

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**FLETCHER F. BOUYER**

A Member of the State Bar

[Nos. 86-O-15106, 87-O-11321]

Filed March 22, 1991; as modified, July 17, 1991

**SUMMARY**

Respondent was charged with misappropriating client funds, failing to pay medical liens, failing to perform competently and acts involving moral turpitude consisting of misappropriation, gross neglect in the handling of personal injury cases, signing clients' names to settlement checks without authorization, and issuance of numerous checks from his general office account which were drawn against insufficient funds. The hearing referee dismissed the charges based on the insufficient funds checks, because the respondent had a standing oral agreement with his bank to cover all checks, and no check was dishonored by the bank. Finding culpability on all the remaining counts, the referee recommended three years stayed suspension, three years probation, and one year actual suspension. (Leon S. Paule, Hearing Referee.)

The review department affirmed the dismissal of the check charges and the conclusion that respondent's grossly negligent office practices and near-total abdication of the handling of his clients' personal injury cases to his non-lawyer support staff constituted moral turpitude, and resulted in incompetent legal services, misappropriation of client trust funds due to inadequate trust account balances, inadequate records, and delayed accountings to clients. With respect to the endorsement of clients' signatures on settlement checks, respondent's practice of relying on oral endorsement authorizations secured from his clients by respondent's office staff, though disfavored, was held not to involve moral turpitude. Respondent's delayed disbursement of settlement funds to his clients had not been properly charged, because his clients had not requested the funds, and respondent had not been charged with violating the rule requiring notification to clients of the receipt of the funds. However, the failure to notify could be considered as an aggravating factor.

In determining the appropriate discipline, the review department concluded that disbarment was not called for where the temporary misappropriation of entrusted funds resulted from the attorney's laxity in supervising office staff, and not from any intent to defraud, and where remedial steps were instituted by the attorney, and the clients were repaid, upon discovery of the situation. The review department recommended a two-year suspension, stayed; a two-year probation period, and actual suspension for six months and until restitution was completed to one client and to medical lien holders.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: David A. Clare

HEADNOTES

[1 a-c] **204.90 Culpability—General Substantive Issues**

**221.00 State Bar Act—Section 6106**

A justifiable and reasonably certain belief that a check will be paid by the bank despite insufficient funds is a valid defense to a charge of issuing checks drawn against insufficient funds. Where respondent had an oral agreement with a bank officer to pay all his checks automatically, which would not have been terminated without notice to respondent, and where all checks he wrote were honored and no creditor was put at risk, respondent's repeated issuance of insufficient funds checks did not constitute misconduct.

[2 a, b] **221.00 State Bar Act—Section 6106**

**420.00 Misappropriation**

Where attorney failed to reveal to clients the real reason for the delay in their receipt of settlement funds, and was grossly negligent in failing to supervise his staff in the handling of client funds and settling of personal injury cases, this misconduct, coupled with misappropriation from the attorney's client trust account due to his failure to maintain a sufficient balance, was an appropriate basis for a finding of moral turpitude.

[3 a, b] **194 Statutes Outside State Bar Act**

**430.00 Breach of Fiduciary Duty**

An attorney may not endorse a client's name to a check without express authority to perform that particular act. However, under Commercial Code section 3403, no specific form of authorization is required from a principal to an agent in order for the agent to sign the principal's name to a negotiable instrument, such as a settlement check.

[4] **221.00 State Bar Act—Section 6106**

Attorney's reliance on clients' oral authorizations to simulate their endorsements on settlement checks did not constitute a basis to find moral turpitude.

[5] **204.90 Culpability—General Substantive Issues**

**715.10 Mitigation—Good Faith—Found**

**791 Mitigation—Other—Found**

Although an attorney is culpable for misconduct committed by inadequately supervised office staff, the degree of the attorney's personal involvement in the misconduct is relevant to the degree of culpability and the appropriate discipline to be imposed.

[6] **204.10 Culpability—Wilfulness Requirement**

**420.00 Misappropriation**

Misconduct which is technically wilful may be less culpable if committed through negligence than if committed deliberately; term "wilful misappropriation" as used in attorney discipline cases covers broad range of conduct varying significantly in degree of culpability.

- [7] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
Attorney who failed to distribute settlement funds and pay medical liens promptly, as a result of his grossly negligent office practices and failure to supervise employees, was culpable of repeated or reckless failure to perform competently.
- [8] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**  
Even though attorney belatedly supplied accountings to his clients, he violated duty to keep adequate records by failing to require his staff to maintain office records adequate to ensure that he would know of receipt of client funds and distribute them promptly upon receipt.
- [9 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**  
Attorney cannot be found culpable of failing to pay funds to client promptly upon request where, due to attorney's failure to notify client of receipt of funds, client has not requested payment.
- [10 a, b] **106.20 Procedure—Pleadings—Notice of Charges**  
**280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]**  
**561 Aggravation—Uncharged Violations—Found**  
An uncharged violation of the rule requiring prompt notification to clients when client funds are received could be considered as an aggravating circumstance, where the respondent was put on notice of the nature of the uncharged misconduct in the notice to show cause and did not object to a finding of culpability under a different rule for the same conduct. Evidence of uncharged misconduct may not be used as ground of discipline, but may be considered for other relevant purposes.
- [11 a, b] **710.53 Mitigation—No Prior Record—Declined to Find**  
Six or seven years of trouble-free law practice prior to commission of misconduct was an insufficient period to be considered a mitigating factor, despite evidence that misconduct was aberrational, had not recurred, and had resulted from lax supervision of staff rather than venality.
- [12] **745.10 Mitigation—Remorse/Restitution—Found**  
Voluntary restitution to all but one client prior to the involvement of the State Bar was a mitigating factor.
- [13] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**  
**280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**  
**420.00 Misappropriation**  
Where attorney held settlement draft uncashed pending review of adequacy of settlement amount, attorney's misconduct consisted of failure to follow through, and improper handling of client funds, rather than misappropriation.
- [14] **571 Aggravation—Refusal/Inability to Account—Found**  
**591 Aggravation—Indifference—Found**  
**691 Aggravation—Other—Found**  
Failure to make restitution is an aggravating factor; thus, incomplete restitution to clients' medical providers constitutes an aggravating factor.
- [15] **420.00 Misappropriation**  
Deficiency in respondent's trust account balance, coupled with respondent's grossly negligent handling of trust funds and delegation of responsibility, in and of itself established misappropriation,

even where there was no evidence as to the cause of the shortfall or that it resulted from a deliberate conversion of funds by respondent.

