

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HARRISON E. TAYLOR

A Member of the State Bar

[No. 87-O-17713]

Filed June 5, 1991; as modified, July 17, 1991

SUMMARY

A hearing referee found, after a default hearing, that an attorney was culpable of representing clients while under suspension for failure to pay his State Bar membership fees; failing to perform the services for which he was hired; failing to communicate with clients; failing to return client files, papers and unearned advanced fees; deceiving a client, and failing to cooperate with the State Bar in the investigation of the client matters. Based on these findings and on the existence of earlier discipline, the referee recommended disbarment. (Jared Dreyfus, Hearing Referee.)

The review department modified the referee's decision to expand the findings of fact and revise the conclusions of law and, with those modifications, adopted the recommendation that the attorney be disbarred. The review department held that attorneys' duty to cease practicing law while suspended supersedes their duty to render competent legal services and their duty not to withdraw from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of their clients. As a result, the attorney could not be found culpable of violating these duties by virtue of acts or omissions during his suspension. However, attorneys' duties to communicate with clients (other than by giving legal advice) and to refund unearned fees survive their suspensions, and all fees advanced for work performed while suspended must be returned.

The charge of failing to cooperate with the State Bar investigation was overturned because of the absence of evidence that the address to which the investigator's letters were sent was a valid address for the attorney.

The review department concluded that the attorney had repeatedly practiced law while suspended; deceived a court and client by filing an unauthorized lawsuit and by using a presigned verification of a civil complaint without ascertaining from the client the veracity of the facts therein; failed to communicate with clients, and failed to return client files, papers and unearned advanced fees. This misconduct, coupled with the attorney's prior State Bar discipline; his failure to comply with his criminal probation; his failure to participate in both the present and past disciplinary proceedings, and the lack of mitigating circumstances, clearly demonstrated that the risk of future misconduct was great and that disbarment was necessary.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: No appearance (default)

HEADNOTES

- [1 a, b] 135 **Procedure—Rules of Procedure**
165 **Adequacy of Hearing Decision**
166 **Independent Review of Record**

Where hearing referee's decision contained virtually no findings of fact and did not relate the conclusions of law either to the facts or to specific counts of the notice to show cause, review department was compelled to exercise its authority to make its own findings and conclusions based on independent review of the record, as authorized by rule 453 of the Transitional Rules of Procedure.

- [2] 107 **Procedure—Default/Relief from Default**
162.90 **Quantum of Proof—Miscellaneous**
204.90 **Culpability—General Substantive Issues**

Where the State Bar chooses to present evidence in a default hearing that undercuts or negates the allegations of the notice to show cause, it is the evidence, and not the allegations, that controls the findings of fact.

- [3 a, b] 107 **Procedure—Default/Relief from Default**
146 **Evidence—Judicial Notice**
162.19 **Proof—State Bar's Burden—Other/General**
165 **Adequacy of Hearing Decision**

Where hearing referee failed to determine whether respondent's default was properly entered, review department was required to do so, and for that purpose it took judicial notice of respondent's membership records address under Evidence Code section 459; evidence of membership records address is essential in a default case to assess the propriety of the default procedures.

- [4] 230.00 **State Bar Act—Section 6125**

The mere holding out by a suspended attorney that he or she is practicing or is entitled to practice law constitutes the unauthorized practice of law. Where suspended attorney accepted money to perform legal services, attorney violated probation against law practice by anyone other than active State Bar members.

- [5] 199 **General Issues—Miscellaneous**

Language used in an opinion is to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.

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

Suspended attorneys are expressly precluded by statute from practicing law. On the other hand, one of the Rules of Professional Conduct requires an attorney to perform the services for which he or she is hired, because the failure to do so can be an intentional or reckless failure to perform competently in violation of the rule. Thus, requiring a suspended attorney to comply with both the

unauthorized practice statute and the rule regarding competent performance would result in incompatible duties. For this reason, the rule regarding failure to act competently has no applicability to attorneys practicing while suspended. The suspended attorney's only duty is to stop practicing until reestablished as an attorney in good standing.

[7] **199 General Issues—Miscellaneous**

A statute should be interpreted so as to produce a result that is reasonable and if two constructions are possible, that construction which leads to the more reasonable result should be adopted.

[8 a, b] **230.00 State Bar Act—Section 6125**

270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

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

582.10 Aggravation—Harm to Client—Found

861.20 Standards—Standard 2.6—Disbarment

There is no reason to require suspended attorneys to comply with the rules requiring competent representation and prohibiting prejudicial withdrawal even while they are precluded from practicing because suspended. A full range of discipline is available to protect the public, courts and profession for unauthorized practice alone. Recklessness or incompetence in the unauthorized practice of law, or a precipitous withdrawal, would cause harm to the client and would constitute an aggravating factor which justifies greater discipline than would have been appropriate if no harm had occurred. In order to minimize harm to clients, suspended attorneys should take all steps to avoid foreseeable prejudice, short of practicing law.

[9] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**

277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]

277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

The Rule of Professional Conduct which sets forth the duties and obligations of an attorney who withdraws from employment applies when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client.

[10] **230.00 State Bar Act—Section 6125**

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

The Rule of Professional Conduct which provides that an attorney shall not withdraw until he or she takes steps to avoid foreseeable prejudice to the rights of the client requires, by its express terms, that the attorney continue representing the client until the attorney has taken steps to avoid foreseeable prejudice. This obligation directly contradicts the duty of a suspended attorney to cease practicing law immediately. It is unreasonable to hold an attorney to a duty of having to continue to represent his or her client for a reasonable period of time to avoid prejudice prior to withdrawal, if the attorney has an absolute duty to stop practicing due to a suspension. Thus, the rule against prejudicial withdrawal has no applicability to attorneys while they are suspended.

[11 a-c] **230.00 State Bar Act—Section 6125**

277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

An attorney must, upon withdrawal, promptly return any unearned fees. An attorney is not required to practice law in order to comply with this rule, and it therefore continues to apply even if an attorney is suspended. Moreover, a suspended attorney is legally precluded from practicing law and therefore, the attorney's agreement to provide legal services in exchange for a fee is illegal. Permitting a suspended attorney to retain any of the money paid him by a client for services rendered while suspended would condone the attorney's unauthorized practice of law and would be contrary to public policy.

