STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT C

A Member of the State Bar

[No. 84-O-15433]

Filed April 22, 1991

SUMMARY

Respondent was charged with misconduct in four client matters and with failure to cooperate in the State Bar's investigation. The hearing referee found respondent not culpable of most of the charges, but did find culpability of failing to communicate with a client in one matter, and failing to cooperate with the State Bar investigation. The referee recommended a public reproval, conditioned on passage of the Professional Responsibility Examination. (Paul C. Maier, Hearing Referee.)

The examiner requested review, seeking additional culpability findings of failing to perform services competently and of conducting an improper business transaction with a client. The review department rejected the proposed additional findings, holding that respondent's decision not to pursue a fruitless damages claim did not violate either version of the former rule governing failure to perform competently, and that respondent's possession of his client's assignment of a promissory note and deed of trust was not an improper acquisition of an adverse interest in the client's property, because there was no actual intent to assign an interest in the note to respondent.

The review department also struck the finding of culpability of failure to cooperate with the State Bar investigation, because it was based on the investigator's deposition testimony, which should not have been admitted at trial in lieu of live testimony since the State Bar did not show that it was unable to procure the investigator's attendance at trial despite reasonable diligence.

Based on the single remaining culpability finding of "common law" failure to communicate with a client, which caused minimal harm to the client, and given the mitigating circumstances including respondent's many years of practice without prior discipline, the review department determined that the private reproval which would otherwise be the appropriate discipline would be improperly punitive, and that the matter should be disposed of by admonition.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: Tom Low

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

HEADNOTES

[1] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Where attorney completed all work he could have reasonably performed for client, attorney neither withdrew from employment nor was discharged, and was not culpable of prejudicial withdrawal from employment.

[2] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
The rule prohibiting prejudicial withdrawal from employment applies to attorneys who are discharged as well as to those that withdraw. Where respondent was discharged by a client, but nevertheless took reasonable steps to avoid prejudice to the client, record did not support a violation of the rule.

[3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Rule 453, Trans. Rules Proc. of State Bar, requires review department, in all cases brought before it, to independently review record. Review department accords great weight to findings of fact by hearing department resolving testimonial issues. However, it may make findings, conclusions and recommendations differing from those of the hearing department.

[4] **130 Procedure—Procedure on Review**
166 Independent Review of Record
Issues raised or addressed by parties on review do not limit scope of issues to be resolved by review department.

[5] **169 Standard of Proof or Review—Miscellaneous**
802.30 Standards—Purposes of Sanctions
Review department's overriding concern is same as that of Supreme Court: preservation of public confidence in profession and maintenance of high professional standards.

[6 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where attorney's alleged failure to perform competently occurred after effective date of revised version of rule governing duty of competence, and notice to show cause charged attorney only with violating previous version of rule and notice was not amended, attorney was properly found not culpable of violating earlier version of rule.

[7] **204.90 Culpability—General Substantive Issues**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where attorney's decision not to pursue client's damages action was not made until after effective date of revised rule regarding duty to perform competently, attorney's conduct in deciding not to pursue damages was covered by revised rule and attorney could not be found culpable of violating earlier version of rule.

[8 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where attorney agreed to seek recovery of a client's vehicle and damages for loss of its use, and attorney promptly recovered vehicle but decided not to pursue damages because vehicle was

inoperable, attorney was not culpable of violating either original or revised version of former rule regarding duty to perform competently.

[9] **204.90 Culpability—General Substantive Issues**
214.30 State Bar Act—Section 6068(m)
Statutory duty to communicate with clients is not an appropriate basis for discipline for failure to communicate which occurred well before effective date of statute.

[10 a, b] **213.10 State Bar Act—Section 6068(a)**
410.00 Failure to Communicate
Prior to enactment of statute establishing attorney's duty to communicate with clients, Supreme Court had long held that failure to communicate was a proper ground for discipline. This common law duty to communicate falls within the parameters of an attorney's oath and duties, under attorney's general duty to uphold the law. Where attorney failed to inform client of attorney's decision not to pursue fruitless damages claim, finding of violation of duty to uphold the law by failing to communicate with client was appropriate basis for culpability.

[11] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2
410.00 Failure to Communicate
Where respondent was found culpable of violating statutory duty to uphold the law by failing to adhere to common law duty to communicate with client, additional charge that respondent violated attorney's "oath and duties" under separate statute was duplicative, and resolution of case would not be affected by finding such violation.

[12] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
Wilfulness is established by proof that the attorney acted or omitted to act purposely. No rational relationship exists between an attorney's years in practice and the attorney's ability to act or omit to act purposefully on a specified occasion.

[13 a-c] **273.00 Rule 3-300 [former 5-101]**
Where a client gave an attorney an assignment of a promissory note and deed of trust, but the attorney did not record the assignment or collect payments under the note until after issuance of court order assigning the note to the attorney in payment of attorney's fees, and the attorney did not make any use of the executed assignment that was unfair or detrimental to the client until after the court order, the attorney did not knowingly acquire an interest in the client's property until after the issuance of the court order, and the attorney's conduct did not violate the rule governing business transactions with clients.

[14 a, b] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
273.00 Rule 3-300 [former 5-101]
Intent is a necessary element of an assignment. Where the physical transfer of an assignment of a promissory note and deed of trust from client to attorney was not intended to transfer an interest in the promissory note to the attorney, the transfer did not result in an acquisition by the attorney of an interest in the client's property, and thus did not violate the rule governing attorneys' business transactions with clients.

[15] **213.90 State Bar Act—Section 6068(i)**
Argument that accused attorney can wait and cooperate with attorney employed by State Bar rather than one of its investigators is not supported by authority and is contrary to express language of statute setting forth duty to cooperate with State Bar investigations.

[16] **204.90 Culpability—General Substantive Issues**
213.90 State Bar Act—Section 6068(i)
Attorney was properly found not to be culpable of violating statutory duty to cooperate with State Bar investigation where alleged violation predated effective date of statute.