- [16]     **135     Procedure—Rules of Procedure**  
          **159     Evidence—Miscellaneous**  
          **162.19  Proof—State Bar’s Burden—Other/General**  
          **750.10  Mitigation—Rehabilitation—Found**  
Where attorney represented to State Bar Court that no disciplinary investigations against him were pending, examiner’s failure to rebut this contention, as permitted by rule 573, Trans. Rules Proc. of State Bar, warranted inference that State Bar did not dispute attorney’s representation.
- [17]     **750.10  Mitigation—Rehabilitation—Found**  
          **791     Mitigation—Other—Found**  
          **822.53  Standards—Misappropriation—Declined to Apply**  
If a misappropriation of entrusted funds results from an attorney’s laxity in supervising office staff, and not from an intent to defraud, and remedial steps are instituted by the attorney upon discovery of the situation, further underscoring the lack of fraudulent intent, far less discipline than disbarment is appropriate.
- [18]     **801.30  Standards—Effect as Guidelines**  
          **801.47  Standards—Deviation From—Necessity to Explain**  
The Standards for Attorney Discipline are treated by the Supreme Court as guidelines for imposing discipline, which it is not bound to follow in a “talismanic fashion,” but from which it will generally not depart unless there is a compelling reason for doing so.
- [19 a, b] **204.90  Culpability—General Substantive Issues**  
          **791     Mitigation—Other—Found**  
          **822.53  Standards—Misappropriation—Declined to Apply**  
While gross negligence is not a defense to a charge of misappropriation, the absence of evidence of intentional misappropriation is a substantial factor in mitigation.
- [20]     **174     Discipline—Office Management/Trust Account Auditing**  
A trust account auditing requirement and a course on law office management were appropriate conditions of probation where respondent’s misconduct included mishandling of client funds and stemmed from his failure to supervise his office staff properly.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

- 221.12 Section 6106—Gross Negligence
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
- 420.12 Misappropriation—Gross Negligence

##### Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.54 Misappropriation—Not Proven

**Aggravation****Found**

- 521 Multiple Acts
- 541 Bad Faith, Dishonesty
- 582.10 Harm to Client
- 601 Lack of Candor—Victim

**Declined to Find**

- 575.90 Refusal/Inability to Account
- 595.90 Indifference

**Standards**

- 801.41 Deviation From—Justified

**Discipline**

- 1013.08 Stayed Suspension—2 Years
- 1015.04 Actual Suspension—6 Months
- 1017.08 Probation—2 Years

**Probation Conditions**

- 1021 Restitution
- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1025 Office Management
- 1026 Trust Account Auditing

**Other**

- 171 Discipline—Restitution

## OPINION

PEARLMAN, P.J.:

Respondent was admitted to the practice of law in 1979 and has no prior disciplinary record. The misconduct charged in the matter before us involves grossly negligent office practices which occurred from November 1985 through November 1986. This proceeding involved a total of four matters, two in which notices to show cause were filed (and then consolidated), and two investigation matters (involving the handling of a single matter for different plaintiffs) which were consolidated with them and tried by stipulation, without a notice to show cause having been filed.

The consolidated matters were heard by a referee appointed under the former volunteer State Bar Court system, who found culpability on all counts except one. Respondent was found culpable on the two consolidated investigation matters and one of the original notices to show cause, each of which involved misappropriation of client funds, failure to pay medical liens, and failure to communicate.<sup>1</sup> Based thereon, the referee recommended three years suspension, stayed, three years probation and one year actual suspension.

The remaining count involved checks written on respondent's general office account (*not* his trust account) which were drawn on insufficient funds, but not dishonored. The bank paid all of these checks (hereafter "the NSF checks") pursuant to a standing arrangement with respondent that he would cover them by the next day and pay a service charge. The referee dismissed this count.

Both parties requested review. The examiner contends that (1) the referee should not have dis-

missed the count involving the NSF checks, and (2) the appropriate discipline is disbarment. Respondent contends that (1) although he is culpable of misconduct in the three counts involving clients, the record demonstrates gross negligence due to insufficient staff supervision and not intentional misconduct; (2) some of the referee's findings and conclusions on those counts contain factual and legal errors; and (3) the recommended discipline is excessive (specifically, the period of actual suspension should not exceed six months if all of the findings are upheld, and less if respondent's culpability is reduced per respondent's other arguments).

Upon our independent review of the record we adopt most of the referee's culpability determinations, but find that respondent was grossly negligent and did not intentionally misappropriate funds from his clients. We therefore modify the recommended discipline in light of relevant Supreme Court precedent to include six months actual suspension and until restitution is completed.

## FACTS

The referee made quite detailed findings of fact on the counts as to which he found culpability, which are, for the most part, supported by the evidence and not contested by either party. With the exception of a few (albeit significant) modifications discussed *post*, we adopt them. The following discussion is based on the undisputed portions of the findings, supplemented with factual details from the record.

A. Ervin Matter

(Investigation Matter No. 86-O-14499)

Complaining witness Willie James Ervin was in an automobile accident in June 1985. In July 1985, he hired respondent (through Haroun

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1. Because the parties stipulated that the two investigation matters could be tried without the filing of a notice to show cause, there is no record of the exact allegations and charges made in those two matters. The State Bar (with respondent's consent) showed the referee a proposed stipulation which had been prepared by the State Bar but to which the parties had not agreed, and asked that the stipulation be treated as if it were a notice to show cause. (8/23/89 R.T. pp. 4-6.) However, the

proposed stipulation was not marked as an exhibit or otherwise entered into the record, though some of its contents may be gleaned from references to it made by respondent's counsel in his closing argument. (See 8/23/89 R.T. pp. 134-141.) In any event, the parties expressly stipulated that the statute and rule violations charged in the two investigation matters were identical to those charged in the notice to show cause in the factually similar Moore matter. (8/23/89 R.T. pp. 143-145.)

Alhambra, respondent's office manager) to pursue personal injury and property damage claims on his behalf. (8/23/89 R.T. pp. 7-9, 16.) After November 1985, neither respondent nor Alhambra returned Ervin's frequent telephone calls about the status of the case. (8/23/89 R.T. pp. 15, 22-23.)

In December 1985, the matter was settled on Ervin's behalf without his consent, and his endorsement was placed on the settlement checks by someone in respondent's office without Ervin's consent.<sup>2</sup> (8/23/89 R.T. pp. 16-17, 19-20; exhs. 16, 17.) Neither respondent nor his staff told Ervin the case had settled, or paid Ervin his share of the settlement, until November 1986, almost a year after the matter was settled. (8/23/89 R.T. pp. 23-26.) In the interim, respondent's trust account balance fell below the amount respondent's office had received on Ervin's behalf and deposited into the trust account. (8/23/89 R.T. p. 18; exh. 9.)

**B. Swanson Matter**  
(Investigation Matter No. 87-O-11719)

Complaining witness Mary Swanson (hereafter "Swanson") and her minor children (twins, named Jason and Jennifer (8/23/89 R.T. pp. 48, 58)) were in the car with Ervin at the time of his June 1985 accident. (8/23/89 R.T. pp. 21, 48.) Ervin and the Swansons were sharing a residence at that time, although they had different addresses by the time of trial. (8/23/89 R.T. pp. 37-38, 73; compare 8/23/89 R.T. p. 6 with 8/23/89 R.T. p. 47.) Ervin referred the Swansons to respondent, and Swanson retained respondent to pursue personal injury claims for herself and the children in connection with the accident. (8/23/89 R.T. pp. 48, 70-71.)

As did Ervin, Swanson testified that respondent did not return her telephone calls; that her case was settled without her knowledge or consent; and that the endorsements on her settlement checks were not her signature and were not made with her consent. (8/23/89 R.T. pp. 51-59; exhs. 22, 23.) As with Ervin, respondent delayed paying Swanson and Jennifer their shares of the settlement until November 1986, nearly a year after the settlement drafts were received. (8/23/89 R.T. p. 62; exh. 24.) Also as with Ervin, in the interim, respondent's trust account balance fell below the amount of the settlement funds he had received on Swanson's and Jennifer's account. (Exh. 9.) With respect to Jason's personal injury claim, respondent never cashed the settlement check, and Jason never received any funds in settlement of his claim. (See 8/23/89 R.T. pp. 63-67.)

