

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**JOHN F. FARRELL**

A Member of the State Bar

[No. 88-O-11261]

Filed May 20, 1991

**SUMMARY**

Respondent was found culpable by a referee of the former, volunteer State Bar Court of making misrepresentations to the judge during a municipal court trial, and of failing to cooperate with the State Bar's investigation of this misconduct. Respondent's culpability was based solely on documentary evidence, which included requests for admissions that were deemed admitted by the referee because respondent failed to respond to them. Respondent appeared at the hearing and testified in mitigation. The referee concluded that respondent had committed an act of moral turpitude and dishonesty, but did not specify which rules or statutes he had violated. The referee recommended a two-year stayed suspension, three years probation, and three months actual suspension, plus passage of the Professional Responsibility Examination. (Willard E. Stone, Hearing Referee.)

The examiner requested review, seeking modifications of the referee's decision and an increase in the recommended discipline. The review department concluded that respondent was culpable of violating section 6068(d) of the Business and Professions Code and its parallel provision in former Rule of Professional Conduct 7-105(1) (now Rule of Professional Conduct 5-200(B)), and of committing an act of dishonesty (section 6106), because the facts deemed admitted showed that the misrepresentations had been made intentionally and were material. The review department also agreed that the failure to cooperate with the State Bar constituted an independent charge of which respondent was culpable, not merely a factor in aggravation.

Notwithstanding the facts deemed admitted, the review department accepted as mitigation respondent's testimony that he had not known that the facts he stated to the municipal court judge were untrue. Nonetheless, based on respondent's misconduct, the review department saw no reason in the record to depart from the Standards for Attorney Sanctions for Professional Misconduct, which called for greater discipline in this proceeding than the three-month actual suspension which had been imposed on respondent in his prior disciplinary proceeding. The review department therefore recommended a two-year stayed suspension, a six-month actual suspension, and three years probation. The review department also recommended that respondent be ordered to complete a law office management course and attend the State Bar's Ethics School program, in lieu of requiring passage of the Professional Responsibility Examination, which had already been ordered in respondent's prior disciplinary proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: No appearance

HEADNOTES

[1] 130 Procedure—Procedure on Review

Where respondent's counsel withdrew after the hearing, and respondent did not file a brief on review, the Presiding Judge ordered respondent precluded from presenting oral argument on review.

[2 a-d] 113 Procedure—Discovery

141 Evidence—Relevance

159 Evidence—Miscellaneous

715.10 Mitigation—Good Faith—Found

Where facts deemed conclusively established by court order, following respondent's failure to respond to examiner's requests for admissions, showed that respondent had wilfully misled judge, but respondent was permitted to testify that representations made to judge, though false, were true to the best of respondent's knowledge at the time they were made, respondent's testimony on this point was properly received, but only in mitigation, and not to contradict deemed admissions on which culpability findings were based. Deemed admissions, while conclusive as to literal truth of facts clearly set forth in request for admissions, did not preclude referee from admitting and considering other evidence that tended to explain or helped to interpret admitted facts.

[3 a, b] 113 Procedure—Discovery

159 Evidence—Miscellaneous

Where respondent failed to respond to examiner's requests for admissions, those facts deemed admitted were properly considered as conclusive where there had been no timely motion for relief.

[4] 191 Effect/Relationship of Other Proceedings

204.90 Culpability—General Substantive Issues

213.40 State Bar Act—Section 6068(d)

220.00 State Bar Act—Section 6013, clause 1

320.00 Rule 5-200 [former 7-105(1)]

1518 Conviction Matters—Nature of Conviction—Justice Offenses

The mere fact that an attorney has been held in contempt of court is not grounds for discipline. The State Bar must establish that the contempt resulted from bad faith noncompliance with a court order, or that the underlying facts present other independent grounds for discipline.

[5 a, b] 204.20 Culpability—Intent Requirement

213.40 State Bar Act—Section 6068(d)

320.00 Rule 5-200 [former 7-105(1)]

In order to violate the statute prohibiting seeking to mislead a judge, or its parallel Rule of Professional Conduct, an attorney must knowingly make a false, material statement of fact or law to a court, with the intent to mislead.