- [12] **213.10 State Bar Act—Section 6068(a)**
 230.00 State Bar Act—Section 6125
 231.00 State Bar Act—Section 6126
Charging an attorney with a violation of the duty to support the Constitution and laws, by reason of the attorney's violation of the statutes prohibiting practicing law while suspended, provides the basis for imposition of professional discipline for unauthorized practice.
- [13] **220.00 State Bar Act—Section 6103, clause 1**
 220.10 State Bar Act—Section 6103, clause 2
 230.00 State Bar Act—Section 6125
With the exception of a wilful violation of a court order, section 6103 of the Business and Professions Code does not define a duty or obligation of an attorney but provides only that the violation of the attorney's oath or duties defined elsewhere is ground for discipline. Thus, an attorney can not violate section 6103 unless he or she violated a court order. However, an attorney who is suspended for failure to pay State Bar membership fees is suspended by order of the Supreme Court. Thus, the attorney's continued practice of law after suspension is a violation of the court order suspending the attorney and therefore is a violation of section 6103.
- [14] **214.30 State Bar Act—Section 6068(m)**
 230.00 State Bar Act—Section 6125
The statute requiring attorneys to communicate with their clients does not require a suspended attorney's continued practice of law, and a suspended attorney thus may be found culpable of violating the statute. It is extremely important for a suspended attorney to continue to communicate with the client so that prejudice to the client is minimized, though such communication must not take the form of legal advice.
- [15] **221.00 State Bar Act—Section 6106**
 230.00 State Bar Act—Section 6125
The statute providing that any act of moral turpitude by an attorney is cause for discipline applies regardless of whether the act was committed in the practice of law. Hence, a suspended attorney's duty under this statute does not contradict the attorney's duty to cease practicing while suspended.
- [16] **221.00 State Bar Act—Section 6106**
An act of concealment can be dishonest and involve moral turpitude that is subject to professional discipline.
- [17] **107 Procedure—Default/Relief from Default**
 161 Duty to Present Evidence
 162.90 Quantum of Proof—Miscellaneous
Where evidence offered by State Bar at default hearing neither established nor controverted or undermined allegations of notice to show cause, such allegations, which were deemed admitted by respondent's default, could properly be relied on to establish attorney's culpability.
- [18] **221.00 State Bar Act—Section 6106**
The use of a presigned verification, attesting to the truth of facts set forth in a civil complaint, without first consulting with the client to assure that the assertions of fact are true, constitutes an act of moral turpitude.

- [19] **221.00 State Bar Act—Section 6106**
 230.00 State Bar Act—Section 6125
A suspended attorney held himself out to a client as entitled to practice law when he discussed her legal problems with the client, accepted a fee and filed a lawsuit on her behalf. This conduct also involved moral turpitude in that the attorney deceived the client by not advising her that he was not entitled to practice law. An attorney's practice of deceit involves moral turpitude.
- [20] **220.30 State Bar Act—Section 6104**
 230.00 State Bar Act—Section 6125
Requiring a suspended attorney to comply with the statutory prohibition against appearing as attorney for a party without authority would not necessitate the attorney's continued practice of law. The attorney can comply with the unauthorized appearance statute by not practicing while suspended. Accordingly, an suspended attorney who wilfully filed a lawsuit on behalf of a client without her authority could be found culpable of violating the statute.
- [21] **214.30 State Bar Act—Section 6068(m)**
 230.00 State Bar Act—Section 6125
A suspended attorney's failure to inform his client that he was suspended and that he was nonetheless filing an unauthorized complaint on her behalf, and his failure to communicate with the client in any other way, amounted to a violation of his statutory obligation to keep his client reasonably informed of significant developments with regard to her case.
- [22] **106.20 Procedure—Pleadings—Notice of Charges**
 204.90 Culpability—General Substantive Issues
 214.30 State Bar Act—Section 6068(m)
A notice to show cause which alleged that an attorney was hired by a father to represent his son and that the attorney thereafter failed to perform services for, communicate with, and return unearned fees to, the father was sufficient to put the attorney on notice that he was charged with the specified misconduct in his dual representation of the father and son, because the attorney would not have had a duty to communicate with the father if he were not representing the father.
- [23] **161 Duty to Present Evidence**
 213.90 State Bar Act—Section 6068(i)
The State Bar failed to establish that an attorney violated his duty to cooperate with the State Bar in a disciplinary investigation, where the evidence showed that letters were purportedly sent to the attorney by State Bar investigators, but no evidence was submitted proving that the letters were properly addressed to, or received by, the attorney.
- [24] **515 Aggravation—Prior Record—Declined to Find**
 802.21 Standards—Definitions—Prior Record
The payment of State Bar membership fees is only a prerequisite to practicing law. No statute or rule of professional conduct requires payment of the fees unless the attorney intends to practice law in this state. Failure to pay fees is not improper in and of itself. The impropriety occurs when the attorney continues to practice law after suspension. Accordingly, an attorney's previous suspension for failure to pay membership fees is not a prior disciplinary record and is not an aggravating circumstance.

- [25] **511 Aggravation—Prior Record—Found**
Even though criminal conduct underlying attorney's prior disciplinary suspension occurred partly at same time as professional misconduct involved in subsequent disciplinary matter, prior suspension was properly considered in aggravation in subsequent matter.
- [26] **801.30 Standards—Effect as Guidelines**
1091 Substantive Issues re Discipline—Proportionality
The Standards for Attorney Sanctions for Professional Misconduct serve as guidelines in determining the appropriate degree of discipline to recommend. The review department must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.
- [27] **230.00 State Bar Act—Section 6125**
861.40 Standards—Standard 2.6—Disbarment
Practicing law while suspended has resulted in a range of discipline from suspension to disbarment, depending on the circumstances of the misconduct, including the nature of any companion charges and the existence and gravity of prior disciplinary proceedings.
- [28] **591 Aggravation—Indifference—Found**
611 Aggravation—Lack of Candor—Bar—Found
621 Aggravation—Lack of Remorse—Found
1091 Substantive Issues re Discipline—Proportionality
Where attorney displayed indifference and lack of remorse by failing to participate in past and present disciplinary proceedings, far more severe discipline was required than in other cases involving similar misconduct where attorneys did participate in disciplinary proceedings.
- [29] **179 Discipline Conditions—Miscellaneous**
611 Aggravation—Lack of Candor—Bar—Found
691 Aggravation—Other—Found
An attorney is not a good candidate for suspension and/or probation where that attorney has failed to comply with the terms and conditions of a prior criminal probation, and has failed to participate in present and past disciplinary proceedings. These facts reflect the attorney's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
- 214.31 Section 6068(m)
- 220.01 Section 6103, clause 1
- 220.31 Section 6104
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 230.01 Section 6125
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]

Declined to Find

- 213.15 Section 6068(a)
- 213.95 Section 6068(i)
- 220.15 Section 6103, clause 2
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]

Aggravation

Found

541 Bad Faith, Dishonesty

Standards

802.30 Purposes of Sanctions

802.61 Appropriate Sanction

805.10 Effect of Prior Discipline

831.40 Moral Turpitude—Disbarment

831.50 Moral Turpitude—Disbarment

Discipline

1010 Disbarment

OPINION

NORIAN, J.:

We review the recommendation of a hearing referee of the State Bar Court that respondent, Harrison E. Taylor, be disbarred from the practice of law in this state. The referee found, after a default hearing, that respondent was culpable in four separate matters. These involved representing clients while under suspension for failure to pay his State Bar membership fees, failing to perform the services for which he was hired, failing to communicate with clients, failing to return client files, papers and the unearned portion of the fees, deceiving a client, and failing to cooperate with the State Bar in the investigation of the client matters. Based on these findings and on the existence of earlier discipline, the referee recommended disbarment.

