 49 Cal.3d at p. 804.)

With respect to the charged rule 8-101(B)(3) violation of the duty to render appropriate accounts, the referee found that the accounting occurred in February of 1984 and no improprieties were proved by clear and convincing evidence. (Decision, ¶ 22.) We disagree. The referee impliedly found that respondent's accounting solely to the client's new counsel satisfied his duty to "render appropriate accounts to his client." (Rule 8-101(B)(3), emphasis added.) [5a] Since respondent was not directed by the client to render the account to her new counsel and since the obligation ran directly to the client we question the sufficiency of his indirect method of

5. Respondent sent Siegel a copy of his September 8, 1986, letter to Vinzon, with the enclosure; Siegel testified that he did not receive the February 28, 1984, letter until respondent sent him the copy in 1986, but the referee found otherwise. (Decision, ¶¶ 12-15.)

6. Vinzon ultimately sued respondent in a small claims court action challenging his fees, which action respondent defended

and won. The referee permitted this testimony for the limited purpose of establishing the fact that the litigation occurred as part of the ongoing dispute between the attorney and client. (I R.T. pp. 103-105.) Independent of the small claims court judge, the referee also found that no clear and convincing evidence established that the client raised a legitimate challenge to respondent's fees and costs.

accounting to the client under circumstances which indicate that he wished to avoid notifying his client directly because she might disagree about the appropriate disposition of the funds. (See respondent's testimony, I R.T. pp. 88-89.) As a result, it appears from the record that the client herself, as opposed to her new counsel, did not receive actual notice of the accounting until more than two years after it was made to her new counsel. When Vinzon was notified, she objected, but by then respondent had long since already paid himself.

[5b] Nonetheless, we do not base our finding that respondent violated rule 8-101(B)(3) on his failure to transmit his February 1984 accounting directly to his client. The possibility that he was relying on Siegel to transmit the accounting to Vinzon precludes clear and convincing proof of a violation on that basis. [6] Rather, we find a rule 8-101(B)(3) violation based on the fact that even the accounting respondent made in February 1984 was deficient. The record reveals no explanation by respondent for failing to mention in his transmittal letter to the new counsel in November of 1983, the funds he had long since received from the insurance company and placed in trust and his intended disposition thereof to cover costs and attorneys fees upon his withdrawal. Had respondent accounted to the client then as he should have done, the client would have had an opportunity to object prior to disbursement of the funds. [7] Any objection Vinzon then raised to the fees or costs would have had to be resolved prior to respondent's withdrawal of funds from the trust account to pay his fees and reimburse costs advanced. (See former rule 8-101(A)(2), now rule 4-100(A)(2).)

We therefore reject the finding of no culpability of a rule 8-101(B)(3) violation, but for the reasons set forth below, we adopt the referee's challenged findings of no culpability with regard to the charges of violating sections 6104 and 6106 of the Business and Professions Code and rule 8-101(B)(4).

1. Section 6104.

[8] The examiner's argument that respondent's simulation of Vinzon's signature on the draft constituted an unauthorized appearance in violation of section 6104 tortures both the facts and the law. Respondent's conduct manifestly did not constitute "corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding." (Bus. & Prof. Code, § 6104.)⁷ Merely signing the back of a check does not constitute an appearance within the meaning of Business and Professions Code section 6104; and in any event, the State Bar's own evidence showed that respondent was fully authorized, by a signed retainer agreement, to represent Vinzon and to appear on her behalf in connection with the accident that gave rise to the insurance payment. (Exh. 2.)