[17 a-d] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
Discovery in State Bar proceedings must be completed within 90 days after service of notice to show cause, subject to reasonable extension. (Trans. Rules Proc. of State Bar, rule 316.) Where examiner noticed and took deposition well after 90-day cutoff, and did not seek extension of discovery period, deposition was clearly discovery, even though examiner's purpose in taking it was to preserve evidence for trial. However, provision of Civil Discovery Act governing time to object to deposition notice on certain grounds did not apply, because respondent's objection was not based on grounds set forth in Civil Discovery Act but on examiner's failure to comply with State Bar rules of procedure.

[18] **113 Procedure—Discovery**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
Even if respondent waived procedural objection to deposition by appearing and participating, deposition transcript should not have been admitted in evidence, because examiner failed to show that State Bar had been unable to procure deponent's attendance at trial despite reasonable diligence, as required by provision of Civil Discovery Act governing use of depositions at trial.

[19] **120 Procedure—Conduct of Trial**
135 Procedure—Rules of Procedure
159 Evidence—Miscellaneous
Error in admitting evidence in State Bar proceedings does not invalidate a finding of fact unless the error resulted in the denial of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) In light of deposition witness's hazy memory and respondent's contrary testimony, proper determination weighing the conflicting testimony could not be made without face-to-face assessment, and admission of witness's deposition transcript therefore denied respondent a fair trial.

[20 a-e] **213.10 State Bar Act—Section 6068(a)**
410.00 Failure to Communicate
710.10 Mitigation—No Prior Record—Found
844.79 Standards—Failure to Communicate/Perform—No Pattern—No Discipline
1094 Substantive Issues re Discipline—Admonition
Where respondent successfully performed services for which he was retained, and his sole culpability was for single act of failing to inform client of respondent's entirely proper exercise of judgment not to pursue damages, and both harm to client and extent of misconduct were minimal, appropriate discipline would have been private reproval. However, in light of attorney's many years of practice without prior disciplinary record, and other extenuating circumstances, discipline

would be punitive and would not further purposes of attorney discipline. Since finding of culpability precluded dismissal, admonition was an appropriate disposition.

[21] **801.30 Standards—Effect as Guidelines**
802.30 Standards—Purposes of Sanctions
Standards for Attorney Sanctions for Professional Misconduct serve as guidelines, and must be viewed with the objective of achieving the purposes of attorney discipline, which do not include punishment of the errant attorney, but rather are protection of the public, the profession, and the courts; maintenance of high professional standards; and preservation of public confidence in the legal profession.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
410.01 Failure to Communicate

Not Found

213.15 Section 6068(a)
213.95 Section 6068(i)
214.35 Section 6068(m)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.05 Rule 3-300 [former 5-101]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.05 Rule 4-100(A) [former 8-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Mitigation

Found

720.10 Lack of Harm
735.10 Candor—Bar

Found but Discounted

740.32 Good Character

OPINION

NORIAN, J.:

In this proceeding we review the recommendation of a referee of the former, volunteer State Bar Court, that respondent,[1] who was admitted to the practice of law in this state nearly 40 years ago and has no prior record of discipline, be publicly reproved and as a condition thereof, be required to take and pass the Professional Responsibility Examination. The recommendation is based on the referee's conclusions that in one matter, respondent failed to communicate with his client in violation of Business and Professions Code sections 6068 (a) and 6103 (all further section references are to the Business and Professions Code unless otherwise stated), and in another matter, respondent failed to cooperate with the State Bar in its investigation of several matters in violation of sections 6068 (a), 6068 (i) and 6103.[2] The State Bar examiner seeks review, requesting we modify the referee's decision to add violations of former Rules of Professional Conduct,[3] rule 6-101(2) (failing to perform services competently) in count one and rule 5-101 (avoiding adverse interests) in count three. The examiner does not challenge any of the other findings and conclusions of the referee nor does he seek modification of the recommended discipline.

After independently reviewing the record, we conclude that respondent failed to communicate with his client in one matter in violation of section 6068 (a). In light of the extenuating circumstances of the misconduct and the presence of compelling mitigation, including respondent's many years of practice without prior discipline, we have determined that respondent should be admonished pursuant to rule 415 of the Transitional Rules of Procedure of the State Bar.

BACKGROUND

On December 9, 1988, a notice to show cause was filed charging respondent with professional misconduct in five separate counts. Respondent filed an answer to the charges and appeared at trial with counsel. The trial spanned four days in July and August 1989. The referee filed his decision on November 29, 1989, finding respondent culpable of failing to communicate in count one and failing to cooperate in the investigation in count five. No culpability was found on the remaining charges in the remaining counts. Based on the existence of compelling mitigating circumstances, the referee recommended a public reproval with the condition that respondent take and pass the Professional Responsibility Examination.

FACTS AND FINDINGS

The referee made the following findings of fact and conclusions of law. With the exception of the modifications discussed *post*, we have independently reviewed the record and consider the findings and conclusions well supported by the record and adopt them as our own.

A. Count One (Wanda H.)

In August 1982 Wanda H. employed respondent to recover possession of her 1974 Ford van and recover damages. At the time of employment Wanda H. paid respondent $500 as advance legal fees and in

1. If respondent received a private reproval, he would be entitled not to be identified by name in this opinion. (See rule 615, Trans. Rules Proc. of State Bar.) In light of our disposition by admonition, we deem it equally appropriate not to identify him by name herein.

2. Section 6068 describes the duties of an attorney which include, under subdivision (a), the duty to support the Constitution and state and federal laws. Under subdivision (i) of section 6068, an attorney has the duty to cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. Section 6103 provides, in relevant part, that any violation of an attorney's duties constitutes cause for disbarment or suspension.

3. The former Rules of Professional Conduct were in effect from January 1, 1975 to May 26, 1989. Rule 6-101(2) of those rules was in effect from January 1, 1975 to October 23, 1983, at which time it was amended. New Rules of Professional Conduct became operative May 27, 1989. References herein to rule 6-101(2) are to the rule in effect from 1975 to 1983. All other references to the rules, unless otherwise stated, are to the former Rules of Professional Conduct in effect from 1975 to 1989.