**C. Moore Matter (No. 87-O-11321)**

Complaining witness Bennie Moore's story was very similar to those of Ervin and Swanson. Moore retained respondent in August 1985, through Alhambra, to represent her in an automobile accident case. (6/14/89 R.T. pp. 89-91.) Her case was settled at the end of December 1985 without her knowledge or consent,<sup>3</sup> and her name was endorsed on the settlement check without her authority. (6/14/89 R.T. pp. 92, 95-96; exhs. 4, 5.) Moore was not paid her share of the settlement until August 1986. (6/14/89 R.T. pp. 98-100; exh. 8.) Prior to August 1986, respondent failed to return telephone calls from Moore and her husband. (6/14/89 R.T. pp. 122-126.) As with Ervin and Swanson, between the date Moore's settlement proceeds were deposited in respondent's trust account and the date she received her share, the

2. There was no evidence that respondent knew of the client's lack of consent. Respondent was frequently out of his office during this period in connection with civil rights litigation. (6/14/89 R.T. pp. 140-141.) He had instructed Alhambra to obtain clients' oral consent before placing settlement funds in the trust account with a simulated client signature. (6/14/89 R.T. pp. 132-133; 6/15/89 R.T. pp. 31-32.) On review, respondent has conceded through his counsel that his office procedures during this period were negligent, and "probably" grossly negligent.

3. The referee resolved conflicting evidence on this point, and we defer to his finding, which respondent has not contended is unsupported by the evidence. (Decision at pp. 7-8 [finding of fact 5(b)].) However, there is documentary evidence in the record of a four-minute telephone call in December 1985 from respondent's office to Moore's telephone number. (6/15/89 R.T. pp. 8-10; exh. K.) (Respondent's counsel referred to this in his brief on review as an 18-minute call, but this characterization appears to have been based on a misreading of the relevant exhibit. (Exh. K.))

balance in the trust account fell below the amount owed to Moore. (Exh. 9.)

D. NSF Check Matter (No. 86-O-15106)

On 52 separate occasions during September, October and November 1986, respondent's general office account did not have sufficient funds to cover checks drawn on the account at the time the checks were presented for payment. All of these checks were paid by the bank even though the account had insufficient funds.<sup>4</sup> (6/14/89 R.T. pp. 20-21.) Respondent was assessed a \$10.00 service charge each time this occurred. (6/15/89 R.T. pp. 16-18.)

Both respondent and Diane McDaniels, who was operations manager of respondent's bank branch at the relevant time (6/15/89 R.T. p. 15), testified that during this period, respondent had an informal arrangement with the bank regarding insufficient funds checks drawn on respondent's general office account. The arrangement was that upon receipt of an NSF check, the bank would call respondent (or his office personnel) and arrange for him to come in and deposit funds to cover the check later that day or the next day. (6/14/89 R.T. pp. 38-40, 43-44; 6/15/89 R.T. pp. 15-16, 19.) After making such a call, the bank would proceed to pay the check, and charge respondent a \$10.00 fee. (6/15/89 R.T. pp. 16-18.) This arrangement was a courtesy to respondent as a long-standing customer. (6/15/89 R.T. p. 18.) It was oral and informal, and could have been terminated by the bank at any time. (6/15/89 R.T. p. 22.) However, it would not have been terminated without advance notice to respondent. (6/15/89 R.T. pp. 21-23.) By September 1986, the arrangement had been in effect and had been honored by the bank for a couple of years. (6/14/89 R.T. pp. 47-48.)

DISCUSSION

A. Dismissal of NSF Check Matter

The examiner requests reversal of the referee's recommendation of dismissal of the NSF check matter, relying on *Rhodes v. State Bar* (1989) 49 Cal.3d 50. In that case, the hearing panel had dismissed some of the NSF check counts on the basis of a finding that the attorney had an understanding with the bank that his NSF checks would be covered. The review department had reinstated the counts, finding that "petitioner knew his account had insufficient funds and had no way of knowing whether his checks would be honored by the bank." (*Id.* at p. 58, emphasis added.)

Respondent counters persuasively that *Rhodes v. State Bar*, *supra*, 49 Cal.3d 50 is distinguishable. [1a] In this matter, the evidence shows that respondent reasonably relied on an arrangement with the bank whereby all of his checks were supposed to be and in fact were paid, despite the inadequate balance in his account. Although oral and informal, this arrangement would not have been terminated without prior notice to respondent. Thus, respondent justifiably believed, with reasonable certainty, that unless and until he was told otherwise by the bank, all of his NSF checks would be paid upon presentment.

[1b] The Supreme Court in *Rhodes v. State Bar*, *supra*, 49 Cal.3d 50 recognized that a justifiable and reasonably certain belief that an NSF check will be paid is a valid defense to an NSF check charge. (*Rhodes v. State Bar*, *supra*, 49 Cal.3d at p. 58, fn. 9, citing *People v. Rubin* (1963) 223 Cal.App.2d 825, 835.)<sup>5</sup> In this regard, the situation in this case is very different from that in *Rhodes v. State Bar*. *Rhodes*'s bank "did not represent that it would honor *all* of [*Rhodes*'s] checks

4. There was some testimony from bank employees, based on "Refer to Maker" stamps present on some of the checks, that some of the checks might have been paid only after being returned to the payee and resubmitted. (See 6/14/89 R.T. pp. 15-17, 21-23; 6/15/89 R.T. pp. 20-21, 26-27.) However, neither of the bank employees was able to state positively that this had occurred. Indeed, there was also testimony that the stamp might have been placed on the checks in error. (6/15/89

R.T. pp. 20-21, 24, 27.) In any event, all of the checks were paid. (6/14/89 R.T. p. 29.)

5. *People v. Rubin* was disapproved on other grounds in *People v. Poyet* (1972) 6 Cal.3d 530, 536. In *People v. Poyet*, the Court disapproved of the suggestion in *People v. Rubin* that negotiation of a check does not necessarily represent that there are currently sufficient funds in the bank, but only that in the ordinary course of business the check will be honored.

for insufficient funds.” (*Rhodes v. State Bar*, *supra*, 49 Cal.3d at p. 58, emphasis added.) Furthermore, Rhodes’s arrangement depended on the checks being presented for payment to a particular officer, and Rhodes had no way of knowing whether that would occur or not. (*Id.*) Finally, many of Rhodes’s checks had in fact been returned unpaid, and Rhodes “was therefore on notice that *he could not reasonably rely* on the informal agreement.” (*Id.*, emphasis added; fn. omitted.)

[1c] In this case, respondent’s agreement was with a particular operations officer, and could have changed if and when that officer left the bank, but, unlike in *Rhodes v. State Bar*, *supra*, 49 Cal.3d 50, the agreement automatically applied to all checks presented while it was in effect, and it would not have been terminated without prior notice. These distinctions are critical. Here, contrary to the examiner’s claim and contrary to the facts in *Rhodes v. State Bar*, respondent did not put his creditors at risk of nonpayment by writing them NSF checks. Thus, the State Bar did not prove by clear and convincing evidence that any of respondent’s checks had to be resubmitted. Even if they were, however, that was contrary to respondent’s arrangement with the bank that they would be honored, and it is undisputed that they were all paid. (6/14/89 R.T. p. 29.) Respondent’s belief that his NSF checks would be paid was not only justifiable (based on substantial prior experience with the arrangement) but correct; all of his NSF checks were in fact paid, and no creditor was harmed. These facts distinguish this case not only from *Rhodes v. State Bar*, but also from the other NSF check cases cited to us by the parties.<sup>6</sup> We therefore adopt the recommendation of dismissal of this count.