The examiner argues that the provision of the retainer agreement expressly giving respondent a special power of attorney to sign Vinzon's name on drafts and other documents related to her case was void as against public policy. As respondent points out, the examiner's unconscionability argument relies heavily on a view of the facts expressly contrary to that taken by the referee.⁸ [9 - see fn. 8] The referee expressly found that the client's testimony that she

7. In *Hizar v. State Bar* (1942) 20 Cal.2d 223, an attorney was disbarred for, among other things, forging signatures on grant deeds and other documents that the attorney had notarized. However, the attorney was charged with and found culpable of committing acts of moral turpitude and violating his oath as an attorney, not making unauthorized appearances. (See *id.* at p. 224.) Thus, contrary to the examiner's contention, *Hizar* does not stand for the proposition that signature forging constitutes an unauthorized appearance. Moreover, in *Hizar*, unlike this case, there was no indication in the record that the signatures were authorized by a power of attorney. (See *Hizar, supra*, 20 Cal.2d at p. 227 [declining to address contention, raised for first time in reply brief on appeal, that State Bar's case was flawed by failure to prove absence of power of attorney].)

8. [9] Given the deference which the Supreme Court has directed us to accord to the referee's findings on issues of fact and credibility, the party requesting review does not advance his or her cause very effectively by ignoring those findings, especially when no contention is advanced that the findings are not supported by the evidence. (Cf., e.g., *Oliver v. Board of Trustees* (1978) 181 Cal.App.3d 824, 832 ["fundamental tenets of appellate practice" require appellant's brief to state *allevidence*, not merely evidence most favorable to appellant's position]; *Rodriguez v. North American Rockwell Corp.* (1972) 28 Cal.App.3d 441, 446-448 [criticizing appellant for disregarding obligation, in attacking trial court's factual findings, to set forth all evidence in support of those findings, as well as contrary evidence].)

was unaware of the provision was not credible, and we have no basis for rejecting that determination. [10] Absent unconscionable circumstances in its creation, an agreement granting an attorney express authority to sign a client's name on documents is clearly not contrary to public policy. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 793-794.) Indeed, it is essential that express authority be obtained by an attorney seeking the power to sign the client's name to documents on the client's behalf. (*Id.*)

The examiner's other legal arguments are also unavailing. [11a] The examiner argues that inclusion of a special power of attorney in a fee agreement creates a conflict of interest in and of itself and that conflict requires compliance with rule 5-101 of the Rules of Professional Conduct. [12] Respondent was not charged in the notice to show cause with violating rule 5-101 of the former Rules of Professional Conduct. Therefore, even if the examiner's contention had any merit, he could not now be found culpable of violating that rule. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929; *Leoni v. State Bar* (1985) 39 Cal.3d 609, 621, fn. 10.) It is a fundamental constitutional and statutory requirement that the respondent must be given notice of all charges and a reasonable opportunity to prepare his defense thereto. (Bus. & Prof. Code, § 6085; *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420-421; *In re Strick* (1983) 34 Cal.3d 891, 899; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163.)

[11b] In any event, respondent did not acquire any adverse interest by virtue of the special power of attorney. The referee found that respondent merely received from his client advance written authorization for the ministerial act of affixing her signature to the draft. Such authorization is common practice in the personal injury field and has long been recognized as proper. (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 597-598.) The provisions of rule 5-101 have never been interpreted by the Supreme Court to apply in such circumstances.

[13a] The examiner also argues that Civil Code sections 2450, et seq., mandate a different format for special powers of attorney than the one which respondent used. Civil Code sections 2450, et seq., were not enacted until 1984, two years after the power of attorney was executed by Vinzon and one

year after it was acted upon by respondent. [14] Statutes affecting a substantive right are generally construed prospectively to avoid a declaration of unconstitutionality. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 495, pp. 685-686, and cases cited therein.) [13b] Moreover, section 2456, enacted simultaneously with section 2450, expressly provides, "Nothing in this chapter affects or limits the use of any other form for a power of attorney. Any form that complies with the requirements of any law other than the provisions of this chapter may be used in lieu of the form set for in section 2450." Accordingly, any formatting provisions of those code sections are irrelevant to the issues in this proceeding.