December 1982 paid an additional $135 for costs. Wanda H. was the legal owner of the van. Her son and daughter-in-law were the registered owners and had possession of the van. The son and daughter-in-law became entangled in a marital dispute and the daughter-in-law's brother towed the van to his garage. At the time the van was towed the son and daughter-in-law owed $5,500 to Wanda H. for the van. After the van was towed, no further payments were made on the balance.

Respondent filed a complaint in September 1982 to recover possession of the van and damages for loss of use. Respondent obtained a writ of possession and the van was recovered by Wanda H. on November 1, 1982.[4] The van was inoperative both when towed by the daughter-in-law's brother and when Wanda H. took possession, and remained inoperative for at least six months thereafter.

Beginning in August 1983, Wanda H. wrote respondent four letters requesting status reports. Respondent did not reply. In the last letter, dated November 29, 1983, she advised him that she was referring the matter to the State Bar. Respondent wrote her on December 1, 1983, informing her that he was negotiating with opposing counsel to settle the matter. Respondent determined that pursuing the lawsuit would be pointless because no loss of use damages were incurred because the van was inoperative.[5] Respondent did not inform Wanda H. of the inability to recover damages and no further communications occurred between respondent and Wanda H.

This count of the notice to show cause charged violations of sections 6068 (a) and 6103 and rules 2-111(A)(2), 2-111(A)(3) and 6-101(2). The referee made the following conclusions of law.

Respondent did not violate rule 2-111(A)(2) in that the evidence of prejudice to the client was not clear and convincing. Wanda H. was not damaged by the loss of use of the van because the van was inoperative.[6] **[1 - see fn. 6]**

Respondent did not violate rule 2-111(A)(3)[7] in that he fully earned the $500 that was paid to him as fees and Wanda H. did not expect to receive any money back. Additionally, the costs incurred exceeded those paid by the client.

Respondent did not violate former rule 6-101(2) "in that there is no such rule." Rather, the referee acknowledged the existence of rules 6-101(A)(2) and 6-101(B)(2), which were not charged in the notice to show cause. He went on to conclude that even assuming that the notice to show cause was properly interpreted to charge the violation of one or both of these rules, the evidence did not show a violation in that respondent acted competently in the recovery of the van and properly exercised his judgment in not pursuing damages.

Respondent violated sections 6068 (a) and 6103 in that he failed to communicate to Wanda H. his decision not to pursue damages.

B. Count Two (Donna and George C.)[8]

Respondent was employed by Donna and George C. in March 1986 to represent their nephew, Douglas C., in connection with a juvenile court proceeding as well as charges that involved weapons possession and a stolen car. In addition, respondent was to inquire into the possibility of instituting a guardianship proceeding to make the C.'s the guardians of Douglas C., or alternatively, of Douglas C. becom-

4. The record supports this date rather than October 1, 1982, as found by the referee. (See R.T. p. 133.)

5. Neither the decision nor record indicate when respondent made this determination.

6. [1] We also note that respondent completed all the work he could have reasonably performed for Wanda H. Thus, respondent did not withdraw from employment, nor was he discharged.

7. A conclusion on this charge was unnecessary as the examiner withdrew the charge at trial. (R.T. pp. 302, 489.)

8. The referee concluded that respondent was not culpable of the charged misconduct in this count. Neither the examiner nor respondent have sought review of the referee's findings of fact and conclusions of law. We have independently reviewed the record and have concluded the findings and conclusions are supported by the record and adopt them as our own. As the findings and conclusions are not in dispute, we set them forth only briefly.

ing emancipated. At the time respondent was employed for the above matters, he was representing George C. in an unrelated civil proceeding. Respondent was paid $2,125 by the C.'s which was for all of the matters for which respondent was employed.

The notice to show cause in this count charged violations of sections 6068 (a), 6068 (m) and 6103 and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2). The referee concluded that there was no clear and convincing evidence that respondent failed to competently perform all of the services he was obligated to perform for both the C.'s and Douglas C. or that he did not earn the entire fee paid him. Having so concluded, the referee found no violation of the charged rules and statutes.

C. Count Three (Steven S.)

Respondent was employed by Steven S. in September 1979[9] to handle the dissolution of his marriage. An interlocutory judgment of dissolution was entered in October 1980, at which time Steven S. owed respondent $2,900 for fees.

At the time of the interlocutory judgment, Steven S. was the holder of a note and trust deed. Trung C. V. and his wife were the obligors and trustors. Steven S. assigned the note to respondent in payment of the attorney's fees due respondent and the attorney's fees due the attorney for Steven S.'s wife. At the time of the interlocutory judgment, $3,300 was owed to opposing counsel as well as the $2,900 owed to respondent. The note was payable with interest in monthly installments and a balloon payment at its expiration. The outstanding balance on the note was approximately $9,600 at the time of the interlocutory judgment. There was some discussion between Steven S., respondent and opposing counsel with regard to the discounted value of the note at the time of the interlocutory judgement. The referee found that the note had a fair market value of approximately $5,800 at that time.

There was a discrepancy in the testimony regarding the assignment of the note. Respondent testified the note was assigned outright at its discounted value. Steven S. testified that the note was assigned with the agreement that after the attorney's fees were satisfied Steven S. was to receive the excess payments. The Orange County Superior Court, in the interlocutory judgment, awarded the note to respondent in its entirety, subject to the payment of the wife's attorney's fees.

The document evidencing the assignment is contained in exhibits 26 and 23 and is a standard form "Assignment of Deed of Trust." Respondent testified that between December 20, 1979, and November 17, 1980, the assignment of the trust deed was in his file.[10] (R.T. pp. 418-419.) Respondent also testified that Steven S. was thinking of moving out of town and wanted to determine what to do with the note. According to respondent, Steven S. had financial obligations for support and taxes and wanted to "find out the value of it and he just signed it and left it with me." (*Id.*) Steven S. continued to receive the payments because respondent did not consider the assignment delivered. (*Id.*) Respondent did not discuss the discounted value of the note until sometime after Steven S. signed the assignment. (*Id.*)

The referee found that Steven S. executed the assignment on December 20, 1979, but that the notary certificate is dated November 17, 1980, and the assignment was recorded on November 17, 1980. The referee also found that it was undisputed that payments under the note were made to Steven S. through October of 1980, when the note was ordered assigned to respondent in the interlocutory judgment. The referee concluded that notwithstanding that Steven S. executed the assignment in December 1979, the actual assignment occurred in October 1980, at the time of the interlocutory judgment, when it was agreed that the note was assigned in full at its discounted value in payment of the legal fees then owing. Respondent collected the total sum of $10,845,

9. The record supports this date rather than 1983 as charged in the notice to show cause. Respondent has not objected to this variance.