#### B. Basis for Finding of Moral Turpitude

Respondent has not attacked the referee’s conclusions that respondent committed acts of moral

turpitude in violation of section 6106 of the Business and Professions Code (hereinafter section 6106). However, as we discuss *post*, to the extent that the referee’s conclusion of moral turpitude was based on his finding that respondent was personally involved in settling his clients’ cases without their consent or in placing their signatures on checks without their authorization, the conclusion is invalid, because the findings are without evidentiary support. [2a] After respondent discovered the problem, respondent did, however, fail to reveal to his clients that his office had received the funds long before he paid them their shares of the settlements.<sup>7</sup> (See 8/23/89 R.T. pp. 42-43, 45, 63, 86; decision at p. 11 [finding of fact 7].)

[2b] Moreover, respondent had been grossly negligent, bordering on reckless, in earlier failing to supervise his staff’s handling of client funds and in delegating the handling of personal injury settlements almost entirely to his office staff, with little or no supervision. This gross negligence, coupled with the misappropriation of which respondent was culpable due to the shortfall in his trust account balance that occurred while he was holding his client’s funds, constitutes an appropriate basis upon which to base a finding of moral turpitude and of culpability on the section 6106 charge. (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37 [misappropriation caused by serious, inexcusable violation of duty to oversee entrusted funds is deemed willful even in the absence of deliberate wrongdoing]; *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475 [gross negligence in handling client funds, shortfall in trust account and careless supervision of his staff constituted moral turpitude notwithstanding attorney’s lack of intent to misappropriate funds]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 859 [attorney’s gross negligence in failing to supervise office staff, resulting in an office practice where his staff signed affidavits and declarations on behalf of others, amounted to moral turpitude].)

6. See *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 571-572, 577, fn. 13 (attorney disbarred for multiple acts of serious misconduct including issuance during a five-year period of over 550 checks that attorney knew were not backed by sufficient funds and that were returned for insufficient funds; 28 of these checks were drawn on trust accounts, and several remained unpaid as of the hearing date); *Alkow v. State Bar* (1952) 38 Cal.2d 257, 264 (attorney suspended for three years for multiple acts of serious misconduct including repeated

issuance of both trust account and personal checks “which he *knew would not be honored*” [emphasis added]).

7. When respondent explained to Ervin and Swanson that he had reduced his fee, respondent at least implicitly attributed the delay in their receiving payment to the failure of the case to settle earlier rather than to his own failure to disburse the funds promptly. (See 8/23/89 R.T. pp. 42-43, 45, 63, 86.)

On review, the examiner argues that there is yet another basis on which to make a finding of moral turpitude, that is, the simulation of clients' endorsements on settlement checks by respondent's office staff without the clients' prior approval. The examiner cites *Palomo v. State Bar* (1984) 36 Cal.3d 785, 793-795 in support of this contention. [3a] But *Palomo v. State Bar* only holds that an attorney may not endorse a client's name to a check without express authority to perform that particular act. (*Id.* at p. 794.) It does *not* require that such authority must be given formally or in writing. Thus, *Palomo v. State Bar* is some authority for the proposition that respondent's reliance on oral client authorization, while risky (as he now acknowledges), did not by itself constitute moral turpitude.<sup>8</sup>

Moreover, the examiner's contention is contrary to California statutes and case law governing check endorsements by authorized agents. [3b] Commercial Code section 3403, subdivision (1), provides

that an agent's signature on a negotiable instrument binds the principal if the signature is authorized, and that *no specific form of authorization* is required. The official code comment to the underlying Uniform Commercial Code section indicates that the agent may simply sign the principal's name rather than indicating that he or she is signing as an agent, although it does not recommend this practice. (See 23B West's Ann. Cal. U. Com. Code (1964 ed.) § 3403, p. 267; *id.* (1990 supp.), p. 16; see also *Kiekhoefer v. United States Nat. Bank* (1934) 2 Cal.2d 98, 105-108 [holding, under predecessor statute to Cal. U. Com. Code, § 3403, subd. (1), that attorney-in-fact who was authorized to endorse checks made payable to principal validly endorsed check by simulating principal's signature without indicating he was signing as agent].) [4] Based on the foregoing, we decline to find that respondent's reliance on the clients' oral authorization of check endorsement constituted a separate basis for finding moral turpitude.<sup>9</sup>

8. None of the other cases cited to us by the parties is precisely on point. *Hallinan v. State Bar* (1948) 33 Cal.2d 246, 248-249 held 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, the holding in *Hallinan* was not extended to check endorsements, the legal nature and import of which is markedly different from that of releases.

In *Vaughn v. State Bar*, *supra*, 6 Cal.3d at pp. 856, 857-859, the respondent attorney's secretary endorsed and deposited a check made out to the attorney for his fees. As a result of negligent recordkeeping, the attorney's staff later took action to collect the fees, not realizing the payment had been made. The secretary also signed the attorney's name to a declaration in that connection. For this and other misconduct, the attorney received a public reproof. The Supreme Court was deeply troubled by the secretary's having signed the declaration, and by the attorney's sloppy recordkeeping, but did *not* indicate that the secretary's having endorsed the check on the attorney's behalf was cause for discipline.

Both *Garlow v. State Bar* (1982) 30 Cal.3d 912 and *Levin v. State Bar* (1989) 47 Cal.3d 1140 involved acts of moral turpitude, but neither case is factually comparable to this matter. The attorney in *Garlow v. State Bar* forged a client's signature without authorization on a declaration, and then represented to the court that the signature was genuine and suborned perjury to that effect. (*Garlow v. State Bar*, *supra*, 30 Cal.3d at p. 917.) In *Levin v. State Bar*, 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 mishandled the settlement funds by delivering the client's share in cash to the client's cousin without obtaining a receipt. (*Levin v. State Bar*, *supra*, 47 Cal.3d at pp. 1143-1145.) It was Levin's acts of overt dishonesty, not his mere endorsement of his client's name on a check, that led to the moral turpitude finding in that case. (See *id.* at pp. 1145-1146.)

9. *Aronin v. State Bar* (1990) 52 Cal.3d 276, 286-287, is distinguishable. In *Aronin v. State Bar*, the attorney was held to have committed an act of moral turpitude when he wrote his clients' signatures on the verification of a pleading, a practice specifically forbidden by statute. (*Id.* at pp. 286-287, citing Code Civ. Proc., § 446.) The forged client signatures were misleading to the court and opposing counsel, because under the statute the presence of the signatures constituted a representation that the clients personally had signed the verification. Because the statute governing check endorsements affirmatively permits agents to endorse their principals' names, the bank that pays the check does not have a legitimate expectation that the check was endorsed by the payee personally. Accordingly, the endorsements in this matter were not acts of moral turpitude.

C. Respondent's Requested Modifications  
to Decision

*1. Deletion of Conclusions re Violations of Sections 6068 (a) and 6103 of the Business and Professions Code.*

Respondent argues on review that the referee's findings of violations of Business and Professions Code sections 6068 (a) and 6103, as to each of the counts on which he found culpability, should be deleted on the authority of *Baker v. State Bar* (1989) 49 Cal.3d 804, 814-815. The examiner did not address this issue in her reply brief. For the reasons discussed in *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561-562; *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617-618, and *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059-1060, respondent is correct. We do not adopt these portions of the referee's findings and conclusions.