2. Section 6106.

[15a] The examiner argues that the review department can find that respondent's simulation of his client's endorsement on the medical payment draft, without expressly indicating that he was signing under power of attorney, constituted an attempt to deceive the bank and therefore violated section 6106. She makes this argument even though (1) the endorsement was found to have been placed on the draft pursuant to respondent's authority under the retainer agreement; (2) the draft was properly deposited in respondent's trust account after the endorsement was simulated, and (3) there is no evidence that any fraud was intended. The examiner apparently takes the position that as a matter of law simulation of client endorsements on checks constitutes moral turpitude if the representational capacity of the signature is not expressly indicated, even if the client's approval was obtained in advance and memorialized in a formal power of attorney.

[16a] The official comment to Commercial Code section 3403 indicates that a properly authorized agent may simply sign the principal's name rather than indicating that s/he is signing as agent. The examiner nonetheless argues that *Palomo v. State Bar*, *supra*, 36 Cal.3d at pp. 793-95 supports her position. [15b] *Palomo* holds that an attorney may not endorse a client's name to a check without express authority to perform that particular act, but does *not* hold that when such authority has been given, the representative capacity of the signature must be indicated on the check.

Hallinan v. State Bar (1948) 33 Cal.2d 246 does hold that an attorney who simulated a client's signature on a *release*, under a formal power of attorney, should have indicated that he was signing in a representative capacity, *since he knew the beneficiary of the release was concerned to obtain the personal signature of the releasor*. However, even assuming the holding in *Hallinan* applies to check endorsements, the legal nature and import of which is markedly different from the execution of a release, there is no evidence here that the bank placed any particular importance on obtaining Vinzon's personal endorsement of the check. [16b] Absent evidence to the contrary, the bank's expectations must be presumed to be in accord with the Commercial Code which permits authorized agents not to identify the fact of their agency in endorsing their principal's name.

Levin v. State Bar (1989) 47 Cal.3d 1140, also cited by the examiner, involved acts of moral turpitude, but is not factually comparable to this matter.⁹ It was Levin's acts of overt dishonesty, not the mere endorsement of his client's name on a check, that led to the moral turpitude finding. (See *id.* at pp. 1145-1146.)¹⁰

[17] Finally, the examiner appears to contend that moral turpitude is demonstrated simply by respondent's failure to notify Vinzon that the draft had arrived and that he had endorsed it for her. Although respondent clearly violated rule 8-101(B)(1) by such conduct, his actions do not amount to dishon-

esty or other misconduct in any way characterizable as moral turpitude.

3. Uncharged Rule 8-101(A) Violation.

[18] The notice to show cause alleged that respondent had misappropriated funds to his own use and purposes, but did not charge respondent with a breach of former Rule of Professional Conduct 8-101(A), which concerns the proper payment of funds. The notice did, however, charge a violation of section 6106. In the very recent case of *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, the Supreme Court held that the factual allegations supporting the section 6106 charge against Sternlieb encompassed a rule 8-101(A) charge. (*Id.* at p. 321.) Here, the notice does not appear to have clearly put respondent on notice of a charge that he had violated former rule 8-101(A). Nor has the examiner ever argued that a rule 8-101(A) violation is properly encompassed in the charges. Since respondent was never apprised of a possible 8-101(A) violation, we decline to find culpability of a rule 8-101(A) violation here in light of the mandate that respondent be given adequate notice of all charges and a reasonable opportunity to respond thereto. (Bus. & Prof. Code, § 6085; *Gendron v. State Bar, supra*, 35 Cal.3d at pp. 420-421.)¹¹ [19a - see fn 11]

4. Rule 8-101(B)(4).

The referee found that respondent did not violate rule 8-101(B)(4) when he paid his own lien with

9. In *Levin*, the attorney committed the following misconduct: (1) in a case in which Levin personally was a co-defendant, he represented to the opposing party's attorney that he had settlement authority for his co-defendant which he did not have; (2) in that same matter, he persisted in attempting to contact the opposing party directly rather than through counsel; and (3) in another matter, he settled a case without authority from his client, forged the client's signature on the *release* and affirmatively represented it as genuine, and mis-handled the settlement funds by delivering the client's share in cash to the client's cousin without obtaining a receipt.

