

**STATE BAR COURT**  
**REVIEW DEPARTMENT**

In the Matter of

**RESPONDENT K**

A Member of the State Bar

No. 80-O-10164

Filed March 16, 1993

**SUMMARY**

Respondent represented six named plaintiffs in an antitrust case in the 1970's and achieved enormously positive, unexpected results, including a \$9 million settlement for the six plaintiffs. In addition, respondent negotiated a \$1 million settlement for hundreds of other clients in connection with the case. Although none of the six named plaintiffs complained about respondent, one of the other clients sued respondent for malpractice. In 1980, when the client who had sued won a substantial verdict against respondent, the State Bar became aware that misconduct may have occurred. In 1987 the State Bar charged respondent with numerous ethical violations regarding the above matters.

After a lengthy State Bar Court trial, a hearing referee of the former State Bar Court concluded that respondent was not culpable of any of the misconduct alleged in the notice to show cause and recommended that the matter be dismissed. The State Bar examiner sought review before the former review department. The former review department concluded that respondent had represented clients with conflicting interests without obtaining their written consent. The former review department then remanded the matter to the same hearing referee for a recommendation as to the degree of discipline. After further hearings, the referee recommended that respondent be privately reprovved. (C. Thorne Corse, Hearing Referee.)

Respondent requested review before the current review department, contending that he was not culpable of misconduct, or, in the alternative, that the misconduct did not warrant any discipline. The current review department concluded that the only properly charged conflict of interest which had been found by the referee or former review department was not established by clear and convincing evidence. However, it found respondent culpable of failing to keep the portion of his legal fee which was disputed by the client in a trust account until the resolution of the dispute. Because the sole basis of culpability was this trust account violation and because the mitigating circumstances outweighed the aggravating circumstances, the current review department imposed a private reprovval conditioned on respondent taking and passing the professional responsibility examination. (Gee, Acting P.J., concurred in part and dissented in part and filed a separate opinion.)

## COUNSEL FOR PARTIES

For Office of Trials: Jerome Fishkin

For Respondent: James J. Brosnahan, Jr.

## HEADNOTES

- [1 a, b] 130 Procedure—Procedure on Review  
 135 Procedure—Rules of Procedure  
 139 Procedure—Miscellaneous  
 166 Independent Review of Record

The law of the case doctrine does not preclude the current review department from reviewing the former review department's decision de novo. If review is sought in a proceeding which had been previously decided by the former review department, the entire matter is before the review department for independent de novo review, and it may act on an issue regardless of whether the parties have raised it. (Rule 453(a), Trans. Rules Proc. of State Bar.) Accordingly, review department could reopen a charge dismissed by the former review department.

- [2 a, b] 102.10 Procedure—Improper Prosecutorial Conduct—Reopening  
 135 Procedure—Rules of Procedure

Initiation of disciplinary proceeding against respondent was not barred under former rule 511 of the Rules of Procedure of the State Bar by State Bar's decision to monitor appeal in malpractice case against respondent instead of pursuing formal investigation.

- [3] 130 Procedure—Procedure on Review  
 139 Procedure—Miscellaneous  
 166 Independent Review of Record

Former review department's alleged lack of quorum was moot where all issues in proceeding were before current review department for independent de novo review.

- [4] 141 Evidence—Relevance  
 146 Evidence—Judicial Notice  
 191 Effect/Relationship of Other Proceedings

Where civil malpractice action against respondent involved essentially identical factual issues to those in discipline proceeding, nontestimonial exhibits consisting of documents relating to judgment in such civil proceeding, including unpublished appellate opinion explaining reasons for decision of civil courts, were admissible evidence in disciplinary proceeding.

- [5 a, b] 135 Procedure—Rules of Procedure  
 159 Evidence—Miscellaneous

Former review department's admission of certain exhibits into evidence without allowing respondent an opportunity to present rebuttal evidence was error. Nevertheless, no error in admitting or excluding evidence invalidates a finding of fact, decision or determination unless the error resulted in a denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar.) Where such exhibits were not relied upon in determining culpability and discipline, respondent failed to show that the admission of the documents deprived him of a fair hearing.

- [6]      **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
          **162.12 Proof—State Bar’s Burden—Preponderance of Evidence**  
          **191 Effect/Relationship of Other Proceedings**  
Because the preponderance of the evidence standard of proof in a civil malpractice trial is lower than the clear and convincing evidence standard of proof in a disciplinary proceeding, the conclusions reached by civil courts in a malpractice action against respondent are not dispositive of disciplinary charges.
- [7]      **204.90 Culpability—General Substantive Issues**  
          **280.00 Rule 4-100(A) [former 8-101(A)]**  
The amount of client trust funds that an attorney mishandles goes to the issue of discipline, not culpability, and the mishandling of even an insignificant amount can constitute a disciplinable offense. No de minimis exception applies to the determination of culpability for mishandling trust funds.
- [8 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**  
A client’s objection to respondent taking any legal fee from a settlement triggered the provision of the rule of professional conduct requiring respondent to retain disputed funds in a trust account pending a resolution of the dispute even though respondent later reduced his legal fee.
- [9 a-c] **106.20 Procedure—Pleadings—Notice of Charges**  
          **106.90 Procedure—Pleadings—Other Issues**  
          **113 Procedure—Discovery**  
          **273.30 Rule 3-310 [former 4-101 & 5-102]**  
An attorney can be disciplined only for misconduct charged in the notice to show cause or an amendment thereto. Where notice to show cause charged violation of rule against representing clients with conflicting interests, and respondent served interrogatory requesting identification of all such alleged conflicts, charges against respondent were limited to those identified in State Bar’s answer to such interrogatory, and respondent could not be found culpable of violating conflict of interest rule based on a conflict not listed therein.
- [10 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**  
The former rule of professional conduct prohibiting an attorney from representing clients with conflicting interests without written client consent was violated where the attorney favored one client at the expense of another client. An attorney has a duty to secure as large a recovery as possible for a client and the attorney violates this duty when the representation of one client might have induced the attorney to negotiate a low settlement for another client. A conflict of interest between jointly represented clients occurs whenever their common lawyer’s representation of one is rendered less effective by reason of the lawyer’s representation of the other.
- [11 a-e] **273.30 Rule 3-310 [former 4-101 & 5-102]**  
Representing over 700 clients by majority rule posed risk of conflicting interests among clients, since respondent owed same ethical obligations to each client, not just those in majority. However, respondent’s representation of multiple clients did not violate the former rule of professional conduct prohibiting an attorney from representing clients with conflicting interests without written client consent where the clients’ interests were compatible, not conflicting; respondent was not put in a position of choosing between conflicting duties or of attempting to reconcile conflicting interests; there was no clear and convincing evidence that respondent’s representation of one group of clients rendered his representation of the other group less effective; and there was not clear and convincing evidence that potential conflicts or favoritism ever materialized.