*2. Correction of Findings re Respondent's Personal Involvement in Misconduct.*

The referee found, in several portions of his decision, that misconduct was committed by "respondent or a member of his staff under his direction." (E.g., decision at p. 3, lines 1-2.) Respondent argues on review that these findings are unsupported by the record, because the undisputed evidence shows that if anyone settled cases or simulated client signatures without the clients' consent, it was not respondent personally, but his office staff, acting contrary to respondent's instructions, and without his knowledge.

Respondent correctly characterizes the evidence. (See, e.g., 6/14/89 R.T. pp. 130-133, 142; 6/15/89 R.T. pp. 31-34; 8/23/89 R.T. pp. 93, 113, 125-127, 129-132.) [5] The examiner's sole argument on this point is that respondent remains culpable even if his misconduct was committed by his inadequately supervised office staff rather than by respondent per-

sonally. This is correct, of course (see, e.g., *Palomo v. State Bar*, *supra*, 36 Cal.3d at pp. 795-796), and respondent does not dispute it. Nonetheless, respondent wishes the findings corrected because his degree of personal involvement is relevant to the degree of his culpability, and thus to the degree of discipline appropriate to his misconduct.<sup>10</sup> [6 - see fn. 10] We agree and modify the referee's findings accordingly, as specified below.

Respondent also argues that there is no evidentiary or other basis for the referee's distinction between the "simulation" of client signatures found to have occurred with respect to the Ervin and Swanson matters, and the "forgery" of the client's signature found to have occurred with respect to the Moore matter. Respondent is correct that there is no basis to draw a distinction in this regard between the Moore matter and the other two.

The examiner's brief does not directly respond to this contention. Because the checks were deposited in the trust account, and there was no evidence of any intent to defraud the clients, we believe the referee's use of the expression "simulated" was more appropriate, and modify the findings accordingly as specified below, making the wording consistent with respect to all three counts.

Accordingly, we amend the decision as follows:

(a) *Finding 2.a (Decision p. 3, lines 1-2):* Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(b) *Finding 2.b (Decision p. 3, lines 8-10):* Change "In December 1985, without the prior knowledge or consent of his client, Respondent or a member of his staff under his direction settled Ervin's personal injury claim for \$5,000.00" to "In December 1985, due to respondent's grossly inadequate

10. [6] As the examiner impliedly acknowledged in her brief on review, misconduct which is technically wilful may be less culpable if it is committed through negligence than if it is committed deliberately. (See, e.g., *Edwards v. State Bar*,

*supra*, 52 Cal.3d at p. 38 ["As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability."]; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.)

supervision of his staff, a member of respondent's staff settled Ervin's personal injury claim, without Ervin's prior knowledge or consent, for \$5,000.00".

(c) *Finding 3.a (Decision p. 4, lines 19-20)*: Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(d) *Finding 3.b (Decision p. 4, line 28 through p. 5, line 1)*: Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(e) *Finding 5.b (Decision p. 8, lines 1-2)*: Change "the Respondent, without authorization from Moore, either forged or caused to be forged" to "due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff, without authorization from Moore, simulated".

#### CONCLUSIONS AS TO CULPABILITY

Besides the conclusion that respondent had violated Business and Professions Code sections 6068 (a), 6103 and 6106 (discussed *ante*), the referee concluded as to each of the Ervin-Swanson and Moore matters that respondent had violated former rules 6-101(A)(2), 8-101(B)(3), and 8-101(B)(4) of the Rules of Professional Conduct.<sup>11</sup> None of these conclusions is challenged by respondent on review, but all are nonetheless before us for reconsideration.

##### A. Rule 6-101(A)(2).

[7] The conclusion that respondent repeatedly failed to perform competently or acted with reckless disregard in violation of rule 6-101(A)(2) is justified on all counts by the fact that respondent's failure to distribute the settlement funds and pay the medical liens promptly (an aspect of competent performance) resulted from the combination of his

grossly negligent office practices and his near-total abdication to Alhambra of the responsibility for negotiating personal injury settlements, obtaining the clients' approval thereof, and handling the settlement proceeds.

##### B. Rule 8-101(B)(3).

[8] The findings of violation of rule 8-101(B)(3) in failing to maintain complete records and render appropriate accounts in each matter are also justified by the record before us. The testimony with regard to respondent's having given (or at least shown) accountings to his clients was conflicting, and in the Ervin-Swanson matter, though not in the Moore matter (see decision at pp. 8-9 [finding of fact 5.f]), the referee found that respondent *had* shown the clients an accounting. (Decision at pp. 3-4, 5 [findings of fact 2.e, 3.e.]) However, the evidence showed in both matters that respondent failed to require his staff to maintain records adequate to ensure that he would know about the receipt of client funds and would be in a position to distribute them promptly upon receipt. This misconduct is adequate to support the rule 8-101(B)(3) violations in both matters despite the fact that respondent did give belated accountings to Ervin and Swanson.

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

Rule 8-101(B)(4) requires that funds to which a client is entitled must be paid to the client promptly "as requested by [the] client."<sup>12</sup> (See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 170.) [9a] In the present case, because the clients did not know that respondent was in possession of their settlement proceeds, and because respondent did not respond to their attempts to communicate during the relevant time period, the clients did not actually request to be paid. Neither the referee nor the parties before us have addressed client demand as a prerequisite for the finding that respondent violated the rule.

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

12. Current rule 4-100(B) of the Rules of Professional Conduct preserves former rule 8-101(B) substantively unchanged.

By failing to inform the clients that he had received their settlement proceeds, respondent plainly violated rule 8-101(B)(1), requiring attorneys to notify clients promptly when they receive funds to which the client is entitled. But respondent was not charged with violating rule 8-101(B)(1) in any of the counts.

Thus, the question is whether respondent should be found culpable of violating rule 8-101(B)(4) because his other, uncharged misconduct (his violation of rule 8-101(B)(1) by failing to notify the clients promptly of the receipt of funds due them) created a circumstance under which the clients had no reason or ability to request payment. In *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 126-127, the Supreme Court specifically refused to hold that failure to transmit to a client funds that were properly payable to that client was a violation of rule 8-101(B)(4) when there was no evidence that the client requested the funds. (See also *Guzzetta v. State Bar* (1987) 43 Cal.3d 962; *Lawhorn v. State Bar*, *supra*, 43 Cal.3d 1357; *Rhodes v. State Bar*, *supra*, 49 Cal.3d 50.)

[9b] Since rule 8-101(B)(1) was promulgated to cover precisely the sort of misconduct that occurred in this case, the State Bar should have sought discipline under that rule, and should not have attempted to prosecute under rule 8-101(B)(4) instead, when its elements were not present. Accordingly, we strike the findings of rule 8-101(B)(4) violations as to all three counts. [10a] We note, however, that violation of rule 8-101(B)(1) may properly be taken into account as an aggravating circumstance in arriving at the appropriate discipline for respondent's misconduct. (See discussion, *post*.)