No request for review has been filed. However, as part of the transition to the new State Bar Court system, under rules adopted by the State Bar Board of Governors, effective September 1, 1989, this review department, created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, must independently review the record of all State Bar proceedings which were tried prior to September 1, 1989, before former referees of the State Bar Court, but assigned to this department after September 1, 1989. (Rules 109 and 452(a), Trans. Rules Proc. of State Bar.)

We set this matter for briefing and oral argument following our ex parte review of the record because of questions we had concerning the referee's findings of fact, conclusions of law and recommended discipline. We notified the examiner¹ of the areas of our concern by letter dated and filed February 27, 1990. The examiner's brief was filed April 3, 1990, and oral argument occurred on May 1, 1990. Subsequent to oral argument, the Supreme Court disciplined respondent in an unrelated matter. At our direction, the examiner submitted certified copies of the State

Bar record of this prior discipline, which we take judicial notice of and make a part of the record of this proceeding.

Based on our independent review of the record, we have concluded that the referee's decision should be modified to expand the findings of fact and to modify the conclusions of law. With these modifications we recommend to the Supreme Court, as did the hearing referee, that respondent be disbarred.

I. BACKGROUND

This proceeding was initiated by a notice to show cause filed January 30, 1989. Counts one through three of the four-count notice alleged that respondent undertook representation of three separate clients while suspended from the practice of law in this state. Thereafter, respondent failed to perform the services for which he was hired, failed to communicate with the clients, and failed to return the unearned portion of his legal fees. Count two further alleged that respondent requested the client sign a verification, concealed the import of the verification from her, and filed a lawsuit on behalf of the client without her knowledge or consent. Count four alleged that respondent failed to cooperate with the State Bar in the investigation of the above three client matters.

On February 2, 1989, the notice to show cause was served on respondent by certified mail. The notice warned respondent that his default could be entered and the allegations admitted if he did not timely file an answer to the notice. On March 2, 1989, the examiner served a notice of application to enter default on respondent (rule 552.1(a), Trans. Rules Proc. of State Bar), informing him that his answer had not been filed and again warning him that his default could be entered if he did not file an answer within twenty days of service of the notice. No answer was filed and the clerk entered the respondent's default on March 28, 1989, and served the notice of entry of default on respondent on the same day. (Rule 552.1(c), Trans. Rules Proc. of State Bar.)

1. Inasmuch as respondent's default had been entered in this proceeding and no timely application for relief from default was filed, he was not entitled to participate further in the

proceeding, and no further notices were served on him. (Rule 552.1, Trans. Rules Proc. of State Bar.)

On May 30, 1989, the referee assigned to this matter held a formal hearing on the charges. At the hearing, the referee granted the examiner's motion to have the allegations contained in the notice to show cause deemed admitted as a result of the respondent's default. (Rule 552.1, Trans. Rules Proc. of State Bar.) Documentary evidence and witness declarations under penalty of perjury were received in evidence at the hearing. The referee's one and one-half page decision was filed on August 23, 1989. The referee, without elaboration, found respondent culpable of violating Business and Professions Code sections 6068 (a), 6068 (i), 6068 (m), 6103, 6104 and 6106 (all further section references are to the Business and Professions Code unless otherwise stated) and former Rules of Professional Conduct, rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2) (all further references to rules, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar in effect from January 1, 1975, to May 26, 1989). Finding aggravation in the form of earlier, unidentified, discipline, and no mitigation, the referee recommended disbarment.

[1a] The referee's decision contains virtually no findings of fact and does not relate the conclusions of law to either the facts or the particular count or counts of the notice to show cause to which they apply. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968; *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 931.)

[1b] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before the review department, the department shall, like the Supreme Court, independently review the record. (See *Sands v. State Bar* (1989) 49 Cal.3d 919, 928.) We may adopt findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar; *Bernstein v. State Bar*

(1972) 6 Cal.3d 909, 916.) Because of the deficiencies in the referee's decision, we are compelled to exercise our authority to make our own findings of fact and conclusions of law based on our independent review of the record.

As noted above, respondent's default was entered in this matter for his failure to timely file an answer to the notice to show cause. In a default proceeding, the examiner is entitled to rely on the admissions that result from respondent's default. (Section 6088; rule 555(e), Trans. Rules Proc. of State Bar.) However, additional evidence may also be introduced as long as it is reliable. (*Id.*) The examiner introduced additional evidence in the form of witness declarations. Those declarations undermine certain material allegations of the notice to show cause.²

[2] Where, as here, an examiner chooses to present evidence in a default hearing that undercuts or negates the allegations of the notice to show cause, it is the evidence, and not the allegations, that controls the findings of fact. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fn. 5; see also *Remainders, Inc. v. Bartlett* (1963) 215 Cal.App.3d 295.) Our findings of fact herein are, unless otherwise specified, based on the allegations deemed admitted by respondent's default, supplemented by the additional evidence submitted at the hearing. Where specified, we have relied on the evidence submitted because it undermined or negated the charging allegations.

[3a] Before we turn to the proper conclusions and recommendations, we must decide whether respondent's default was properly entered as the hearing referee failed to do so. No evidence was introduced at the hearing showing respondent's State Bar membership records address.³ [3b - see fn. 3] We notified the examiner of our intent to take judicial

2. The clerk's letter to the examiner invited him to brief the issue of whether the evidence offered at the hearing was at variance with the allegations in the notice to show cause and if so, should the evidence offered prevail over the allegations deemed admitted. The examiner's brief asserts that the allegations in the notice to show cause should prevail over the evidence offered, and that in any event, any variance is "slight."

3. [3b] The records introduced as State Bar exhibit 1 indicate respondent's suspension for nonpayment of fees and his admission date. However, they do not provide us with his membership records address, which is essential in a default case in order to independently assess the propriety of the default procedures.

notice of the State Bar membership records under the provisions of section 459 of the Evidence Code. No objection having been received, we take judicial notice of the State Bar membership records and make them (two-page document attached to the order and notice of intent to take judicial notice filed October 10, 1990) a part of the record of this proceeding.