10. Steven S. gave conflicting testimony with regard to when he executed the assignment. (See exh. 23, pp. 8, 11, 13.)

paid the opposing counsel's fees in full, and kept the balance.

In May 1983 Steven S. requested fee dispute arbitration to recover from respondent the sum of $4,645, which represented the difference between the amount of the attorney's fees paid and the amount collected under the note. (See Bus. & Prof. Code, §§ 6200-6206.) The arbitration proceeding, which was advisory, was held on October 4, 1983. During the hearing Steven S. apparently had a cerebral hemorrhage and the hearing was adjourned and never concluded. On December 2, 1983, the arbitrator made an award in Steven S.'s favor for the full $4,645. In December 1983 Steven S. hired another attorney to recover the sums ordered by the arbitration. In January 1984 respondent filed a request for trial de novo in Municipal Court in Orange County, but took no further action with respect to that request. In May 1984 Steven S.'s new attorney petitioned to confirm the arbitration award in Superior Court in Orange County. The court made its order confirming the award and entered judgment for Steven S. against respondent for $4,645 plus interest and attorneys fees of $850. The judgment was served on respondent. At the State Bar hearing in October 1989, respondent introduced into evidence an agreement executed in September 1989 between himself and Steven S. settling all claims between them for the payment of $4,645 to Steven S.

The notice to show cause in this count charged violations of sections 6068 (a), 6103 and 6106 and rules 5-101, 8-101(A) and 8-101(B)(4). The referee made the following conclusions of law.

Respondent did not violate rule 5-101 because he had not obtained an interest in Steven S.'s property as the assignment was of a third-party note in payment of fees. The transaction was a simple payment of an obligation by the transfer of property, not a security transaction. Further the transaction was not a business transaction, and in any event the transaction was fair and reasonable to Steven S. as the assigned note at the time had a market value of approximately $6,000 which was in discharge of Steven S.'s obligation of $6,200 to the two attorneys.

Respondent did not violate rule 8-101(A) or 8-101(B)(4) in that there was no clear and convincing evidence that respondent failed to handle trust funds properly or that he failed to pay or deliver his client's funds. Respondent was not obligated to pay the excess payments under the note to Steven S. At the time the note was assigned it was agreed that the present value of the note was approximately the same as the attorneys' fees due and the assignment was an assignment in full, notwithstanding the arbitration award.

Respondent did not violate sections 6068 (a), 6103 or 6106 because respondent had not violated any of the charged rules.[11]

D. Count Four (Isabel R.)[12]

Respondent was hired by Isabel R. in April 1986 to represent her son, Gabe N., who was then in jail in northern California, in connection with outstanding traffic warrants both in northern California and Orange County, and in connection with the proposed transfer of Gabe N. to Orange County to answer the Orange County warrants. Isabel R. paid respondent $1,500 as a retainer for fees and costs to be incurred in connection with this employment. On May 7, 1986, Isabel R. discharged respondent.

The notice to show cause in this count charges violations of sections 6068 (a), 6068 (m) and 6103 and rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2)

11. We also note that section 6106 establishes that the commission, by an attorney, of any act involving moral turpitude, dishonesty or corruption is cause for suspension or disbarment. No such acts occurred, therefore, respondent did not violate this section.

12. As with count two, the referee concluded that respondent was not culpable of violating any of the charges contained in the notice to show cause. Neither party has requested our review of the referee's findings and conclusions in this count. We have independently reviewed the record and have concluded the referee's findings and conclusions are supported by the record and adopt them as our own. As the findings and conclusions are not in dispute, we deem it appropriate to set them forth only briefly.

and 6-101(B)(1). The referee concluded that respondent competently performed the services for which he was employed during the time period he represented Gabe N. and further, that respondent took reasonable steps to prevent prejudice to his client after he was discharged. Finally, the referee concluded that respondent was entitled to delay returning the fees paid him because there was a controversy regarding whether he had earned the money, and that in any event, there was substantial evidence that respondent earned the entire fee paid him. Having so concluded, the referee found no violation of the charged statutes and rules.[13] **[2 - see fn. 13]**

E. Count Five (Failure to Cooperate with State Bar)

In late 1985, an investigator for the State Bar wrote respondent two letters (exhs. 24 and 25), requesting his reply to the Wanda H. complaint. Respondent received the letters, but did not reply. On August 27, 1986, a different investigator for the State Bar wrote respondent a letter (exh. 22), requesting his reply to the Donna and George C. complaint and directing his attention to the provisions of section 6068 (i) (duty to cooperate). On October 6, 1986, an investigator for the State Bar wrote respondent a letter requesting his reply to the complaints of Donna and George C. and Isabel R. and directing his attention to section 6068 (i). Respondent received both the 1986 letters and did not reply.

After the above matters were transferred to the State Bar's Office of Trials for prosecution, respondent fully cooperated with the assigned State Bar attorneys. Respondent explained that his lack of cooperation with the investigators was because he preferred to deal with attorneys rather than investigators.

The notice to show cause in this count alleged that respondent failed to cooperate with the State Bar in its investigation of counts one (Wanda H.), two (Donna and George C.) and four (Isabel R.) in violation of sections 6068 (a), 6068 (i) and 6103. The referee concluded that respondent violated sections 6068 (a), 6068 (i) and 6103 by his failure to cooperate with the State Bar in its investigation of the Donna and George C. and Isabel R. matters.

With regard to the failure to cooperate in the Wanda H. matter, the referee concluded respondent did not violate the charged sections because section 6068 (i) was not effective until January 1, 1986 and the investigator's letters were sent in 1985.