## AGGRAVATING AND MITIGATING CIRCUMSTANCES

### A. Aggravation

The referee's decision did not explicitly designate any findings as factors in aggravation. However,

his finding of fact number 7 (decision at p. 11) appears to have been intended as an aggravation finding. It includes findings, all of which are supported by substantial evidence, that respondent's misconduct involved multiple acts, harm to clients, concealment, and lack of candor to clients. (See decision at pp. 6, 9 (findings of fact 3.h, 5.g) [clients were contacted by medical lienholders whom respondent had failed to pay]; 8/23/89 R.T. pp. 42-43, 45, 63, 86 [respondent failed to reveal to his clients that the delay in their receiving settlement funds was due to respondent's own negligence].)<sup>13</sup>

While we adopt these aggravating factors, we note that all of the alleged misconduct occurred in two underlying client matters (treating the personal injury case involving Swanson and Ervin as one matter) and derived from a single source (respondent's failure to supervise his employees properly and his poor office practices). [10b] We do, however, add a finding of violation of rule 8-101(B)(1) as a factor in aggravation pursuant to standard 1.2(b)(iii). Since respondent was on notice of the nature of the misconduct charged and did not object to culpability under rule 8-101(B)(4) for his conduct in violation of rule 8-101(B)(1), he can hardly object to the inclusion of the same facts as a finding in aggravation instead of culpability. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 35-36.) "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." (*Id.*)

### B. Mitigation

[11a] In mitigation, respondent introduced evidence that most of the misconduct found in this case—the unauthorized settlements and client endorsements, the failure to pay clients and their medical providers promptly, and the deficient trust account balance—was the product of lax office practices and inadequate employee supervision rather than deliberate venality. (See, e.g., 8/23/89 R.T. pp. 110-113.) While acknowledging that these facts do not elimi-

13. The referee also found that respondent's misconduct involved "bad faith." This finding is not justified by any of the underlying facts found by the referee, and we do not adopt it;

as explained in more detail *post*, respondent's misconduct amounted to gross negligence but did not involve bad faith.

nate his culpability, respondent argued them in mitigation, and introduced evidence that he had voluntarily cured the office management problems that led to his misconduct. (See 6/14/89 R.T. pp. 134-135, 146; 8/23/89 R.T. pp. 147-153.) Thus, respondent contended that the misconduct he committed in this matter was aberrational and had not recurred.

The referee essentially accepted respondent's contentions, noting as well that respondent had voluntarily reduced his fees in the Ervin-Swanson case as partial recompense for the delay in payment. (Decision at pp. 12-13; 8/23/89 R.T. pp. 42-44, 86, 118-120.) Respondent has no disciplinary record apart from these consolidated cases. One other matter dating from the same time period was made the subject of a notice to show cause, but the charges were dismissed in that matter (No. 87-O-13117), and the State Bar has not requested review of the dismissal, which has become final. **[11b]** We accept respondent's testimony that his misconduct during the 1985-1986 time period was not typical of the way he practiced law. Nonetheless, as of the date of his misconduct, respondent had only been in practice some six or seven years, which was an insufficient period of trouble-free practice to consider as substantial mitigation. (See, e.g., *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658.)

**[12]** We do consider as a mitigating factor respondent's voluntary restitution to all but one of the clients whose funds had been misappropriated as soon as he discovered the problem, well before the involvement of the State Bar. (8/23/89 R.T. p. 152.) On review, the examiner argues that the problems which caused respondent's misconduct have not been cured, because as of the date of trial respondent still had not paid one of the clients (Jason)<sup>14</sup> **[13 - see fn. 14]** and still owed a total of \$2,884.95 to his clients' medical providers.<sup>15</sup> The examiner argues that respondent's misappropriation thereby "continued" up to the time of trial. **[14]** Failure to make restitution is legitimately considered as an aggravating factor (standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V [hereafter "standard(s)"]), and we find that incomplete restitution to medical providers constitutes an aggravating factor here.

Overall, respondent's evidence adequately demonstrated that his misconduct stemmed from inadequate office management and not from any venal intent. Nonetheless, he was grossly negligent for a substantial period of time in complying with his ethical responsibilities vis-a-vis his personal injury clients. Respondent put on evidence that he had an expanding practice and was preoccupied with civil

14. **[13]** As to Jason Swanson, respondent did not make restitution. However, he had never misappropriated Jason's settlement funds; rather, he had held the settlement draft uncashed in his file, apparently in order to preserve Jason's claim in the event the settlement amount proved to be inadequate. (See 8/23/89 R.T. pp. 63-67, 81, 101, 105-107 [after receiving settlement draft, respondent refrained from cashing it, and told Swanson he did not want to finalize Jason's settlement until he knew whether complications would arise from Jason's head injuries].) Thus, in Jason's case respondent's misconduct consisted of failure to follow through on the matter, and improper handling of client funds, rather than misappropriation. The Supreme Court's opinion in *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126-1128 is on point. There, an attorney who refrained from depositing a refund check from the Internal Revenue Service to his client was found not culpable of misappropriation. The court reasoned that the attorney had a reasonable belief that depositing the check might compromise the client's position in a tax dispute. (*Id.* at pp. 1127-1128.) However, the court did find the attorney culpable for "caus[ing] the matter to drift for two and

one-half years." (*Id.* at p. 1128.) Moreover, respondent's personal involvement in advising Swanson with regard to Jason's settlement is some evidence that he did not totally abdicate his responsibilities in personal injury cases to Alhambra. As of the date of the hearing in this matter, respondent still had the unnegotiated check in his possession, and evidently intended to disburse the funds upon the conclusion of the State Bar proceedings. (8/23/89 R.T. pp. 106-107.) We assume he will disburse the funds promptly upon the issuance of the Supreme Court's order herein, if he has not already done so. In any event, respondent has not objected on review to the referee's recommendation (which we adopt) that respondent be ordered to make restitution to Jason in the form of interest on the funds he obtained for Jason but did not disburse to him.

15. The referee made detailed findings regarding the outstanding balances due certain medical providers, and the amounts that had already been paid. (Decision at p. 7 [chart].) Neither party contends that these findings were in error, and they are supported by the record. We hereby adopt them.

rights litigation during the period in question. (6/14/89 R.T. pp. 140-141, 156; 6/15/89 R.T. pp. 34-35.) Alhambra testified that he generally discussed proposed settlements with respondent before they were finalized, but neither respondent nor Alhambra said they recalled discussing the settlements of these matters specifically. (8/23/89 R.T. pp. 90, 112-113; but see 6/14/89 R.T. pp. 130-132, 152-153 [respondent testified Alhambra was competent to evaluate settlement offers in soft tissue injury cases].)

[15] The checks with the clients' simulated endorsements were deposited in the trust account, and respondent was under the impression that client authorization for the signatures had been obtained. Nevertheless, there were subsequent deficiencies in the trust account balance. There is no evidence concerning the cause for these deficiencies; as a result, there is no indication that they resulted from deliberate conversion of the funds by respondent. Nonetheless, the shortfall in and of itself establishes misappropriation coupled with respondent's grossly negligent handling of client funds and delegation of responsibility for seeing to it that the funds were properly maintained. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 37; see also *id.* at pp. 37-39 [three years stayed suspension, probation, and one year actual suspension for misappropriation resulting from mismanagement of trust account]; *Giovanazzi v. State Bar, supra*, 28 Cal.3d at pp. 474-475 [three years stayed suspension, probation, and thirty days actual suspension for improper business transaction with client, filing dishonest pleadings, and misappropriation of client trust funds resulting from poor supervision of office staff].)