10. The other cases cited by the examiner also are not on point. In both *Montalto v. State Bar* (1974) 11 Cal.3d 231, 235, and *Himmel v. State Bar* (1971) 4 Cal.3d 786, 788, 793-796, the attorneys forged their respective clients' signatures to checks *without the clients' consent*, and misappropriated the money. In *Resner v. State Bar* (1960) 53 Cal.2d 605, the attorney, who

operated without a trust account, repeatedly deposited settlement checks into his personal account and then misappropriated the proceeds. On at least one occasion, the deposit of the check was preceded by the attorney's simulation of his client's endorsement *with the client's consent*. (*Id.* at p. 611.) In finding the attorney culpable of professional misconduct, the Supreme Court focused exclusively on the commingling and misappropriation, and did not even mention the simulation of the client's signature. Finally, *Stafford v. State Bar* (1933) 219 Cal. 415 involved an attorney who signed several clients' names to releases, deeds, and settlement agreements, not just checks, and who did so *without* authority from the clients; he also commingled and misappropriated money from several clients.

11. [19a] This does not preclude consideration of such misconduct for other purposes, including circumstances in aggravation. (See Discussion, Part B, *post.*)

the proceeds of the medical payment draft because payment was not due to Vinzon's doctor until her case was finally settled, which had not yet occurred, and respondent maintained the funds in his trust account until he was discharged. (Decision, ¶ 23.) The examiner nonetheless contends that the draft was "earmarked" for the payment of medical bills and could not be applied to satisfy the lien for attorney's fees and costs. This argument is misplaced. Respondent testified without contradiction (I R.T. pp. 89-91), and the referee found (decision, ¶ 23), that the draft was termed a "medical payment" draft, and was made out for the amount of Vinzon's medical bills, because it was issued pursuant to the "medical payment" portion of Vinzon's insurance policy, and not because it was required to be used for medical bills. The doctor was not named as a payee on the draft and was not entitled to be paid until the final settlement of Vinzon's uninsured motorist claim and then out of *any* settlement funds, not just the "medical payment" portion.

Respondent's counsel argues that respondent did not violate rule 8-101(B)(4) because, under the terms of respondent's retainer agreement, respondent, unlike the doctor, was entitled to enforce his lien at the conclusion of his representation of Vinzon, rather than waiting for Vinzon's ultimate recovery. This argument is unpersuasive.

He cites in support of his position *Weiss v. Marcus, supra*, 51 Cal.App.3d 590, in which the court concluded that Weiss stated a proper cause of action in alleging that upon his discharge, his contractual lien entitled him to recover "out of the proceeds of the settlement" the reasonable value of his services rendered prior to discharge. (*Id.* at p. 598.) The court in *Weiss* did not have before it the issue presented here. Weiss brought a separate action for recovery of fees and did not engage in any unilateral determination of the amount owed or any self-help from his trust account to satisfy his claim.

As discussed *ante*, we do consider respondent's timing and manner of payment to himself problematic. However, we can dispense with the charged rule 8-101(B)(4) violation because the charge must fail in any event. [20] Rule 8-101(B)(4) expressly requires that funds which "the client is entitled to receive" must be paid to the client promptly "as requested by

[the] client." In the present case, the client was never entitled to receive the funds which were the subject of the two liens. When demand was made in the summer of 1986 after the case was settled, respondent was by then clearly entitled to receive the trust funds to satisfy his lien.

While the delay in notifying the client of the receipt of funds covered by the two liens was in violation of rules 8-101(B)(1) and 8-101(B)(3), there is no basis for finding that rule 8-101(B)(4) was violated here.