F. Aggravation/Mitigation

In mitigation, the referee found that respondent had practiced law for 30 years without prior discipline. In addition, stipulated testimony from a witness was accepted which indicated that the witness had known respondent for 20 years and that respondent is honest and competent.[14] Furthermore, respondent's misconduct took place six years prior to the hearing and while respondent did not cooperate in the investigation stage, he fully cooperated with the Office of Trials. No evidence of aggravation was offered and the referee made no findings of aggravating circumstances.

DISCUSSION

[3] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, we may make findings, conclusions and

13. **[2]** We also note that rule 2-111(A)(2) applies to discharged attorneys as well as those that withdraw. (*Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999.) Here, respondent was discharged by the client. Nevertheless, respondent took reasonable steps to avoid prejudice to his client, which included a trip to Orange County after he was discharged. Under these circumstances, the record does not support a violation of this rule.

14. The stipulated testimony did not reveal whether the witness was aware of the findings on culpability. (See standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V.)

recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) **[4]** Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Id.*) **[5]** Our overriding concern is the same as that of the Supreme Court; the preservation of public confidence in the profession and the maintenance of high professional standards. (See standard 1.3, Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ["standard(s)"]; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

The examiner asserts that respondent should be found culpable of violating former rule 6-101(2) in the Wanda H. matter (count one) in that he failed to perform services and communicate with the client, and of violating rule 5-101 in the Steven S. matter (count three) in that he acquired an adverse interest in his client's property without complying with the rule.

The respondent argues that: A violation of former rule 6-101(2) was not proven in count one. *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931, preclude violations of sections 6068 (a) and 6103 in count one; and in any event, the failure to communicate was not wilful and therefore did not give rise to a 6-101(2) violation. There is no violation of former rule 5-101 in count three because the rule does not apply to the fact situation as found by the referee. There should be no finding of a failure to cooperate in count five because an accused attorney may wait, because of the complexity of the matter, to communicate with an attorney of the State Bar rather than the initial investigator. The evidence upon which the failure to cooperate was found (deposition of investigator) was erroneously admitted and should be excluded and the count dismissed. Respondent asserts that the entire matter should be dismissed.

A. Rule 6-101(2) (Count One)

The examiner argues that respondent abandoned Wanda H. by not completing the damages portion of the lawsuit and failed to communicate to her that he was not pursuing damages, in violation of former rule 6-101(2). Respondent asserts that he performed a tremendous amount of legal work for Wanda H. and pursuing damages would have been frivolous.

The referee concluded that respondent did not violate rule 6-101(2) because there is no such rule. On its face, this appears to be in error. Rule 6-101(2) was in effect from January 1, 1975 to October 23, 1983.[15] The events in the Wanda H. matter occurred from August 1982 through at least December 1983. Thus, the rule covered at least a part of the events in question.

[6a] The distinction between former rule 6-101(2) and rules 6-101(A)(2) and 6-101(B)(2) was discussed at trial (R.T. p. 303) in connection with respondent's unsuccessful motion to dismiss after the examiner presented his case. In light of that discussion, it is inconceivable that the referee would conclude that there was no rule 6-101(2). Rather, it seems appropriate to construe the referee's conclusion to mean that there was no such rule at the time of the alleged failure to perform. **[7]** Respondent wrote Wanda H. in December 1983 (exh. 13) informing her that he was negotiating with opposing counsel. Neither the decision nor the record provide a specific date or time period when respondent decided not to pursue damages. However, it is reasonable to conclude that the decision did not occur before the December 1983 letter. Thus, even if the failure to pursue damages was a failure to perform services

15. Former rule 6-101(2) provided "A member of the State Bar shall not wilfully or habitually . . . [¶] (2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed." The substance of this provision appeared in the amended version of rule 6-101 in effect from 1983 to 1989 and now appears in rule 3-110.

competently, as the examiner asserts, it did not occur until after October 1983 and therefore former rule 6-101(2) would not apply.[16] **[8a - see fn. 16] [6b]** As the notice did not charge violations of rules 6-101(A) or 6-101(B), which were in effect from October 1983 to 1989, and the notice was not amended, the referee's conclusion, construed as set forth above, is supported by the record.

[8b] The referee further concluded that even if the notice to show cause were interpreted to charge violations of rules 6-101(A)(2) or 6-101(B)(2), respondent acted competently in recovering the van, properly exercised his judgment in not pursuing damages and there was no evidence that respondent intentionally or repeatedly failed to act competently or failed to possess the time, resources or ability to complete the work, as specified by the rule. These conclusions are supported by the record. The complaint filed by respondent sought return of the vehicle or its value, damages for loss of use and costs of suit. (Exh. 18.) It is undisputed that the vehicle was inoperative during the time Wanda H. was deprived of possession.

B. Sections 6068 (a) and 6103 (Count One)

The referee concluded that respondent's failure to communicate his decision not to pursue damages in the Wanda H. matter was a violation of sections 6068 (a) and 6103 in that it was a violation of the duty "to keep the client informed of matters of significance concerning the representation." (Decision, p. 7.) Respondent argues that under *Baker*, *supra*, and *Sands*, *supra*, violations of those sections are not appropriate and in any event, any failure to communicate was not wilful because it was only "one instance in over 38 years of practice." Although we reject respondent's claim that years of practice negate wilfulness, we conclude that under controlling Supreme Court precedent, culpability under section 6068 (a) is appropriate. However, as discussed *post*, respondent's many years of blemish-free practice are a significant mitigating circumstance which does affect our disposition of the matter.

[9] Currently, an attorney has a statutory duty to respond promptly to reasonable status inquiries from clients and keep clients reasonably informed of significant developments in the matter the attorney is handling for the client. (Bus. & Prof. Code, § 6068 (m).) This subsection was not added to section 6068 until 1986 and did not become effective until January 1, 1987. (Stats. 1986, ch. 475, § 2.) The failure to communicate in the present case occurred well before the effective date of this subsection and therefore it is not an appropriate basis for discipline under section 6068 (m). (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815.)