Those records indicate that respondent was admitted to the practice of law in this state in June 1972 and that since August 1976 his State Bar membership records address was 1833 The Alameda, San Jose, California 95126. The notice to show cause, notice of application to enter default, and notice of entry of default were all served on respondent at his membership records address by certified mail. We conclude these documents were properly served and respondent's default properly entered.

II. FACTS AND CONCLUSIONS

The Supreme Court suspended respondent from the practice of law in this state for failure to pay his State Bar membership fees, effective September 29, 1986, and he remained suspended through at least April of 1989. (Exh. 2; Bus. & Prof. Code, § 6143.)

A. Count I (Tanaka)

1. Facts

Respondent was hired by Steve Tanaka (Tanaka) in May 1987 to represent Tanaka in a federal civil lawsuit in which Tanaka was a defendant. Tanaka paid respondent \$300 as advanced attorney's fees. Tanaka had one contact with respondent in June 1987 wherein respondent informed Tanaka "that an amended complaint was being drawn up" (exh. 3) and that respondent would contact Tanaka if any new developments came up in the case. After June 1987, Tanaka had no further contact with respondent. Some time after then, Tanaka received from his bank the canceled \$300 check he had written for attorney's fees, indicating that it had been cashed by respondent.

In October 1987, Tanaka contacted the United States District Court for the Northern District of California and learned that a default judgment had been entered against him on August 25, 1987, for \$118,132.50, plus post-judgment interest, and that no papers or documents had been filed in the case on his behalf by respondent. Tanaka tried to contact respondent by calling his home telephone number which had been disconnected and his office telephone number, where he was informed that respondent's whereabouts were unknown. After October 1987, Tanaka hired another attorney to defend him in the action.⁴

2. Conclusions

Respondent was charged in this count with violations of rules 6-101(A)(2), 2-111(A)(2) and 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a). We conclude that he is culpable of violating rule 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a).

[4] Section 6125 provides that only active members of the State Bar may practice law in this state. Respondent was suspended when he was hired by Tanaka in May 1987 and when Tanaka contacted him in June 1987. Respondent accepted money to perform legal services. The "mere holding out by a layman [or a suspended attorney] that he is practicing or is entitled to practice law [citations]" constitutes the unauthorized practice of law. (*In re Cadwell* (1975) 15 Cal.3d 762, 771, internal quotation marks omitted, first bracketed insertion in original.) At the very least, respondent held himself out to Tanaka as entitled to practice law and therefore violated section 6125.

Rule 6-101(A)(2) provides that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." Our initial concern centered on whether an attorney who is suspended and therefore legally precluded from practicing law can be found culpable of failing to perform services competently.⁵ We informed the

4. The record does not reveal whether Tanaka was successful in having the default judgment set aside.

5. Section 6126, as it read during respondent's misdeeds, made it a misdemeanor for a suspended attorney to practice law.

examiner of our concern and requested he brief the issue. The examiner asserts that it is appropriate to find respondent culpable, citing *Chasteen v. State Bar* (1985) 40 Cal.3d 586.

The charges in *Chasteen* arose out of conduct which occurred between 1976 and 1981. Chasteen was suspended in November 1978 for nonpayment of State Bar membership dues and the suspension remained in effect until January 1984. (*Id.* at p. 589.) In two out of the three matters on which he was charged, the misconduct commenced two to three years before he was suspended. Only the misconduct in failing to diligently prosecute a personal injury case on behalf of another client, MacNaughton, took place solely while he was under suspension. The hearing referee found that Chasteen violated sections 6125 and 6126, acted in contempt of court in violation of section 6127 and violated rules 8-101 and 6-101. The Supreme Court did not specifically address which statutory or rule violations it was upholding or for which time period, stating generally: "Petitioner's misconduct involved failing to act competently and to perform his duties as an attorney, commingling and misappropriating funds, and the unauthorized practice of law while under suspension by the State Bar." (*Id.* at p. 592.)

It does not appear that in deciding *Chasteen*, the Supreme Court was asked to consider whether an attorney can simultaneously have a duty to refrain from the practice of law while suspended and have a duty, if practicing while unauthorized to do so, to act competently. The issue before the Court was the appropriate degree of discipline. Chasteen did not seek Supreme Court review until he was notified by the Court that it was considering imposing more severe discipline than recommended by the State Bar. (*Id.* at p. 588.) On review, he did not contest most of the hearing panel's findings of fact as amended by the review department. (*Id.* at p. 589.) [5] "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

It was not necessary to the decision to determine that Chasteen violated rule 6-101(A)(2) while sus-

pending since his pre-suspension conduct qualified as a failure to act competently. The result in *Chasteen* could easily have been based on the failure to act competently prior to his suspension and separately thereafter practicing law while suspended in violation of section 6125. We therefore do not construe *Chasteen* as deciding the issue of whether an attorney can be simultaneously culpable of violating rule 6-101(A)(2) and of practicing law while suspended. Accordingly, we address this issue as one of first impression.

[6a] By its express terms, section 6125 precludes a suspended attorney from practicing law. Rule 6-101(A)(2), on the other hand, requires an attorney to perform the services for which he or she is hired because the failure to do so can be an intentional or reckless failure to perform competently in violation of the rule. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5.)

[6b] Requiring compliance with both section 6125 and rule 6-101(A)(2) results in incompatible duties. The suspended attorney must cease practicing immediately, yet continue to render competent legal services. The suspended attorney must choose—commit a criminal offense under section 6126, which as presently enacted could be a felony, by practicing while suspended, or commit a State Bar discipline offense under rule 6-101(A)(2) by failing to perform. [7] "A statute should be interpreted so as to produce a result that is reasonable. [Citation.] If two constructions are possible, that which leads to the more reasonable result should be adopted. [Citation.]" (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.)

[8a] We perceive no reason to require simultaneous compliance with the statute and rule. Standard 2.6(d) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V; hereafter "standard[s]") provides for suspension or disbarment for attorneys found culpable of violating sections 6125 or 6126, depending on the gravity of the offense or the harm to the victim. Thus, a full range of discipline is available to protect the public, courts and profession for the section 6125 violation alone. Recklessness or incompetence in the unauthorized practice of law would cause harm to the

client and would constitute an aggravating factor which justifies greater discipline than would have been appropriate if no harm had occurred.