B. Aggravation.

[21] Under standard 1.2(b)(iii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standard(s)"]), greater discipline may be imposed for a rule 8-101(B)(3) violation than might otherwise be appropriate if the member's misconduct was surrounded by bad faith, dishonesty, concealment, or overreaching, as well as for other violations of the State Bar Act or Rules of Professional Conduct or refusal or inability to account for improper conduct toward trust funds. The examiner introduced no evidence designated as evidence in aggravation, and the referee found that there were no aggravating circumstances. (II R.T. pp. 144-145; decision ¶ 36.) On review, although the examiner argues for increased discipline based on respondent's culpability, she does not contend that the referee should have found aggravating circumstances. Nonetheless, as indicated above, there is an aggravating circumstance clearly demonstrated on the record. [22a] Under California law, absent an enforceable contractual lien, an attorney commits a trust account violation by unilaterally determining his or her fee and withdrawing trust funds to satisfy the fee, even though the attorney may be entitled to a fee in the withdrawn amount. (*Silver v. State Bar* (1974) 13 Cal.3d 134, 142; *Brody v. State Bar* (1974) 11 Cal.3d 347, 350, fn. 5.) [23a] Here, respondent had a contractual lien, but withdrew before completion of the case thereby rendering uncertain the amount, if any, he was entitled to be paid.

[23b] When an attorney withdraws from a contingent fee case, the attorney's entitlement to enforce a pre-existing lien for fees depends on whether the

attorney had justifiable cause for withdrawing. (*Estate of Falco* (1987) 188 Cal.App.3d 1004, 1018-1020 [no justifiable cause for the attorney's withdrawal despite the clients' refusal to settle or cooperate]; *Hensel v. Cohen* (1984) 155 Cal.App.3d 563, 567-568 [no justifiable cause where the attorney's withdrawal resulted from the belief that the case could not be won]; *Pearlmutter v. Alexander* (1979) 97 Cal.App.3d Supp. 16, 20 [justifiable cause where the attorney's withdrawal resulted from the client's refusal to consummate an authorized settlement]. See also 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, §§ 170, 173, pp. 197, 199.)¹² It appears inescapable that in the event of a withdrawal of an attorney from a contingent fee case, the attorney's right to enforce his lien and the extent of his recovery cannot be determined unilaterally by the attorney, any more than the fees could be so determined if there had never been a contractual lien in the first place. If the attorney and client cannot reach a new agreement, then the attorney's sole recourse is to an independent tribunal with the funds remaining in trust in the interim. (See former rule 8-101(A)(2) [now rule 4-100(A)(2)].)

[22b] That Vinzon eventually lost her small claims court action challenging respondent's entitlement to his fees is no defense to his conduct. She should not have had to sue him after he had taken the fees. By unilaterally determining his fee and withdrawing trust funds to satisfy the fee, an attorney violates former rule 8-101(A). (Cf. *Silver v. State Bar*, *supra*, 13 Cal.3d at p. 142 [Silver "had no right or authority unilaterally to determine that he was entitled to \$1,000 for his services and to withhold the money, even if his services in truth were worth that figure"].)

[19b] While we declined to consider this trust account violation as an independent basis for discipline, it is an appropriate matter for us to consider in aggravation. "Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered for other purposes

relevant to the proceeding." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36; see, e.g., *Arm v. State Bar* (1990) 50 Cal.3d 763, 775.)

[24] However, we do not construe respondent's trust account violation to amount to an act of moral turpitude. In *Sternlieb v. State Bar*, *supra*, 52 Cal.3d at p. 321, the Supreme Court similarly rejected culpability under section 6106 while finding culpability of a rule 8-101(A) violation because there was no evidence the attorney acted dishonestly in her unauthorized withdrawal of fees from her trust account. Here, respondent clearly did not commit an act of moral turpitude by his payment to himself of a reduced fee taken in the good faith belief of a claim of right. [19c] We therefore modify the referee's finding of no aggravation to make a finding that respondent's unilateral withdrawal of fees prior to the fixing of the amount thereof established a circumstance in aggravation of the rule 8-101(B)(3) violation. Following the Supreme Court's opinion in *Edwards*, we see no violation of respondent's right to notice of the rule 8-101(A) charge: the evidence was necessarily elicited in the course of proving the rule 8-101(B)(3) charge; has been used merely to establish a circumstance in aggravation; and was based on respondent's own testimony. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 36.)