[10a] Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. [Citations.]" (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor* v. *State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068 (m), as falling within the parameters of an attorney's oath and

16. **[8a]** In any event, the examiner's argument for culpability under former rule 6-101(2) fails on the merits. The examiner would have us hold that respondent's failure to pursue a claim for damages was a wilful or habitual failure to perform under rule 6-101(2), citing *McMorris v. State Bar* (1983) 35 Cal.3d 77. McMorris had been found culpable in five separate matters, four of which involved failure to perform services in violation or rule 6-101(2). (*Id.* at p. 80.) In the two matters relied on by the examiner, McMorris failed to perform any of the services for which he had been employed, which resulted in the dismissal of the client's case in one of the matters for failure to bring the action to trial within five years. (*Id.* at p. 81.) In the other two matters, McMorris also failed to perform most or all of the services for which he was employed. (*Id.*) Respondent's conduct here pales in comparison. Respondent agreed to seek recovery of the van and damages. He filed a complaint, obtained a writ of possession and had the sheriff recover the van, all within an approximate three-month period. (State Bar exh. 18.) Respondent's decision not to pursue damages appears well-founded considering the van was inoperable.

duties, under the general provisions of sections 6068 (a) (duty to support the laws). (See, e.g., *Taylor* v. *State Bar*, *supra*; *Aronin* v. *State Bar*, *supra*.)

[10b] Although respondent recovered the van, he failed to inform his client that he was not pursuing damages. Irrespective of the merits of the claim for damages, respondent had a duty to communicate to his client his decision that pursuing damages was fruitless. His failure to do so deprived his client of the benefit of his professional advice. In addition, as the referee observed, the client was deprived of an opportunity to consult with another attorney if she chose to do so. The referee's conclusion that respondent failed to communicate with his client in violation of section 6068 (a) is supported by the record and is an appropriate basis for culpability pursuant to the above cases.

Contrary to respondent's assertion, we do not believe that *Baker* and *Sands* eliminate section 6068 (a) as a substantive violation. Rather, as indicated in *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562, the Court was unable to find a sufficient factual basis in *Baker* and *Sands* for a section 6068 (a) violation. (*Id.* at p. 561.) Indeed, the Court in *Sands* deleted the State Bar's conclusion that Sands violated 6068 (a) in only three of the four client matters. (*Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931.) The fourth matter was based on conduct amounting to bribery. (*Id.* at pp. 928-930.) The Court adopted the State Bar's conclusion that that conduct violated section 6068 (a). (*Id.* at p. 931.)

We do not, however, view section 6103 as an appropriate basis for culpability. The Supreme Court has repeatedly indicated that section 6103 does not define a duty or obligation of an attorney, but provides for the imposition of discipline for violations of oaths and duties that are defined elsewhere. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815; *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548, 561; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.)

We recognize that in *Aronin* v. *State Bar*, *supra*, 52 Cal.3d 276, 287-288, the Court seemingly found a substantive violation of section 6103 based on the attorney's failure to communicate. However, we note that the Court only adopted, without explanation, the State Bar's conclusion that section 6103 had been violated, which was not disputed by Aronin. (*Id.*) Under these circumstances, *Aronin* does not appear to us to constitute an express determination that section 6103 defines a duty or obligation, the violation of which would result in a substantive violation.

[11] In any event, the Court's analysis in *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060, regarding the duplicative nature of charging sections 6068 (a) and 6103 along with specific rule violations for the same misconduct, is equally applicable here. "If . . . misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103." (*Id.*) Here we have found a violation of section 6068 (a). No purpose would be served by finding a substantive violation of 6103 as our resolution of this case would not be affected. Our disposition "does not depend on whether multiple labels can be attached to the misconduct." (*Id.* at p. 1059.)

Respondent has not cited any authority for his argument that his many years of practice render his action in count one not wilful. **[12]** Wilfulness is established by proof that the attorney acted or omitted to act purposely. (*Phillips* v. *State Bar* (1989) 49 Cal.3d 944, 952.) No rational relationship exists between years of practice and ability to act or omit to act purposefully on a specified occasion. In any event, the record before us indicates that respondent knew what he was doing and not doing with regard to his failure to communicate with the client. Respondent testified he decided not to pursue the damages because there were none. (R.T. pp. 317-319.) He also testified he informed Wanda H. of this decision. (*Id.*) Wanda H. testified he did not. (R.T. pp. 165-167.) The referee resolved this conflict against respondent and we are bound to accord that resolution great weight. (Rule 453, Trans. Rules Proc. of State Bar.) Respondent's current claim that his failure to communicate was not wilful is inconsistent with his claim at trial that he did communicate. Respondent's actions with regard to this issue can only be characterized as wilful and we so conclude.

C. Rule 5-101 (Count Three)

The referee concluded that rule 5-101 did not apply to the Steven S. matter because the assignment of the trust deed[17] was not a security transaction, "but a simple payment of an obligation by the transfer of property." (Decision, p. 25.)

The examiner argues that the assignment occurred when Steven S. signed the document in December of 1979; that the assignment states that it was made to secure payment of attorney's fees and that there was no evidence that any attorney's fees were owing at that time. Under these facts, the examiner asserts that respondent could have unilaterally eliminated any interest Steven S. had in the property after December 1979 and therefore the requirements of rule 5-101 apply under *Hawk* v. *State Bar* (1988) 45 Cal.3d 589.

First, we note that the requirements of the law prior to *Hawk* with respect to the acquisition of security interests in clients' property were not clear. In *Fall* v. *State Bar* (1944) 25 Cal.2d 149, 159, the court "said nothing to condemn an attorney for taking as his fee the client's assignment of the note secured by deed of trust." (*Hawk* v. *State Bar*, *supra*, 45 Cal.3d at 599.) The facts here predate the Supreme Court's decision in *Hawk* by a number of years.

[13a] The referee's decision that no rule 5-101 violation occurred is supported by the record. Respondent did not record the assignment until November 1980 after a court order assigning the note to him and did not notify the trustors to make payments to him until then. This supports respondent's position that, prior to the court order, he understood himself merely to be holding the note pending Steven S.'s decision as to what to do with it. **[14a]** In short, the referee impliedly concluded that Steven S. and respondent did not intend the transfer of the note in December 1979 to be the acquisition by respondent of an interest in Steven S.'s property. There is no clear and convincing evidence that respondent and Steven S. intended otherwise.