- [6]        **213.40 State Bar Act—Section 6068(d)**  
**320.00 Rule 5-200 [former 7-105(1)]**

Where respondent falsely stated to the judge, during a trial, that one of his witnesses who had not yet arrived at court was under subpoena, such false statement was material, because it affected the court's scheduling of its daily calendar to accommodate the late witness and because it wrongfully caused the court to treat the witness initially as being in disobedience of a subpoena when he did arrive.

- [7]        **221.00 State Bar Act—Section 6106**

The commission of any act of dishonesty constitutes a violation of section 6106.

- [8 a, b]    **113 Procedure—Discovery**  
**141 Evidence—Relevance**  
**159 Evidence—Miscellaneous**  
**735.50 Mitigation—Candor—Bar—Declined to Find**

Respondent's testimony that he unsuccessfully tried to telephone a State Bar investigator in response to a letter the investigator sent him regarding his possible misconduct was admissible only in mitigation, not in defense to his culpability of failing to cooperate in the investigation, which was conclusively established by his deemed admissions resulting from his failure to respond to discovery. Such testimony was not a sufficient basis for a finding in mitigation.

- [9]        **213.90 State Bar Act—Section 6068(i)**  
**613.10 Aggravation—Lack of Candor—Bar—Found but Discounted**

Respondent's failure to cooperate with the State Bar's investigation of his misconduct was a substantive violation of the statute requiring such cooperation, not just an aggravating factor.

- [10]       **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**  
**613.10 Aggravation—Lack of Candor—Bar—Found but Discounted**

Respondent's having willfully misled a court during trial and failed to cooperate with the State Bar's investigation of his misconduct were not properly considered as aggravating factors because they were part of the basis for finding respondent culpable of substantive violations.

- [11]       **130 Procedure—Procedure on Review**  
**146 Evidence—Judicial Notice**  
**511 Aggravation—Prior Record—Found**  
**802.21 Standards—Definitions—Prior Record**

Where, at the time of the hearing, respondent's prior discipline record consisted only of another hearing department decision, and the examiner moved to augment the record on review with the review department minutes in the prior matter, the motion was construed by the review department as a motion to take judicial notice and was granted. Thereafter, the review department took judicial notice on its own motion of the Supreme Court's order in the prior matter.

- [12]       **515 Aggravation—Prior Record—Declined to Find**  
**802.21 Standards—Definitions—Prior Record**

An attorney's suspension from the practice of law for nonpayment of State Bar fees is not a disciplinary suspension and is not considered a prior disciplinary record.

- [13]      **159      Evidence—Miscellaneous**  
Where respondent's testimony was admitted subject to a motion to strike, and examiner thereafter moved to strike only as to culpability, not as to mitigation, and then proceeded to elicit testimony from respondent on cross-examination on same subject matter, examiner thereby waived any objection to such testimony.
- [14]      **141      Evidence—Relevance**  
**159      Evidence—Miscellaneous**  
The hearing department has broad discretion in determining the admissibility and relevance of evidence.
- [15]      **765.51   Mitigation—Pro Bono Work—Declined to Find**  
A record of extensive representation of pro bono clients is a proper factor in mitigation, but where respondent testified that he represented primarily lower income and middle income clients, and that over half his clients were served either on a pro bono or reduced fee basis, such evidence was too sketchy to support a finding in mitigation based on pro bono work.
- [16]      **795      Mitigation—Other—Declined to Find**  
An attorney's inability to arrange for service of a subpoena, due to insufficient and inexperienced office staff, was not a mitigating factor, because attorneys are held responsible for the proper supervision of their staff.
- [17]      **801.30   Standards—Effect as Guidelines**  
**805.10   Standards—Effect of Prior Discipline**  
In determining appropriate discipline where the respondent had one prior imposition of discipline, the review department first considered the discipline that would normally be appropriate for the current misconduct, and then considered the prior discipline as a factor in aggravation, using as a guide the standard that the discipline in the second matter should exceed that imposed in the prior matter. The level of discipline was based on a balancing of all factors involved.
- [18]      **213.20   State Bar Act—Section 6068(b)**  
**213.40   State Bar Act—Section 6068(d)**  
**220.00   State Bar Act—Section 6103, clause 1**  
**320.00   Rule 5-200 [former 7-105(1)]**  
**1099     Substantive Issues re Discipline—Miscellaneous**  
**1518     Conviction Matters—Nature of Conviction—Justice Offenses**  
Depending upon the circumstances, a finding of contempt against an attorney may result in no discipline at all or substantial discipline.
- [19]      **165      Adequacy of Hearing Decision**  
**801.47   Standards—Deviation From—Necessity to Explain**  
The hearing department should have made clear its reasons for recommending a lower level of discipline than that called for by an applicable standard.