[6c] As a matter of statutory and regulatory construction, we therefore interpret section 6125 to prohibit altogether the unauthorized practice of law and we hold that rule 6-101(A)(2) has no applicability to attorneys practicing while suspended. The suspended attorneys' only duty is to stop practicing until they have reestablished themselves as attorneys in good standing. In the case of an attorney suspended for failure to pay membership fees, this is simply cured by immediate payment. As soon as suspended attorneys are returned to good standing, they are responsible for complying with rule 6-101(A)(2).

[9] Rule 2-111 sets forth the duties and obligations of an attorney who withdraws from employment. The requirements of the rule apply "when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client." (*Baker v. State Bar*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5.) [10] Subsection (A)(2) of the rule provides that an attorney shall not withdraw until he or she takes steps to avoid foreseeable prejudice to the rights of the client. By its express terms, this subsection requires the attorney to continue representing the client until he or she has taken steps to avoid foreseeable prejudice. This obligation, like that of rule 6-101(A)(2), directly contradicts the suspended attorney's duty to cease practicing law immediately. It is unreasonable to hold respondent to a duty of having to continue to represent his client for a reasonable period of time to avoid prejudice prior to withdrawal, if he had an absolute duty under section 6125 to stop practicing while under suspension. For these reasons and those discussed *ante* with regard to the rule 6-101(A)(2) violation, we hold that rule 2-111(A)(2) has no applicability to attorneys practicing while suspended.

[8b] Again, this analysis does not insulate attorneys who are engaged in the unauthorized practice of law from discipline for the precipitous withdrawal occasioned by the incapacity to act. All harm suffered by the client is appropriately considered as aggravation of the section 6125 violation and the

discipline accordingly enhanced. In order to minimize harm to the client, the attorney should take all steps necessary to avoid foreseeable prejudice to the client, *short* of practicing law.

[11a] Rule 2-111(A)(3) provides that the attorney shall, upon withdrawal, promptly return any unearned fees. Tanaka paid respondent \$300 as advanced attorney's fees, which respondent did not return. Respondent was not required to practice law in order to comply with this subsection. His only obligation was to return the unearned advanced fee to the client. We therefore do not find the requirement of compliance with rule 2-111(A)(3) incompatible with the requirement of section 6125.

As noted, rule 2-111(A)(3) obligated respondent to return any *unearned* fee he received. There is no evidence in the record that anything more than negligible efforts were made on the client's behalf. Thus, there is no basis for concluding that any of the \$300 was earned. [11b] In addition, as respondent was suspended when hired by Tanaka he was legally precluded from practicing law and therefore, his agreement to provide legal services in exchange for a fee was illegal. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 238, fn. 8.) Permitting respondent to have earned any of the money paid him by Tanaka, even a reasonable fee under a quantum meruit theory, would condone his unauthorized practice of law. "It is clearly contrary to the public policy of this state to condone a violation of the ethical duties which an attorney owes to his client. [Citation.]" (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 951.) We conclude that none of the \$300 was earned and that respondent's failure to return the advance fee was a wilful violation of rule 2-111(A)(3).

Section 6068 sets forth numerous duties of an attorney. Subsection (a) provides it is the duty of an attorney to support the Constitution and laws of the United States and this state.

[12] We have considered the propriety of culpability under section 6068 (a) with respect to an attorney who had practiced while suspended in violation of sections 6125 and 6126. (*In the Matter of Trousil*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 237.)

Our holding there is equally applicable here. We observed that "There is no express provision for professional discipline to be imposed directly as a consequence of a section 6125 or 6126 violation." (*Id.*) As a result, "Charging a respondent with a violation of section 6068 (a) by reason of alleged violation of sections 6125 and 6126 provides the basis for imposition of professional discipline for the crime of practicing law while suspended." (*Id.*)

Section 6103 provides: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." [13] The Supreme Court has recently held that "With the exception of a wilful violation of a court order, 'this section does not define a duty or obligation of an attorney but provides only that violation of [her] oath or duties defined elsewhere is ground for discipline'; thus petitioner could not violate section 6103 unless she violated a court order. [Citations.]" (*Read v. State Bar* (1991) 53 Cal.3d 394, 406 [bracketed insertion in original].) Respondent was suspended by order of the Supreme Court. His continued practice of law was a violation of the court order suspending him and was therefore a violation of section 6103.

[14] Section 6068 (m) provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of the client and keep the client reasonably informed of significant developments with regard to the matter the attorney is handling for the client. As with rule 2-111(A)(3), this subdivision does not require the suspended attorney's continued practice. Indeed, it is extremely important for the attorney to continue to communicate with the client if for no other reason than to inform the client of the attorney's incapacity to continue representation and to facilitate the transition to new counsel so that prejudice to the client is minimized. Naturally, such communication must not take the form of legal

advice because the attorney may not practice law. In the present case, respondent failed to advise Tanaka that he was suspended or communicate in any fashion with the client and therefore violated this section.

B. Count II (Ruybalid)

1. Facts

In May 1987, Sandra Ruybalid (Ruybalid) met with respondent to discuss a matter regarding a partnership dispute in which she was involved. She met him again in June 1987, at which time she gave him various papers in connection with the matter, which included canceled checks and original letters. At this time she also gave respondent a signed blank check for his fees. Respondent told her he did not know the exact amount he would need to get started on her case. Ruybalid did not know respondent had cashed the check for \$2,000 until she received the canceled check from her bank.

In June 1987, respondent gave Ruybalid a blank piece of paper and asked for her signature, which she provided. Respondent informed her that the paper was for the purpose of allowing him to continue with the case. After June 1987, Ruybalid tried on many occasions to contact respondent at both his home and office. She left numerous messages on his answering machine. Her calls were never returned.

In October 1987, Ruybalid hired another attorney to handle the matter for her. At this time she also became aware that respondent had filed a complaint for accounting in the Superior Court of Santa Clara County in August 1987 on her behalf. Ruybalid's verification was attached to the complaint. He filed the complaint without Ruybalid's authority and in fact never discussed the complaint or the wording of the complaint at any time with her. After June 1987, respondent did not contact Ruybalid, or return any of the papers she had given him after he was requested to do so by her new attorney, or return any of the \$2,000 she paid him.⁶

6. The record is silent as to the outcome of the partnership dispute matter or the complaint for accounting.

2. Conclusions

Respondent was charged in this count with violating rules 6-101(A)(2), 2-111(A)(2), and 2-111(A)(3) and sections 6125, 6106, 6104, 6103, 6068 (m), and 6068 (a). We conclude that respondent is culpable of violating rule 2-111(A)(3), and sections 6125, 6103, 6104, 6106, 6068 (m) and 6068 (a).