C. Mitigation.

As of the hearing in this matter (July-November 1989), respondent had been a member of the bar for over ten years, with no disciplinary record before or since the time of his misconduct, which had occurred over six years earlier (January 1983). (Std. 1.2(e)(i), 1.2(e)(viii).) In an attempt to attribute his misconduct to youth and inexperience (see, e.g., *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366), respondent testified that immediately after becoming a member of the bar, he had entered into a law partnership with three other attorneys who were no more experienced than he was, and that the result had been "a disaster." (II R.T. pp. 145-146.) His representation of Vinzon

12. Both the Courts of Appeals in *Estate of Falco*, *supra*, and *Hensel*, *supra*, criticized and distinguished *Pearlmutter* as factually not showing justifiable cause warranting the recov-

ery of fees. (*Hensel*, *supra*, 155 Cal.App.3d at p. 568; *Estate of Falco*, *supra*, 188 Cal.App.3d at p. 1013.)

commenced shortly after that partnership broke up, when he was practicing in a two-partner firm which dissolved fairly soon thereafter. (II R.T. pp. 147-148.)¹³ [25 - see fn. 13]

As already noted, respondent testified that his handling of the medical payment draft, including his simulation of Vinzon's endorsement thereon, was based on rights he interpreted to be given to him by the terms of his retainer agreement. (I.R.T. pp. 56-57, 62-63, 79-82, 94-95, 100, 118-119, 121-124.)

The referee found that respondent had acted in good faith, was candid at the hearing,¹⁴ and had recognized the need to change his procedures for handling medical payments which he had already implemented. She concluded that respondent was unlikely to commit further misconduct. (Decision, ¶¶ 38-39, 44; see stds. 1.2(e)(ii), 1.2(e)(v), 1.2(e)(vii), 1.2(e)(viii).) Although Vinzon was improperly kept in the dark for a lengthy period of time concerning the receipt of the partial settlement and respondent's fees and costs, neither Vinzon nor the doctor suffered monetary harm as a result of respondent's misconduct. (Std. 1.2(e)(iii).) Vinzon received all sums to which she was entitled when she was entitled to them (indeed, respondent waived part of his fee)¹⁵ and Vinzon's second attorney protected the doctor fully by segregating the doctor's share of the settlement from the ultimate recovery and retaining it in his trust account for payment to the doctor pursuant to his lien. The resulting delay in payment to the doctor at Vinzon's request is not attributable to respondent.

D. Recommended Discipline.

As already noted, the referee recommended a public reproof. On review, the examiner argues that even if respondent is culpable only of violating rule 8-101(B)(1), he should receive at least 90 days of actual suspension, and that greater discipline would be appropriate if additional culpability is found.

The examiner argues that standard 2.2(a) mandates a one-year minimum for misappropriation and standard 2.2(b) "mandate[s]" that for violations of rule 8-101 not involving misappropriation, the minimum discipline is a three-month suspension, irrespective of mitigating circumstances. [26] However, the standards are not to be applied in "talismanic fashion" and do not mandate such result. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221 [rejecting minimum one-year actual suspension called for by standards in matter involving one minor misappropriation mitigated by drug and alcohol problems from which attorney had recovered]; *Sternlieb v. State Bar, supra*, 52 Cal.3d 317 at p. 333 [rejecting 120-day suspension recommended by volunteer review department and ordering 30-day suspension for misappropriation resulting from unilateral withdrawal of fees from trust account].) All of the case law cited by the examiner in support of three months or greater actual suspension involved much greater misconduct and less mitigation than that in this case.¹⁶