**[20] 173 Discipline—Ethics Exam/Ethics School**

There was no reason to recommend that respondent be ordered to take and pass the professional responsibility examination when he had recently been ordered to do so in a prior disciplinary matter; instead, the review department recommended that respondent be required to attend the State Bar's Ethics School program.

**ADDITIONAL ANALYSIS**

**Culpability**

**Found**

- 213.41 Section 6068(d)
- 213.91 Section 6068(i)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 320.01 Rule 5-200 [former 7-105(1)]

**Not Found**

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

**Discipline**

- 1013.08 Stayed Suspension—2 Years
- 1015.04 Actual Suspension—6 Months
- 1017.09 Probation—3 Years

**Probation Conditions**

- 1022.50 Probation Monitor Not Appointed
- 1024 Ethics Exam/School
- 1025 Office Management

**Other**

- 172.15 Discipline—Probation Monitor—Not Appointed
- 175 Discipline—Rule 955

## OPINION

PEARLMAN, P.J.:

Respondent John F. Farrell was admitted to the bar in January 1972. Effective April 20, 1990, he was disciplined in one matter in which he received two years probation on conditions including ninety days actual suspension.

The instant matter arose from an incident in 1988, in which respondent made a misrepresentation to the Stanislaus County Municipal Court in the course of a civil trial, for which he was subsequently held in civil contempt. The first count of the two-count notice to show cause charged respondent with making a false statement to the Municipal Court for the purpose of misleading the judge, in violation of sections 6068 (a), 6068 (d), 6103, and 6106 of the Business and Professions Code and former rule 7-105(1) (now rule 5-200) of the Rules of Professional Conduct.<sup>1</sup> The second count charged respondent with failing to cooperate with the State Bar's investigation of this matter in violation of sections 6068 (a), 6068 (i), and 6103 of the Business and Professions Code.

Respondent appeared and was represented by counsel at the disciplinary hearing. The examiner presented his case solely by way of documentary evidence including requests for admissions which were ordered admitted by virtue of respondent's failure to respond to them. (R.T. pp. 6-7; exh. 1-4.) Respondent testified in his defense and in mitigation.

The referee concluded that respondent had committed an act of moral turpitude and dishonesty. He did not specify what statutes or rules respondent had violated. He recommended a two-year stayed suspension, three years probation, three months actual suspension, compliance with rule 955 of the California Rules of Court, and a requirement that respondent take and pass the Professional Responsibility Examination ("PREX").

The examiner requested review, seeking to modify the decision in the following respects: (1) that the finding of failure to cooperate with the State Bar investigation be treated as a substantive finding of culpability rather than just an aggravating circumstance; (2) that the recommended discipline be increased and, in particular, the length of the actual suspension; (3) that standard conditions of probation be included; and (4) that the PREX and rule 955 requirements be deleted since those were imposed in respondent's prior discipline. [1] Respondent's counsel withdrew after the hearing, and respondent did not file a brief on review. Pursuant to order of the Presiding Judge, respondent was accordingly precluded from presenting oral argument and did not appear.

Upon our independent review of the record, we adopt most of the modifications requested by the examiner, including increasing the discipline by including six months actual suspension. However, we do not recommend waiver of the rule 955 requirement as suggested by the examiner. We also add a requirement that respondent attend ethics school and a law office management course as well as adding the standard conditions of probation as requested by the examiner.