Respondent was suspended for nonpayment of membership fees when he filed the lawsuit in August of 1987. At the very least, respondent held himself out as entitled to practice law and therefore violated section 6125. (*In re Cadwell, supra*, 15 Cal.3d at p. 771.)

For the reasons articulated in count I, we hold rules 6-101(A)(2) and 2-111(A)(2) do not apply to the facts in this count.

[11c] Rule 2-111(A)(3) does, however, apply. The services respondent performed in this count are fairly characterized as more than negligible. Nevertheless, for the reasons articulated in count one, respondent was legally precluded from earning any of the money paid him by the client by virtue of his suspension from the practice of law. Accordingly, respondent's failure to return the \$2,000 paid him by Ruybalid was a wilful violation of this rule.

[15] Section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or a misdemeanor or not, constitutes a cause for disbarment or suspension." By its express terms, this section applies regardless of whether the act was committed in the practice of law. Hence, we do not consider respondent's duty under this section as contradicting his duty to cease practicing under section 6125.

The referee's decision, without explanation, found a violation of this section which was only charged in this count. The notice to show cause alleged that respondent had his client sign a verification, concealing its import from her. [16] Concealment can be dishonest and involve moral turpitude within the meaning of section 6106. (See *Crane v. State Bar*

(1981) 30 Cal.3d 117, 122.) Ruybalid's declaration stated that respondent gave her a blank piece of paper, obtained her signature, and informed her that the purpose of her signature was to allow him to continue with her case. The complaint for accounting that respondent filed on Ruybalid's behalf is attached to her declaration. (Exh. 4.) Attached to the complaint is a verification which declares that the document was executed in June 1987 and is purportedly signed by Ruybalid.

[17] While the evidence offered by the examiner does not, in and of itself, establish that Ruybalid signed the verification or that respondent concealed the import of that document from her, it does not controvert or undermine those allegations. (Compare *Conroy v. State Bar, supra*, 53 Cal.3d at p. 502, fn. 5.) As a result, the allegations in the notice to show cause, deemed admitted by respondent's default, may be properly relied on to establish that respondent had his client sign the verification, concealing its import from her.

[18] The practice of having clients sign blank verifications in discovery proceedings was recently addressed by the Supreme Court in connection with the requirements of section 6106, among other statutes and rules. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) The Court found that "The use of a presigned verification in discovery proceedings, without first consulting with the client to assure that any assertions of fact are true, is a clear and serious violation of the statutes and rules." (*Id.*, emphasis in original.) We see no basis for distinction between the proscribed use of presigned verifications in discovery proceedings and the use of the verification in this case. In both instances, the attorney used his client's verification, which attested to the truth of facts, without first ascertaining from the client that the facts were true. We conclude respondent violated section 6106.

[19] In addition, respondent held himself out to Ruybalid as entitled to practice law when he met with her and discussed her legal problems, accepted the \$2,000 fee and filed the lawsuit on her behalf. (See *Farnham v. State Bar* (1976) 17 Cal.3d 605, 612.) This conduct involved moral turpitude and constituted a violation of section 6106 in that respondent

deceived Ruybalid by not advising her that he was not entitled to practice law. “An attorney’s practice of deceit involves moral turpitude.” (*In re Cadwell, supra*, 15 Cal.3d at p. 772, quoting *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253.)

[20] Section 6104 provides: “Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension.” Requiring compliance with this section would not have necessitated respondent’s continued practice of law. He could have complied by not practicing while suspended. Instead, respondent wilfully filed the lawsuit on behalf of Ruybalid without her authority. We conclude respondent violated section 6104.

As in count I, respondent’s violation of section 6125 is a ground for discipline as a violation of his oath and duty to support the laws of this State. (Section 6068 (a).) In addition, respondent violated section 6103 by wilfully violating the Supreme Court order that suspended him.

[21] Respondent did not inform his client that he was suspended, or that he was nonetheless filing the complaint on her behalf, and did not communicate with the client in any other way. This conduct amounted to a failure to keep his client reasonably informed of significant developments with regard to her case in violation of section 6068 (m).

C. Count III (Quetania)

1. Facts

In September 1987, Francisco Quetania (Quetania) hired respondent to assist him in handling the release of his son from the San Jose County Boys Ranch. At that time, Quetania paid respondent \$150 by check dated September 25, 1987, with the understanding that this payment was the initial amount and more would be due after the release of Quetania’s son. After October 1987, Quetania received the canceled check from his bank which indicated that

respondent had cashed the check. Quetania tried for a number of months to contact respondent without success. Respondent never contacted Quetania after payment of the \$150 nor did he do any work on Quetania’s behalf, nor did he return any of the money paid to him by Quetania.⁷

2. Conclusions

Respondent was charged in this count with violating rules 6-101(A)(2), 2-111(A)(2) and 2-111(A)(3) and sections 6125, 6103, 6068 (m), and 6068 (a). We conclude that he is culpable of violating rule 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a).

Our initial concern in this count focused on whether the notice to show cause charged respondent with representing both Quetania and his son. The notice alleged that respondent was hired by Quetania to represent his son in a juvenile court matter, was paid \$150 by the father and thereafter failed to perform the services for which he was hired, failed to communicate with the father and failed to return unearned fees to the father. At trial, the examiner introduced Quetania’s declaration stating that he (Quetania) hired respondent to represent him in getting his son released from a boys ranch and that respondent had taken his money and never contacted him. This declaration establishes the abandonment of the father, which if not properly charged, is not an appropriate basis for culpability. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.)

[22] Though not a model of clarity, the allegations of the notice were sufficient to charge respondent with the specified misconduct in his dual representation of the father and son. The notice specifically alleged that respondent was hired to represent the son and if that were the only allegation, due process issues would exist with regard to imposing discipline based on abandonment of the father. However, the notice also alleged that respondent failed to communicate and return unearned fees to the father. Respondent would not have had a duty to communi-

7. The record does not indicate the outcome of the juvenile matter.

cate with the father if he were not representing him. (See section 6068 (m).) In our view, the allegations of this count were sufficient to place respondent on notice of the specific conduct (abandonment of the father and son) alleged to constitute the misconduct. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1154; rule 550, Trans. Rules Proc. of State Bar; section 6085.)

Respondent was suspended for nonpayment of membership fees at the time he was hired by Quetania in September 1987 and at all relevant times thereafter. At the very least, respondent held himself out as entitled to practice law and therefore violated section 6125. (*In re Cadwell, supra*, 15 Cal.3d at p. 771.)

For the reasons articulated in count I, we hold rules 6-101(A)(2) and 2-111(A)(2) do not apply to the facts in this count.