[14b] Intent is an essential element of an assignment. "While no particular form of assignment is necessary, the assignment, to be effectual, must be a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person. [Citation.]" (*Cockerell* v. *Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291.) **[13b]** Thus, while there was a physical transfer of the "Assignment of Deed of Trust" to respondent, the transfer was not intended to be a transfer of an interest in the promissory note and/or trust deed for purposes of rule 5-101. Accordingly, respondent did not "acquire" an interest in Steven S.'s property.

[13c] Moreover, rule 5-101 specifies that a member of the State Bar shall not "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" without fulfilling the three requirements of the rule. Even if Steven S.'s execution of the assignment of the deed of trust and respondent's possession thereof could be construed as the acquisition of an adverse interest, there is no evidence that respondent *knowingly* acquired any interest in 1979. He did not treat the document he received as a current assignment to him of an interest in the property. Additionally, respondent did not make any use of the executed assignment that was unfair or detrimental to his client and waited for a court order assigning the note to him in 1980 before he took any action on it. Under these facts, the record supports the referee's conclusion that respondent did not violate rule 5-101.

D. Section 6068 (i) (Count Five)

[15] Respondent argues that the section 6068 (i) violation (failure to cooperate with investigation of the Donna and George C. and Isabel R. matters) in count five should be deleted because an accused attorney can wait and cooperate with an attorney employed by the State Bar rather than one of its investigators. Respondent cites no authority for this position and we are not aware of any. Indeed, this

17. The decision refers to the transaction as an assignment of a deed of trust. The assignment was actually of the promissory note and trust deed. (See exh. 23.)

assertion is contrary to the express language of section 6068 (i): "To cooperate . . . in any disciplinary investigation or other . . . proceeding."

The referee found culpability in this count based on the deposition of a State Bar investigator.[18] **[16 - see fn. 18]** Respondent argues that the deposition (exh. 22) was erroneously admitted into evidence because it was taken after the discovery cut-off date and we should exclude the deposition and dismiss the count. The examiner counters that the deposition was not discovery since his purpose was to preserve testimony for trial rather than discover facts. Further, the examiner argues that respondent did not serve his objections to the deposition at least three days prior to the deposition, and therefore waived his objections under section 2025, subdivision (g), of the Code of Civil Procedure. (See also rule 315, Trans. Rules Proc. of State Bar [unless modified by the State Bar rules of procedure, Civil Discovery Act applies to State Bar proceedings].)

[17a] The examiner found out just before trial that the investigator was not going to be available to testify at trial because of her vacation. In State Bar matters, discovery must be completed within 90 days of the service of the notice to show cause. (Rule 316, Trans. Rules Proc. of State Bar.) For good cause, reasonable extensions of time may be granted. (*Id.*)

The notice to show cause was served on December 13, 1988. The examiner noticed the deposition for July 6, 1989 and served the notice by mail on respondent on June 21, 1989. Trial was set for July 17, 1989. **[17b]** Thus, the deposition was well after the 90- day discovery cut-off. The examiner did not seek an extension of the discovery period. Respondent served written objections to the deposition on the examiner by mail on June 30, 1989, based on section 2024 of the Code of Civil Procedure and rules 316 and 317 of the Transitional Rules of Procedure of the State Bar, on the ground the discovery period had ended. However, respondent did not seek a protective order. Instead, he appeared at the deposition, asserted his objections, and then cross-examined the investigator.

At trial, respondent renewed his objection to the deposition when the examiner offered the transcript into evidence. (R.T. pp. 243-256.) The referee admitted the transcript despite the examiner's lack of compliance with State Bar rules of procedure on the ground of waiver because respondent appeared at the deposition and cross-examined the witness. (R.T. pp. 466-476.)

[17c] The examiner's arguments in favor of his use of the improperly obtained deposition are not well-founded. He cites no authority for his position that the deposition was not discovery. Indeed, he argues respondent waived his objections to the deposition by not complying with the section 2025 of the Code of Civil Procedure, which is part of the Civil Discovery Act of 1986. (See Code Civ. Proc., §§ 2016-2036.) The examiner would have us hold that the deposition is not discovery for purposes of its introduction at trial, but is discovery for purposes of ascertaining the validity of respondent's objections. We hold that the deposition was clearly discovery.

[17d] In any event, section 2025, subdivision (g), of the Code of Civil Procedure provides that a party waives any error or irregularity in a deposition notice if, after being served with a deposition notice which does not comply with subdivisions (b) to (f) of section 2025 (dealing with when and where a deposition may be taken), the party does not serve timely written objections specifying the error. This statute does not apply here because the error complained of does not fall within subdivisions (b) to (f). The error here is the examiner's failure to comply with the State Bar rules of procedure.

[18] The referee admitted the transcript on the ground that respondent waived his objections by participating at the deposition. We need not decide

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18. The investigator's deposition was the only evidence offered by the examiner to prove respondent's failure to cooperate in the Donna and George C. and Isabel R. matters. A different State Bar investigator testified at trial regarding respondent's alleged failure to cooperate in the Wanda H. matter. **[16]** As noted, the referee concluded that respondent was not culpable of failing to cooperate in the Wanda H. matter because the alleged violation predated the effective date of section 6068 (i). This conclusion is supported by the record and we adopt it as our own.

this issue, for even assuming he did waive his objections, the transcript should not have been admitted into evidence because the examiner failed to meet the requirements for use of a deposition at trial under section 2025, subdivision (u), of the Code of Civil Procedure. The relevant part of this subdivision provides that the party offering the deposition of an absent witness must establish that he or she has "... exercised reasonable diligence but [was] unable to procure the deponent's attendance by the court's process." (Code Civ. Proc., § 2025, subd. (u)(3)(B).)