### I. THE FACTS

[2a, 3a] The facts regarding respondent's misconduct are not in dispute; most of them were conclusively established by State Bar Court order following respondent's failure to respond to the examiner's requests for admissions. On the morning of March 14, 1988, respondent appeared on behalf of the defendants in a civil suit in Stanislaus County Municipal Court. (Decision, findings of fact ¶¶ 2-3.) It was an unlawful detainer matter, and the defense was that the plaintiff property owner was evicting the defendant tenants in retaliation for their complaint to the county health department about the conditions in the building. (R.T. pp. 9-10.) In response to questions from the trial judge, respondent stated that he

1. Respondent's misconduct occurred in March 1988; the matter is therefore governed by the former Rules of Professional Conduct in effect from January 1, 1975, through May

26, 1989. All references here, unless otherwise noted, will be to these former rules. All statutory references herein are to the Business and Professions Code unless otherwise specified.

had a witness who had not yet arrived at court who was under subpoena. The witness referred to was Dennis Chastain. (Decision, findings of fact ¶¶ 5-6; see also exh. 3 [transcript re contempt].) Chastain was a fellow tenant of the defendants, who was willing to testify for them, but wanted to be subpoenaed in order to protect himself from any possible retaliation by the property owner. (See R.T. p. 17; exh. 3, pp. 13-14.)

At the time of respondent's colloquy with the judge, Chastain had not in fact yet been served with a subpoena. (Decision, findings of fact ¶ 7.) The case was put at the end of the court's calendar and several short recesses were taken so that respondent could check on the whereabouts of his witness. (Exh. 3, p. 6.) Chastain arrived at the courthouse later in the day while the trial was in progress. (Exh. 3, pp. 3, 14; R.T. pp. 10-12.) At that time, respondent served Chastain with a subpoena which respondent had hastily prepared by scratching out the name of another witness and substituting Chastain's name. (Decision, findings of fact ¶¶ 4, 7.) Chastain proceeded to testify. (Exh. 3, pp. 3-5.) The judge questioned Chastain to determine if his delayed arrival was in disobedience of a duly served subpoena as respondent had led the judge to believe. (Exh. 3, p. 6.)

Upon discovering that Chastain had not actually been served with the subpoena until he arrived at court, the trial judge initiated contempt proceedings against respondent. After holding a hearing, he found respondent in civil contempt. Respondent paid a \$500 fine for the contempt, and was not required to serve any jail time. (R.T. pp. 15-16; exh. 2.)

[2b] The referee found, based on respondent's deemed admissions, that respondent wilfully misled the judge in stating that Chastain had already been subpoenaed to appear. (Decision, findings of fact ¶¶ 8, 10; requests for admissions, nos. 19, 24, 29.)<sup>2</sup> However, at the disciplinary hearing, respondent was permitted to testify that his representations to the

court, though later shown to be false, were truthful to the best of his knowledge at the time he said them. (R.T. pp. 10-11, 16-17, 25-26.) The referee received respondent's testimony on this point only in mitigation, and not to contradict the deemed admissions on which the findings of culpability were based. (R.T. p. 29; see discussion of mitigation, *post*.)

## II. DISCUSSION

### A. Culpability.

[4] The mere fact that an attorney has been held in contempt is not grounds for discipline. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 953.) The State Bar must establish that the contempt resulted from bad faith noncompliance with a court order, or that the underlying facts present other independent grounds for discipline. In this case, we have no evidence of failure to comply with a court order. The issues of respondent's culpability on the various violations charged in the notice to show cause are discussed below.

#### *1. Sections 6068 (a) and 6103 (Counts One and Two).*

Both counts of the notice to show cause charged respondent with violating sections 6068 (a) and 6103 as well as other statutes and rules. On review, the examiner did not request the review department to find these violations of sections 6103 or 6068 (a). We follow the Supreme Court's holding in *Baker v. State Bar* (1989) 49 Cal.3d 804, 815 that with respect to a member's oath and duties, section 6103 "provides only that violation of his oath or duties defined elsewhere is a ground for discipline," and therefore respondent cannot be said to have violated this section. We also find that section 6068 (a) does not form a separate basis for culpability on the charges here. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

2. The record also shows, although the referee did not make any findings directly on this point, that in response to the trial judge's question regarding whether respondent had received a return on the subpoena, respondent stated that he did not

"have it with [him]." This response contradicted his admission through failure to respond to requests for admissions that he had never received a return of subpoena at all. (Exh. 3 pp. 2-3; requests for admissions, nos. 8-9, 20-23.)