Rule 2-111(A)(3) does apply. As in count I, respondent did not earn, within the meaning of this rule, any of the money paid him by the client. His failure to return the money was therefore a failure to promptly return unearned fees in wilful violation of rule 2-111(A)(3).

Again as in count I, respondent's violation of section 6125 is a ground for discipline as a violation of his oath and duty to support the laws of this state. (Section 6068 (a).) Respondent also violated section 6103 by his wilful violation of the Supreme Court order suspending him.

Respondent failed to inform his client that he was suspended or communicate with the client in any other way. This conduct amounted to a failure to keep his client reasonably informed of significant developments with regard to his case in violation of section 6068 (m).

D. Count IV

*1. Facts*⁸

On May 11, 1988, April 28, 1988, and April 29, 1988, an investigator for the State Bar mailed respondent three separate letters regarding the complaints of Quetania, Tanaka and Ruybalid, respectively. Each letter asked respondent to reply to the allegations of the specified complaint. The letters were not returned as undeliverable and respondent did not respond to any of them. All three letters were sent to respondent at a post office box address. In addition, all three letters directed respondent's attention to the provisions of section 6068 (i).

2. Conclusions

Respondent was charged in this count with violating sections 6068 (i), 6068 (a) and 6103. We conclude that the State Bar has failed to establish a violation any of these sections.

[23] Section 6068 (i) provides that it is the duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding. No independent grounds exist for the 6068 (a) and 6103 violations other than the 6068 (i) violation. Allegedly, respondent violated these sections by his failure to respond to the three letters. The examiner submitted copies of the three letters. (Exh. 6.) Each of the letters was sent to respondent at a post office box address. The State Bar membership records, of which we took judicial notice, indicate that respondent's address has been a street address since 1976. Thus, the letters were not sent to respondent's State Bar membership address. There is no evidence in the record that the post office address was an accurate address for respondent. Indeed, the examiner indicated at the hearing that he did not know where the

8. Our findings of fact in this count are based on the declaration of A. J. Severino, with attachments, introduced as State Bar

exhibit 6, as this declaration undermined the allegations in the notice to show cause.

post office address came from. (R.T. p. 4.) The evidence submitted at the hearing fails to establish that the letters were properly sent to, or received by, respondent and therefore fails to establish that respondent did not cooperate with the investigation.

E. Aggravation and Mitigation

The referee, without explanation or elaboration, found that respondent's culpability in this matter was aggravated by the existence of earlier discipline which resulted in his suspension from practice. At the time the referee rendered his decision, the record did not contain any indication that respondent was suspended other than his suspension for failure to pay his bar membership fees.

The Business and Professions Code sets forth the legislative authorization for the payment of membership fees at sections 6140 through 6145. Section 6143 provides that any member who fails to pay his or her fees after they become due and after two months written notice of the delinquency, shall be suspended from membership in the State Bar until paid. Where an attorney fails to pay the fees, the State Bar recommends his or her suspension from membership to the Supreme Court and that recommendation is treated as a finding of fact and recommendation that the Supreme Court order the attorney's suspension. (*Hill v. State Bar* (1939) 14 Cal.2d 732, 734-735.) [24] Nevertheless, the payment of membership fees is only a prerequisite to practicing law. No statute or rule of professional conduct requires payment of the fees unless the attorney intends to practice law in this state. Membership in the State Bar is, in this sense, voluntary. We see no valid reason to treat an attorney's "withdrawal" from membership, by failure to pay the fees, as misconduct, for that term implies some impropriety. Failure to pay fees is not improper in and of itself.⁹ Indeed, non-payment could be caused by

circumstances (e.g., illness or incarceration) beyond the attorney's control. The impropriety occurs when the attorney continues to practice law after suspension. Respondent did so here and we have concluded he thereby violated section 6125. However, respondent's actions after he was suspended do not transform his failure to pay fees into misconduct. Accordingly, we decline to consider respondent's suspension as an aggravating circumstance.¹⁰

Respondent's misconduct in counts one and three was surrounded by concealment in that he did not inform his clients that he was not entitled to practice. This is an aggravating circumstance under standard 1.2(b)(iii).

Respondent failed to take all steps necessary, short of practicing law, to protect his clients' interests in counts I, II, and III. In addition, as we discuss later, although the record does not clearly demonstrate the harm the clients likely suffered as a result of respondent's unauthorized practice of law in counts I, II, and III, at the very least, the clients paid money for legal services that were never competently performed. These are aggravating circumstances under standard 1.2(b)(iv).

Respondent has been recently disciplined by the Supreme Court (Bar Misc. 5920 and 5921) as a result of his misdemeanor convictions in two separate matters for failing to provide support for his two minor children. (Pen. Code, § 270.) By order filed June 27, 1990, the Court imposed the State Bar's recommended discipline of one year suspension, execution of which was stayed, and probation for a period of two years on conditions, including six months actual suspension. Respondent did not participate in the State Bar proceeding.

Respondent pleaded guilty to both convictions, one in March 1987 and the other in February 1988.

9. The Supreme Court has, in some cases, referred to an attorney's suspension for non-payment of State Bar dues as "prior discipline." (*Demain v. State Bar* (1970) 3 Cal.3d 381, 383; *Farnham v. State Bar*, *supra*, 17 Cal.3d at p. 608; *Phillips v. State Bar* (1989) 49 Cal.3d 944, 950.) However, in other cases, the Court has sustained the State Bar's finding that the attorney had no prior record of discipline, even though he had

previously been suspended for non-payment of State Bar dues. (See, e.g., *Bate v. State Bar* (1983) 34 Cal.3d 920, 922.)

10. The clerk's letter asked the examiner to brief this issue. The examiner agrees that suspension for failure to pay fees should not be considered as an aggravating circumstance in this case.

The municipal court imposed three years probation in each case, with conditions, including child support payments. He violated his probation in each case by failing to make the support payments and he was sentenced to concurrent six-month jail terms. [25] Although the underlying criminal conduct occurred in January 1986 (Bar Misc. 5920) and November 1987 (Bar Misc. 5921), which somewhat coincides with the misconduct in the present discipline case, these matters are properly considered as aggravation in recommending the degree of discipline in the present proceeding. (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 715.)

III. DISCIPLINE

We next turn to the issue of the degree of discipline we are to recommend to the Supreme Court based on our conclusions as to respondent's misconduct in this case. [26] In determining the appropriate degree of discipline to recommend, we start with the standards which serve as our guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In the present case we have concluded that respondent is culpable of practicing law while suspended, failing to communicate and return fees, appearing without authority and deceit.