The examiner offered no evidence that he exercised reasonable diligence to procure the investigator's testimony at trial. The investigator was apparently served with a subpoena to appear at trial. (Exh. 22, at p. 11.) However, the examiner made no effort either to compel her attendance after she indicated her travel plans or to seek a continuance of the trial. In addition, the investigator's vacation had been planned for approximately two years prior to the deposition. (*Id.* at p. 30.) The examiner agreed to the July 1989 trial date in this matter at the mandatory settlement conference in May 1989. The examiner did not demonstrate that he was reasonably diligent in ascertaining the availability of his witness prior to agreeing to the July trial date. Accordingly, we conclude that the examiner did not exercise reasonable diligence in procuring the investigator's testimony and therefore, it was error to admit the deposition. (Compare *Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 601.) Any purported waiver of objections to the taking of the deposition did not render the transcript admissible in evidence.

[19] Nevertheless, error in admitting evidence in State Bar proceedings does not invalidate a finding of fact unless the error resulted in the denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar; see *Ritter* v. *State Bar, supra.*) Respondent testified at trial that he did respond to some of the investigators' inquiries. (R.T. p. 477.) Without a face-to-face assessment of the investigator's testimony, in light of her seemingly hazy memory of whether respondent replied to her inquiries (exh. 22, p. 11), a proper determination weighing conflicting testimony could not be made. In our view, this denied respondent a fair trial on this count. Accordingly, we exclude the deposition. With this evidence excluded, the record fails to support culpability on the charge of failing to cooperate with the State Bar in its investigation of the Donna and George C. and Isabel R. matters.

DISPOSITION

As noted above, we have concluded that respondent failed to communicate to his client his decision not to pursue damages in the Wanda H. matter, in violation of section 6068 (a). We are not aware of any prior decisions of the Supreme Court on facts similar to the present case. A sampling of the reported Supreme Court cases that imposed discipline based on a "common law" failure to communicate demonstrates the uniqueness of the present case.

In *Spindell* v. *State Bar, supra,* 13 Cal.3d 253, the attorney had been hired in 1966 to represent his client in a domestic relations case. For over a three-year period, Spindell ignored repeated attempts by his client to contact him concerning the progress of the matter. On one of those occasions, Spindell's secretary advised the client that it was permissible to remarry, which the client did in reliance thereon, when no final decree had been obtained. The dissolution complaint was not even filed until June 1968. (*Id.* at pp. 257-258.) Spindell himself characterized his failure to communicate and his delay in obtaining the dissolution as "extreme neglect". (*Id.* at p. 260.)

In *Taylor* v. *State Bar, supra,* 11 Cal.3d 424, the attorney was hired in early 1966 to pursue a personal injury action on behalf of a minor. For the next three years, on the few occasions the clients were able to contact Taylor, he assured them that the case was progressing well. In late 1969 the clients obtained new counsel and the case was settled. For more than three years Taylor was not able to locate the driver of the car that caused the injury. Taylor had no adequate explanation for his failure to prosecute the action. It was Taylor's "course of inattention and sporadic effort over a long period of time" that the Court found to be inconsistent with his oath and duties. (*Id.* at pp. 429-432.)

In *Chefsky* v. *State Bar, supra,* 36 Cal.3d 116, the attorney had been hired in a marriage dissolution matter. He advised the client to file bankruptcy because she was heavily in debt. The client paid

Chefsky to do so. Chefsky prepared a bankruptcy petition, but never filed it. A bank filed suit against the client, which she forwarded to Chefsky. He failed to take any action and the bank obtained a judgment against the client. In both of these matters, Chefsky was found to have failed to communicate with the client. (*Id.* at pp. 124-127.) The Court concluded that the silence and inattention supported the State Bar's finding that Chefsky failed to communicate reasonably with his client. (*Id.* at p. 127.)

In *Aronin* v. *State Bar*, *supra*, 52 Cal.3d 276, the attorney was hired to recover a lease deposit. Although Aronin apparently performed some services for the client, he failed to return numerous phone calls the client made to him for many months in 1984 and 1985. (*Id.* at pp. 287-288.)

[20a] In contrast, respondent performed the services for which he was hired by Wanda H. He successfully recovered the van and properly exercised his judgment not to pursue damages. Respondent obtained for his client all that could reasonably be obtained. Admittedly, he failed to inform his client that he was not pursuing damages. Nevertheless, we do not view a single failure to communicate of this magnitude to rise to the level of the misconduct that occurred in the above cases.

[20b] Standard 2.4(b) provides that an attorney found culpable of "wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." As we have noted, respondent performed significant legal services for his client to accomplish the purpose for which he was employed and properly exercised his judgment in not pursuing damages. His subsequent failure to inform his client of his decision, though not excused, is certainly extenuated by the services he performed and the results he obtained prior to the misconduct.

[20c] The referee found that there was no harm to the client as a result of respondent's misconduct. We find no basis in the record for disturbing this finding. Wanda H. was left in limbo as to the status of her lawsuit which in turn deprived her, at least for some period of time, of an opportunity to consult other counsel or pursue her claim in some other way. Nevertheless, nothing in the record suggests the outcome would have been any different. Thus, for purposes of standard 2.4(b), both the "extent of the misconduct" and "the degree of harm to the client" are minimal.

[20d] We consider respondent's single failure to communicate in this case, absent mitigating circumstances, to merit a private reproval. However, respondent's many years of practice are a significant mitigating circumstance. The "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

[21] The standards serve as guidelines (*id.* at p. 267, fn. 11), and must be viewed with the objective of achieving the purposes of attorney discipline. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126.) "The proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession. [Citations.]" (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 666; see also standard 1.3.)

[20e] In light of the extenuating circumstances and respondent's lengthy period of practice without prior discipline, we conclude that discipline for the single failure to communicate in this case would not further the objectives of attorney discipline and would be punitive in nature. Nevertheless, we have found respondent culpable of violating his duty to communicate with his client and a dismissal is therefore not suitable. In view of all these factors, we consider an admonition an appropriate disposition of this matter.

CONCLUSION

For the foregoing reasons, we hereby admonish respondent pursuant to rule 415 of the Transitional Rules of Procedure of the State Bar.

We concur:

PEARLMAN, P.J.
STOVITZ, J.