2. *Count One.*

[3b] Based on respondent's deemed admissions, and properly considering those as conclusive where there has been no timely motion for relief therefrom (see, e.g., *Gribin Von Dyl & Assocs., Inc. v. Kovalsky* (1986) 185 Cal.App.3d 653, 662-663), the referee found respondent culpable of violating section 6068 (d) of the Business and Professions Code making it a duty "To employ, for the purpose of maintaining the causes confided to him . . . such means only as are consistent with truth, and never to seek to mislead the judge . . . by an artifice or false statement of fact or law." Respondent was also properly found culpable of violating the parallel provisions of rule 7-105(1) of the Rules of Professional Conduct.

[5a] In our previous decision in *In the Matter of Conroy*,\* modified in other respects in *Conroy v. State Bar* (1991) 53 Cal.3d 495, we accepted the examiner's concession that in order to violate section 6068 (d), a misrepresentation made to a tribunal must be material to the issues before the tribunal. We also held that the misrepresentation must be made with the intent to mislead the tribunal. Both of these conclusions were adopted by the Supreme Court. (*Conroy v. State Bar, supra*, 53 Cal.3d at pp. 501-502, 508.)

[5b] Recently in *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, this review department construed rule 7-105(1) to require that, for a violation, the attorney must have knowingly presented a false statement intending to mislead the court. [6] Respondent's deemed admissions establish that he knowingly made a false statement to the judge (requests for admissions, nos. 13-16), and intentionally misled the judge (*id.*, nos. 19, 24, 29, 30), but do not address the question whether the misrepresentation was material. We find that it was material both because it affected the court's scheduling of the daily calendar to accommodate the witness and because it wrongfully caused the wit-

ness, Chastain, to be initially considered by the court in disobedience of a subpoena which had not yet in fact been served upon him.

[7] Based on respondent's deemed admissions, the referee also properly found that respondent violated section 6106 by his misrepresentation since the commission of any act of dishonesty constitutes a violation of section 6106.

3. *Count Two.*

The elements of count two were also fully established by the facts deemed admitted due to respondent's failure to respond to the requests for admissions concerning his lack of cooperation with the State Bar investigation.<sup>3</sup> [8a - see fn. 3] (Requests for admissions, nos. 26-28; see also exh. 4.) [9] The examiner's request that respondent's failure to cooperate in the investigation be treated as a substantive violation of section 6068 (i) rather than just an aggravating factor is well taken.

B. *Aggravation.*

[10] The referee found three aggravating factors: (1) the fact that respondent "willfully mislead [sic] the Court by stating affirmatively that a witness had been subpoenaed to appear at the Trial"; (2) respondent's failure to cooperate with the investigation, and (3) respondent's prior discipline. Of these, only the third is appropriately considered an aggravating factor. As already noted, respondent's failure to cooperate was an additional substantive offense, not an aggravating factor. The finding that respondent wilfully misled the municipal court simply repeats part of the basis for the findings on culpability, and thus does not constitute an additional factor that aggravates respondent's misconduct. (See *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11, recommended discipline adopted, Nov. 29, 1990 (S016265).)

\* [Editor's note: Review granted, Nov. 15, 1990 (S016863); State Bar Court Review Department opinion superseded by *Conroy v. State Bar* (1991) 53 Cal.3d 495.]

3. [8a] Respondent was permitted to testify at the hearing that when he received the State Bar investigator's letter regarding

this matter, he attempted to call the investigator, but was unable to reach him; however, he did nothing further in response to the investigator's letter. (R.T. pp. 17, 21-23.) This testimony was admissible only in mitigation, not in defense of culpability established by his admissions.

[11] With regard to the prior disciplinary matter, at the time of the hearing in this matter, only the hearing department decision had been issued. On review, the examiner moved to augment the record with the review department minutes; the motion was construed as a motion to take judicial notice, and was granted. Thereafter, this court took judicial notice on its own motion of the Supreme Court's order in the prior matter, which was filed on March 21, 1990, and became effective April 20, 1990 (S012372). Respondent's 90-day actual suspension in the prior matter expired on July 19, 1990.<sup>4</sup> [12 - see fn. 4]

The misconduct in the prior matter began in 1983, when respondent had been a member of the bar for over 12 years, and extended into mid-1985, 3 years before the present misconduct. The misconduct in the present matter was committed in March 1988, less than a month after the notice to show cause was filed in the prior.