Respondent's brief cites several summaries appearing in *California Lawyer* of unpublished deci-

13. [25] Respondent terminated his attorney-client relationship with Vinzon because he believed she would not be a good witness, had begun to doubt her credibility himself, and therefore believed that he could not give her effective representation. (II R.T. pp. 149-150.) Respondent's difficulty in working with his client justified respondent's consensual withdrawal. (See former Rules of Professional Conduct 2-111(C)(1)(d), 2-111(C)(2), 2-111(C)(5).)

14. Respondent was also found to have been candid with Vinzon's second attorney concerning his handling of the draft. (Std. 1.2(e)(v).)

15. While it is arguable that respondent was entitled only to the reasonable value of his time, instead of 40 percent of the recovery (see *Weiss v. Marcus, supra*, 51 Cal.App.3d. at p. 598), the record clearly demonstrates sufficient work to jus-

tify the reduced fee of \$217.69 respondent took for his services under either method of calculation.

16. *Phillips v. State Bar* (1975) 14 Cal.3d 492 involved an attempt to deceive the State Bar by means of a forged document. *Guzzetta v. State Bar, supra*, 43 Cal.3d 962 involved grossly negligent mismanagement of entrusted funds and refusal to provide an accurate accounting, as well as failure to perform legal services competently in another matter. *Lawhorn v. State Bar, supra*, 43 Cal.3d 1357 involved misrepresentations and unexplained delays in payment of client funds as well as numerous rule violations and *Boehme v. State Bar* (1988) 47 Cal.3d 448 involved intentional misappropriation. *Hipolito v. State Bar* (1989) 48 Cal.3d 621 also involved intentional misappropriation, and abandonment as well. *Hallinan, supra*, 33 Cal.2d 246 and *Levin, supra*, 47 Cal.3d 1140 involved misconduct far more egregious than that in this case.

sions of the former volunteer review department in which rule 8-101 violations resulted in public or private reprovais. [27] While not binding precedent, these matters do indicate that rule 8-101 violations have not always resulted in actual or even stayed suspensions. Indeed, in *Crooks v. State Bar* (1970) 3 Cal.3d 346 the Supreme Court ordered public reprobval of an attorney for unauthorized (albeit good faith) removal of funds from escrow to pay disbursements coupled with unilateral withholding of \$790 as unauthorized attorneys fees.

[28] Here, respondent's lengthy delay in notifying his client of receipt of a check in partial settlement of her case and failure to render a timely and appropriate accounting upon his withdrawal, aggravated by unilateral payment to himself, merits more than a public reprobval. Certainly, it indicates that respondent's handling of trust account records should be reviewed by an accountant for some period of time to ensure protection of other clients. However, in view of the mitigating circumstances, subsequent corrective measures, and lack of harm to the client or her doctor, no actual suspension appears necessary to protect the public. We do have sufficient concerns, however, to order two months suspension, stayed, conditioned on one year's probation, including periodic auditing of respondent's trust account, and to recommend that respondent be ordered to pass a professional responsibility examination within one year. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 892.) Such recommendation appears sufficient to guard against repetition of respondent's misconduct.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for two months, that execution of such order be stayed, and that respondent be placed on probation for one year on the following conditions:

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

2. That during the period of probation, he shall report not later than January 10, April 10, July 10,

and October 10 of each calendar 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;

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

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

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

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

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

(b) that respondent has maintained a bank account in a bank authorized to do business in the

State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

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

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

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

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

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

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

4. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professional 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;

5. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court or her designee 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 or designee from fixing another place by agreement) any inquiry or inquiries directed

to him personally or in writing by said Presiding Judge or designee relating to whether respondent is complying or has complied with these terms of probation;

6. 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 months shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination given by the State Bar prior to the expiration of one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.