Standard 2.6 provides for disbarment or suspension for violations of sections 6125 or 6068 (a), depending on the gravity of the offense or the harm, if any, to the victim. Standard 2.3 provides for actual suspension or disbarment for offenses involving moral turpitude, depending on the degree to which the victim was harmed, the magnitude of the misconduct, and the degree to which it relates to the practice of law. Pursuant to standard 1.6(a), if two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the sanction imposed should be the most severe of the different applicable sanctions. In the present case, standard 2.3 is the most severe applicable standard. In addition, pursuant to standard 1.7(a), the discipline imposed here should be more severe than the discipline ordered by

the Supreme Court in respondent's prior disciplinary matter.

Except for count one, the record is, for the most part, silent as to the degree of harm suffered by the victims of respondent's unauthorized practice of law. In count one, respondent took Tanaka's money and failed to take any steps to protect his interest in the lawsuit, which resulted in a default judgment. The record does not indicate whether Tanaka was able to have the judgment set aside. Nor does the record indicate whether Tanaka had any defense to the lawsuit. Nevertheless, suffering a default judgment in excess of \$118,000 likely harmed Tanaka significantly even if it only prevented him from settling the claim on more favorable payment terms. Ruybalid lost \$2,000, but we do not know the outcome of the partnership dispute or the harm, if any, caused her by the complaint respondent filed. Quetania lost \$150, but again, we do not know the outcome of the juvenile matter. We do not know if the son remained in the boys ranch for any period of time which was attributable to respondent's unauthorized practice. We do not know the extent to which the delay attributable to respondent's unlawful practice in counts two and three caused harm to the clients. Respondent did not return the papers and canceled checks given him by Ruybalid. Again, we do not know the extent to which this caused her harm. We do find that respondent's deceit in count two was directly related to the practice of law.

[27] Practicing law while suspended has resulted in a range of discipline from suspension to disbarment, depending on the circumstances of the misconduct, including the nature of any companion charges and the existence and gravity of prior disciplinary proceedings. In *Farnham v. State Bar, supra*, 17 Cal.3d at pp. 610-612, the attorney had engaged in the unauthorized practice of law by giving legal advice and preparing legal papers for a client during the period of time he was suspended for nonpayment of membership fees. In addition, he wilfully deceived that client and another, avoided their efforts to communicate with him and eventually abandoned their cases. (*Id.*) Farnham had been previously disciplined. (*Id.* at p. 608.) The Supreme Court imposed two years suspension, stayed, two years probation, and six months actual suspension.

In *Chasteen v. State Bar*, *supra*, 40 Cal.3d 586, the attorney was found culpable of the unauthorized practice of law as well as deceit of clients, commingling and failure to return fees. (*Id.* at p. 592.) The bulk of Chasteen's misconduct was attributable to his long history of alcoholism. (*Id.* at p. 593.) The Supreme Court imposed a two-month suspension by a four-to-three decision. In a concurring and dissenting opinion, joined by Justices Reynoso and Lew (sitting by special assignment), Justice Lucas indicated he would have imposed greater discipline.

In *Morgan v. State Bar* (1990) 51 Cal.3d 598, the attorney engaged in the unauthorized practice of law and, in addition, obtained a pecuniary interest adverse to his client through the use of the client's credit card. Morgan had four prior disciplinary proceedings, one of which also involved the unauthorized practice of law. (*Id.* at pp. 601, 607.) In mitigation, Morgan presented evidence of his various eleemosynary activities. (*Id.* at p. 607.) The Supreme Court ordered disbarment, finding that Morgan's behavior demonstrated "a pattern of professional misconduct and an indifference to this court's disciplinary orders . . ." (*Id.*)

The present case involves deception in that respondent held himself out to his clients and a court as entitled to practice law when he was not. Farnham's unauthorized practice of law involved only one of the two clients and the suspension for a three-month period during his representation of that client. Here, respondent was suspended from the time he undertook representation of the clients through the time he abandoned them. Respondent undertook representation, accepted substantial sums as advanced fees, then abandoned the clients, all while suspended. Chasteen presented substantial mitigating evidence of his efforts at rehabilitation. Respondent did not present any mitigating evidence. Morgan's misconduct was significantly aggravated by his record of prior misconduct. Nevertheless, he participated in the State Bar proceeding. In addition, both Farnham and Chasteen participated in their respective State Bar proceedings.

[28] In contrast, respondent has displayed total indifference and lack of remorse by ignoring both his present and past discipline proceedings. Respondent's lack of participation substantially distinguishes this

case from *Farnham* and *Chasteen* and indicates that far more severe discipline is required to achieve the purposes of attorney discipline set forth in standard 1.3 (protection of the public, courts and legal profession as well as rehabilitation in the proper case).

In *Baca v. State Bar* (1990) 52 Cal.3d 294, the attorney had been found culpable of client abandonment in one matter and misappropriation in another matter. In addition, Baca failed to cooperate with the State Bar in the investigation of the client matters and defaulted in the State Bar trial of those matters. In ordering disbarment, the Supreme Court found that "Baca's failure to cooperate until the recommendation of disbarment was made reflects a disdain and contempt for the orderly process and rule of law on the part of an attorney who has sworn to uphold the law." (*Id.* at p. 305.)

In *Barnum v. State Bar* (1990) 52 Cal.3d 104, the Supreme Court again ordered disbarment. In one client matter, Barnum collected an unconscionable fee, disobeyed court orders compelling him to explain or return the fee and refused to participate in the disciplinary proceeding. (*Id.* at p. 106.) Barnum had been disciplined on one prior occasion. (*Id.*) The prior discipline imposed a period of probation, which Barnum was subsequently found to have violated. (*Id.* at p. 112.) The Court concluded that Barnum was "not a good candidate for suspension and/or probation. He has breached two separate terms of our prior disciplinary order, leading to the imposition of additional sanctions. He also defaulted before the State Bar here and in one other proceeding." (*Id.* at p. 106.)

[29] In our view, respondent is also not a good candidate for suspension and/or probation. He has failed to comply with the terms and conditions of his criminal probation by disobeying two separate court orders requiring him to provide support to his minor children and has failed to participate in both the present and past disciplinary proceedings. In addition to the other misconduct before us, these facts reflect respondent's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great.

In conclusion, our analysis of respondent's misconduct, the aggravating circumstances, the lack of mitigating circumstances, the applicable standards

and Supreme Court cases we deem comparable show that disbarment is necessary in this case to protect the public, courts and legal profession, maintain the high professional standards of attorneys and preserve the public confidence in the legal profession. (Std. 1.3.)

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent be disbarred and that his name be stricken from the roll of attorneys in this state. Further, we recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, of the effective date of the Court's order.

We concur:

PEARLMAN, P.J.
STOVITZ, J.