The prior matter involved two counts. In the first count, respondent accepted a note and deed of trust from his client (to secure his fees, apparently), without the proper legal safeguards for business transactions with one's client. Respondent subsequently accepted a car from the same client in payment of his fee (again without proper safeguards), did not then reconvey the deed of trust to the client, and failed to register the car in his own name, causing his client's ex-husband (the registered owner of the car) to incur multiple citations for illegal parking. Respondent then complicated the situation even further by appearing without authority on behalf of the ex-husband to resolve the parking tickets. He also failed to return his client's file on request.

The second count of the prior matter was a simple abandonment in a domestic relations matter. Based on considerable mitigation, the referee recommended a 30-day actual suspension and one year probation. The former volunteer review department increased the recommendation to a two-year stayed suspension, ninety days actual suspension, and two

years probation, with requirements that respondent pass the PREX and comply with rule 955 of the California Rules of Court. The Supreme Court adopted the review department's recommendation.

### C. Mitigation.

Respondent testified at both the contempt and disciplinary hearings that he did not intend to mislead the court, and that he told the judge that Chastain had been subpoenaed because that was what he honestly believed based on information received from his secretary (who later became his wife). (Exh. 3, pp. 11-12; R.T. pp. 16-17, 25-26.) Apparently as a result of this testimony, the referee found in mitigation that respondent "believed that the witness Chastain had been previously served to appear as a witness at the Trial." (Decision, evidence in mitigation ¶ 1.)

[13] Respondent's testimony on direct examination regarding his state of mind at the time he made the false statements to the municipal court was admitted subject to the State Bar making a motion to strike. The examiner made a motion to strike at the conclusion of the testimony. (See R.T. pp. 6-8, 29.) However, the motion was limited to striking the testimony with regard to culpability only, not as to mitigation. (R.T. p. 29.) The examiner then himself elicited testimony from respondent, on cross-examination, to the effect that when the representations were made, respondent believed that all subpoenas had been served, including Chastain's, based on what his office staff had told him the morning of trial. (R.T. pp. 25-26.) The examiner thereby waived any objection to the testimony. (*Milton v. Montgomery Ward & Co., Inc.* (1973) 33 Cal.App.3d 133, 138-139.) Respondent also testified that the purpose of his telling the judge that he had another witness under subpoena was not to obtain a continuance, but merely to indicate to the judge how long he expected the matter to take, and that he might need to take witnesses out of order. (R.T. p. 14.)

4. Respondent was suspended again, this time for nonpayment of fees, effective July 30, 1990 (BM 6008). The latter suspension is not a disciplinary suspension and is not considered a

prior disciplinary record. (See *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 701, 708.)

[2c] All of this evidence was received in mitigation and not to contradict the deemed admissions. [14] "The trial court has broad discretion in determining the admissibility and relevance of evidence." (*Milton v. Montgomery Ward & Co.*, *supra*, 33 Cal.App.3d at p. 138.) [2d] Respondent's deemed admissions, while conclusive as to the literal truth of the facts clearly set forth in the requests for admissions, did not preclude the referee from admitting and considering other evidence that tended to explain or helped to interpret the admitted facts. (*Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 276-278.) We interpret the finding in mitigation to mean that respondent believed a subpoena had been prepared and sent out for service upon the witness by his staff, but had no proof of service or basis for belief that the subpoena had in fact been served on the witness at the time he made the representation to the judge that the witness was under subpoena.

[8b] Respondent testified in an attempt to mitigate the section 6068 (i) charge that he had made some effort to reach the State Bar investigator by telephone, but had been unable to do so. (R.T. pp. 17, 21-23.) No finding in mitigation was made based thereon nor do we deem his testimony sufficient to make such a finding. We do note that the charge of lack of cooperation is limited to the investigation stage of the proceeding and that he did appear and was not found uncooperative at trial.