Respondent was already in the process of implementing a better office management system when he discovered the problems that had occurred with these matters. (See, e.g., 6/14/89 R.T. pp. 138-139, 146.) He made restitution to the clients voluntarily before any proceedings were brought and reduced his fees

in the Ervin-Swanson matter to make up for the delay. He has since taken additional measures to prevent these problems from recurring (8/23/89 R.T. pp. 148-151, 153), and there is no evidence that they have recurred.<sup>16</sup> [16 - see fn. 16]

#### RECOMMENDED DISCIPLINE

Respondent and the examiner are poles apart on the issue of discipline. The examiner urges disbarment, based primarily on the argument that respondent's evidence in mitigation is insufficient to overcome the presumptive sanction of disbarment for misappropriation. (See standards 1.2(b)(iii), 1.2(b)(v).) The examiner also cites *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, the attorney was disbarred for a single act of misappropriation of approximately \$7,900. However, the attorney's course of conduct amounted to deliberate theft rather than mere negligence in handling funds. (*Id.* at pp. 128-129.) Moreover, the attorney lied to the State Bar investigator about the matter, never acknowledged the impropriety of his conduct, and made no efforts at restitution. (*Id.*) There was no mitigating evidence whatsoever and the Supreme Court concluded that there was a high risk that the attorney might commit further misconduct if allowed to continue to practice. That is not the case here.

Respondent argues that the length of recommended actual suspension should be reduced from one year to six months or less based in large part on the precedents of *Waysman v. State Bar* (1986) 41 Cal.3d 452 and *Palomo v. State Bar, supra*, 36 Cal.3d 785. In *Palomo v. State Bar*, an attorney with one prior instance of discipline (*id.* at p. 790) was found culpable of (1) endorsing a client's name on a \$3,000 check without the client's consent; (2) depositing the proceeds in his payroll account; (3) failing to notify the client and pay over the funds promptly, and (4) misappropriating and commingling the funds. (*Id.* at pp. 790-791, 793-795.) Palomo himself had

16. [16] Respondent represented to the review department in his brief that, other than the charges involved in this matter and another case that was pending at the time of briefing and oral argument, but which has since been dismissed, there are no other pending disciplinary complaints against respondent. (Other complaints had been filed, but they were all dismissed

at the investigation stage.) If there were other investigation matters pending, respondent's reliance on this contention would have given the examiner the right to refer to them to rebut this contention. (Rule 573, Trans. Rules Proc. of State Bar.) We infer from her failure to do so that the accuracy of respondent's representation is not disputed by the State Bar.

endorsed the client's name to the check, but the remaining misconduct resulted from errors by Palomo's office staff rather than any deliberate intent by Palomo to misappropriate the money. (*Id.* at pp. 795, 798.) As in this case, Palomo's lax office management practices did not affect just one client, but pervaded his practice for a period of time. (*Id.* at p. 798.) Palomo was given a one-year stayed suspension and one year probation, with no actual suspension. (*Id.*)

In *Waysman v. State Bar*, *supra*, 41 Cal.3d 452, an attorney with no prior record was found culpable of commingling and misappropriating \$24,000 from a single client. (*Waysman v. State Bar*, *supra*, 41 Cal.3d at p. 454.) The funds were the proceeds of a settlement draft which arrived while Waysman was out of town. Waysman told his secretary to obtain the client's signature, and to deposit the check into the general office account rather than the trust account because it would clear faster than in the latter. (*Id.* at pp. 454-455.) When Waysman returned to his office, he found that his secretary had quit, and her departure combined with other circumstances had left his office finances in considerable disarray. In the confusion, the \$24,000 in client funds had been spent. (*Id.* at p. 455.) At the time of the incident, Waysman suffered from alcoholism. (*Id.*) Waysman received a six-month stayed suspension, no actual suspension, and probation for one year and until restitution was made. (*Id.* at p. 459.)

[17] In both *Waysman v. State Bar*, *supra*, 41 Cal.3d 452 and *Palomo v. State Bar*, *supra*, 36 Cal.3d 785, the Supreme Court accepted the principle that if a misappropriation occurs due to the attorney's laxity rather than intent to defraud, and if that lack of intent is reinforced by the attorney's having taken remedial steps immediately upon discovery of the problem, far less discipline than disbarment is appropriate. (*Waysman v. State Bar*, *supra*, 41 Cal.3d at p. 458; *Palomo v. State Bar*, *supra*, 36

Cal.3d at pp. 797-798.) That is precisely the situation in this case.

Since *Waysman v. State Bar* and *Palomo v. State Bar* were decided, standards were adopted by the State Bar Board of Governors calling for a minimum of one year actual suspension for misappropriation irrespective of mitigating circumstances. (Standard 2.2(a).) In cases involving commingling, the standards call for a minimum of three months actual suspension irrespective of mitigating circumstances. (Standard 2.2(b).) [18] The Supreme Court treats the standards as guidelines for imposing discipline which it is not bound to follow in "talismanic fashion" (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221), but will generally depart from only when it sees a compelling reason for doing so. (*Aronin v. State Bar*, *supra*, 52 Cal.3d at p. 291; see also *Bates v. State Bar*, *supra*, 51 Cal.3d at pp. 1060-1062 [upholding six months actual suspension recommended by former review department for misconduct covered by standard 2.2(a)].)

The Supreme Court has expressly reiterated the basic principle followed in *Waysman v. State Bar*, *supra*, 41 Cal.3d 452 and *Palomo v. State Bar*, *supra*, 36 Cal.3d 785 in cases heard after the promulgation of the standards. (See, e.g., *Lawhorn v. State Bar*, *supra*, 43 Cal.3d at pp. 1367-1368; *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 37-39.) The examiner has not demonstrated that the present matter is distinguishable from this line of cases.<sup>17</sup> [19a - see fn. 17]

In *Lawhorn v. State Bar*, *supra*, 43 Cal.3d 1357, while stopping short of disbarment, the Supreme Court did order much greater discipline than in *Waysman v. State Bar*, *supra*, 41 Cal.3d 452 or *Palomo v. State Bar*, *supra*, 36 Cal.3d 785: a five-year stayed suspension, with two years actual suspension, for a single misappropriation of some \$1,355 committed by an attorney whose acts in intentionally removing client funds from his trust account for fear

17. The examiner's argument regarding respondent's efforts to reform his office practices is discussed *ante*.

[19a] The examiner did argue that the Supreme Court cases differentiating between technically wilful and deliberately venal misappropriation "involved insignificant amounts, sub-

stantial mitigation, or both." This contention does not address the fact that the evidence here of respondent's lack of any deliberate intent to misappropriate is of the same general nature as in *Waysman v. State Bar*, *supra*, 41 Cal.3d 452 and *Palomo v. State Bar*, *supra*, 36 Cal.3d 785, and constitutes "substantial mitigation" as it did in those cases.

that his ex-wife would attach them were found to have been "foolish and . . . definitely wrong," but not "venal." (*Lawhorn v. State Bar, supra*, 43 Cal.3d at p. 1367.)

In *Sugarman v. State Bar, supra*, 51 Cal.3d at pp. 618-619, the Supreme Court imposed three years stayed suspension, probation, and a one-year actual suspension for misconduct consisting of misappropriation of client funds caused by the poor practices of a since-terminated office employee, plus an improper business transaction with another client which had caused unrectified financial loss.