[15] Finally, respondent testified that he had been a solo practitioner for the last 10 years, representing primarily lower income and middle income clients in a general practice. (R.T. p. 34.) He did not have enough financial resources to pay for an attractive office or secretarial services. (R.T. pp. 35, 36-37.) Over half of his clients were served either on a pro bono or reduced fee basis. (R.T. pp. 35-36.) A record of extensive representation of pro bono clients would be a proper factor in mitigation (see, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646, 667), but the

evidence below appears too sketchy to support such a finding here.

[16] Respondent also claimed that his inability to arrange for the prior service of the subpoena was due to insufficient and inexperienced office staff.<sup>5</sup> Accepting this as true, respondent is nonetheless held responsible for their proper supervision. (See, e.g., *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857.)

### III. RECOMMENDED DISCIPLINE

#### A. Length of Actual and Stayed Suspensions and Probation.

[17] The examiner argues that under standard 1.7(a), Standards for Attorney Sanctions for Professional Misconduct ("standard(s)") (Trans. Rules Proc. of State Bar, div. V), respondent's discipline in the present matter should exceed the three months imposed in the prior matter. We agree. We consider the discipline that would normally be appropriate for misconduct of this nature, and then consider the prior as a factor in aggravation thereof, using standard 1.7(a) as a guideline. The level of discipline is based on a balancing of all factors involved.

[18] In *Maltaman v. State Bar*, *supra*, 43 Cal.3d 924, the Supreme Court noted that contempt could result in no discipline at all or substantial discipline depending on the circumstances. The Supreme Court ordered one year's actual suspension of Maltaman for deceitful acts demonstrating serious moral turpitude and also involving willful bad faith disobedience to a series of court orders with no mitigating circumstances. (*Id.* at p. 958.) Here, we have a case of lesser misconduct. [19] Nevertheless, the hearing referee did not indicate why he recommended discipline lower than standard 1.7(a) calls for. He should have made clear his reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) We see no reason to depart from the standards. Taking into account all of the circumstances, including the prior

5. At the time of the unlawful detainer trial, respondent's secretary had been his girlfriend (who later became his wife). She had no experience whatsoever as a secretary before starting to work for him a month before that trial. He also had

another secretary working part-time who had only recently started to work for him. (R.T. pp. 36-37.) As a result of their inexperience, he had had problems in office management. (R.T. p. 37.)

three-month suspension, we increase the discipline recommendation to six months actual suspension.

#### B. Conditions of Probation and Other Requirements.

The examiner's proposal that standard terms and conditions of probation be added to the recommended discipline, together with a requirement that respondent comply with rule 955 of the California Rules of Court, is appropriate. We also recommend that respondent be required to provide the Probation Department with proof of attendance at a law office management course within one year of the effective date of the commencement of his suspension. [20] Under the Supreme Court's order in the prior, respondent must take and pass the PREX sometime between April 20, 1990, and April 19, 1991. Since respondent must comply with this order, there is no reason to require him to pass the PREX again in this matter if he has complied with the prior order. If, on the other hand, he fails to take and pass the PREX as already required, he will be suspended for such violation until he does pass it. In lieu of retaking the PREX, we recommend that respondent be ordered to take the State Bar's Ethics School program.

#### IV. FORMAL RECOMMENDATION

It is therefore RECOMMENDED to the Supreme Court that respondent John F. Farrell be suspended from the practice of law for two years; that such suspension be stayed, and that respondent be placed on probation for three (3) years subject to the following conditions:

1. That during the first six (6) months of said period of probation, he shall be suspended from the practice of law in the State of California;
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 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 subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

5. That respondent shall promptly report, and in no event in more than 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;

6. That respondent shall provide the State Bar Court Probation Department with satisfactory evidence of completion of a course on law office management offered by California Continuing Education of the Bar, or another similar course approved by the State Bar Court Probation Department, within one (1) year from the date on which the order of the Supreme Court in this matter becomes effective;

7. That respondent shall take and pass the State Bar's Ethics School program within one (1) year from the date on which the order of the Supreme Court in this matter becomes effective;

8. 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

9. 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 two (2) 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.

We concur:

NORIAN, J.  
STOVITZ, J.