The referee below considered the closest precedent to the present case to be *Hipolito v. State Bar, supra*, 48 Cal.3d at pp. 627-628, and used it as the basis for his discipline recommendation. (See decision at p. 14.) There, the Supreme Court explained *Lawhorn v. State Bar, supra*, 43 Cal.3d 1357 further, stating that the two-year actual suspension in that case had resulted from Lawhorn's intentional, affirmative misrepresentation to his client, his attempt to avoid his client, and his failure to make restitution until after the client threatened to report him to the State Bar. (*Hipolito v. State Bar, supra*, 48 Cal.3d at pp. 627-628.) In *Hipolito v. State Bar*, the attorney had misappropriated \$2,000 from a client by depositing a settlement check in his general account, after tendering to the client a personal check for the client's share of the settlement. The personal check was returned for insufficient funds, and, as a result of severe financial difficulties, the attorney was unable to make restitution promptly. (*Id.* at p. 624.) In a second matter involving another client, the attorney was found culpable of abandonment and failure to communicate. (*Id.*) In mitigation, the attorney had demonstrated remorse, made restitution voluntarily as soon as he was able, and hired a management firm to prevent his misconduct from recurring. Concluding that the attorney's misconduct "stemmed from inexactitude and insolvency, not greed or venality" (*id.* at p. 628), the Supreme Court ordered three years stayed suspension, three years probation, and actual suspension for one year. (*Id.* at pp. 628-629.)

Subsequently, in *Bates v. State Bar, supra*, 51 Cal.3d 1056, the Supreme Court addressed another situation involving willful misappropriation of client

trust funds and misrepresentations to the client's new counsel regarding the funds. This misconduct was aggravated by the attorney's delay in making restitution until after the conclusion of the State Bar hearing. In light of mitigating circumstances (primarily alcoholism from which Bates had recovered, but also Bates's 14-year prior record of discipline-free practice and good reputation for competence and integrity), the Supreme Court approved the former review department's recommendation of three years stayed suspension, probation, and only six months actual suspension. (*Id.* at pp. 1060-1062.)

In *Edwards v. State Bar, supra*, 52 Cal.3d 28, the attorney's misconduct consisted of willful misappropriation of client funds coupled with habitual negligence in handling his client trust account. Mitigating factors included prompt, full restitution, an 18-year clean record of practice, and voluntary steps by the attorney to improve his management of trust funds. The former review department recommended two years of actual suspension, with three years stayed suspension and probation. The Supreme Court rejected the recommended actual suspension of two years in favor of one year. (*Id.* at pp. 38-39.)

In *Lawhorn, Hipolito, Edwards and Bates*, the respondent intentionally committed misconduct under mitigating circumstances. Here, as in *Waysman, Palomo, and Giovanazzi*, there is no evidence of intentional misappropriation. [19b] While respondent's gross negligence does not constitute a defense to culpability, the cases discussed, *ante*, demonstrate that the absence of proof of intentional misappropriation is a factor in mitigation affecting the appropriate discipline.

Respondent does not argue that no actual suspension is appropriate on the facts of this case. Indeed, here there are several factors militating in favor of some period of actual suspension: multiple victims; lengthy period of inattention to responsibilities; incomplete restitution; and no excuse for the misconduct based on serious personal problems such as alcoholism or family or financial difficulties as in *Waysman, Sugarman, Bates, Lawhorn and Hipolito*. On the other hand, in *Bates, Edwards, Hipolito and Lawhorn*, the attorneys committed the misappropriations through their own personal acts, whereas

here, as in *Waysman*, *Palomo* and *Giovanazzi*, although technically wilful, the misappropriations occurred without respondent's actual knowledge or participation. Respondent's lengthy period of lax supervision is troubling, but it is mitigated by his subsequent institution of better office practices to prevent recurrence of the problem; voluntary restitution to all the clients whose checks were wrongly cashed by his office; and reduction of fees to offset the harm done by delay. Nonetheless, restitution remains incomplete with respect to the medical providers and one client has not yet received his settlement funds.

Upon independent review of the record and analysis of relevant case law in light of our more limited findings of culpability, we modify the referee's recommended discipline and recommend two years suspension, stayed, with two years probation on conditions including actual suspension for six months and until restitution is made as specified in our formal recommendation, *post*.

[20] In light of the nature of respondent's misconduct, we have added to the probation conditions recommended by the referee a provision requiring periodic auditing of respondent's trust account(s), if any. In view of respondent's past difficulties in properly supervising his office staff, we further recommend that, before resuming the practice of law, respondent provide his probation monitor referee with written certification that respondent has attended in its entirety a course or seminar in law office practices or management conducted by the California Continuing Education of the Bar (CEB) or a similar course of study approved in advance by the probation monitor referee. (See *Aronin v. State Bar*, *supra*, 52 Cal.3d at pp. 292-293; *Blair v. State Bar* (1989) 49 Cal.3d 762, 782-783.) We also recommend that respondent be required to take and pass the newly adopted California Professional Responsibility Examination within one year, and that he be ordered to comply with rule 955, California Rules of Court.

#### FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent be suspended from

the practice of law in California for two (2) years; that execution of the suspension be stayed, and that respondent be placed on probation for two (2) years on the following conditions:

1. That respondent shall be suspended from the practice of law in California during the first six (6) months of said period of probation and until respondent makes restitution as follows and provides satisfactory evidence thereof to the Probation Department of the State Bar Court (or shows to the satisfaction of his probation monitor that payment was made prior to the issuance of the Supreme Court's order herein):

(a) Payment to clients as follows:

(i) to Willie Ervin, ten percent (10%) per annum interest on \$5,500.00 for the period from December 15, 1985, through November 15, 1986;

(ii) to Mary Swanson, ten percent (10%) per annum interest on \$4,575.00 for the period from January 15, 1986, through November 15, 1986;

(iii) to Jennifer Swanson, ten percent (10%) per annum interest on \$1,312.50 for the period from January 15, 1986, through November 15, 1986;

(iv) to Jason Swanson, \$1,600.00, plus ten percent (10%) per annum interest for the period from June 5, 1987, through the date payment is or was made to Jason Swanson of such \$1,600.00; and

(v) to Bennie Moore, ten percent (10%) per annum interest on \$4,412.85 for the period from December 31, 1985, through August 11, 1986; and

(b) Payments of medical liens:

(i) \$44.70, plus interest at ten percent (10%) per annum from November 25, 1985, to the date said \$44.70 is or was paid, to the Association of Medical Group Specialists on account of Willie Ervin;

(ii) \$2,142.25, plus interest at ten percent (10%) per annum from January 15, 1986, to the date said \$2,142.25 is or was paid, to Superior Care on account of Mary Swanson; and

(iii) \$698.00, plus interest at ten percent (10%) per annum from January 15, 1986, to the date said \$698.00 is or was paid, to Superior Care on account of Jennifer Swanson;

2. 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;

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 Probation Department, 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 thirty (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 provision 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) thereof;

4. That if respondent is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly 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:

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

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

(iii) 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 "clients' funds account";

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

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

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

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

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

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

5. 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;

6. That prior to resuming the practice of law, respondent shall provide his probation monitor referee with written certification that respondent has attended in its entirety a course or seminar in law office practices or management conducted by the California Continuing Education of the Bar (CEB), or a similar course of study approved in advance by the probation monitor referee.

7. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

8. That respondent shall promptly report, and in no event in more than ten (10) days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

9. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

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

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme

Court order in this matter, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

It is further recommended that respondent be ordered to take and pass the California Professional Responsibility Examination prescribed by the State Bar within one (1) year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.  
STOVITZ, J.