- [12 a-c] **106.20 Procedure—Pleadings—Notice of Charges**  
**273.30 Rule 3-310 [former 4-101 & 5-102]**  
**563.90 Aggravation—Uncharged Violations—Found but Discounted**  
 Respondent violated former rule of professional conduct prohibiting representation of clients with conflicting interests when he accepted more signatories to a settlement than were required, because interests of required signatories conflicted with interests of extra signatories, whose participation in settlement reduced amounts received by required signatories and by previous extra signatories. Where such violation of conflict of interest rule was not charged, it could not be basis of culpability, but could be relied on in aggravation. However, because of novelty of situation, which involved extremely unusual settlement, uncharged violation was given minimal aggravating weight.
- [13 a, b] **213.40 State Bar Act—Section 6068(d)**  
**221.00 State Bar Act—Section 6106**  
 In order for an attorney's misrepresentation to be a violation of the statute prohibiting the commission of any act involving moral turpitude, dishonesty or corruption, the misrepresentation must be made with an intent to mislead. Negligence in making a representation does not constitute a violation of the statute. Where no clear and convincing evidence established any misrepresentation or deception, attorney's statements did not involve moral turpitude and also did not violate statute requiring attorneys only to use means consistent with truth and not to deceive judicial officers.
- [14 a-d] **541 Aggravation—Bad Faith, Dishonesty—Found**  
 Where respondent made, and urged his clients to make, misleading statements to the opposing party in connection with a settlement, wrongfully demanded the return of a partial settlement payment from a client who was entitled to the funds, and delayed sending the same client other partial settlement payments to which the client was entitled, this conduct constituted bad faith and was an aggravating factor.
- [15] **106.30 Procedure—Pleadings—Duplicative Charges**  
**541 Aggravation—Bad Faith, Dishonesty—Found**  
**605 Aggravation—Lack of Candor—Victim—Declined to Find**  
**801.90 Standards—General Issues**  
 Even if respondent's demand that client return settlement check demonstrated lack of candor or cooperation with client, review department would not consider it as separate aggravating circumstance where it had already been found to be a factor establishing bad faith, a different aggravating circumstance.
- [16 a, b] **615 Aggravation—Lack of Candor—Bar—Declined to Find**  
**735.10 Mitigation—Candor—Bar—Found**  
 Where respondent was candid and displayed exemplary conduct during disciplinary proceedings, respondent's vigorous defense of the charges, which was motivated only by his honest belief in his innocence, did not negate the mitigating force of his candor and cooperation with the State Bar.
- [17] **740.31 Mitigation—Good Character—Found but Discounted**  
**740.32 Mitigation—Good Character—Found but Discounted**  
 The weight to be accorded to respondent's character evidence was diminished somewhat where respondent presented a limited range of character witnesses, only one of whom revealed a full understanding of respondent's culpability.

- [18] **740.10 Mitigation—Good Character—Found**  
Civic service, such as valuable charitable work, can deserve recognition as a mitigating circumstance under the standard providing that evidence of good character is mitigating.
- [19] **162.20 Proof—Respondent’s Burden**  
**745.59 Mitigation—Remorse/Restitution—Declined to Find**  
A respondent has the burden of proving mitigation by clear and convincing evidence. While respondent’s honest belief in his innocence was not an aggravating factor, it precluded finding by clear and convincing evidence that respondent’s recognition of his wrongdoing was a mitigating factor. Recognition of wrongdoing does not require false penitence, but it does require acceptance of culpability.
- [20 a-c] **595.90 Aggravation—Indifference—Declined to Find**  
**625.10 Aggravation—Lack of Remorse—Declined to Find**  
**750.10 Mitigation—Rehabilitation—Found**  
Respondent’s long period of postmisconduct practice of law without further discipline was a significant mitigating circumstance, because it demonstrated that respondent was able to adhere to acceptable standards of professional behavior and was not likely to commit misconduct in the future. Respondent’s good faith defense of his innocence, in which he honestly believed, did not constitute a lack of understanding of his misconduct so as to preclude such finding, especially where respondent offered evidence about his sensitivity to misconduct of which he had been found culpable at an earlier stage in the proceeding.
- [21 a-c] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**  
**162.20 Proof—Respondent’s Burden**  
**755.52 Mitigation—Prejudicial Delay—Declined to Find**  
Excessive delay in the conduct of a disciplinary proceeding may be a mitigating circumstance, but the attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. A delay in a disciplinary proceeding merits consideration only if it has caused specific, legally cognizable prejudice. Where respondent was able to present evidence on all issues as to which respondent claimed prejudicial delay, and did not specify what missing evidence would have shown, respondent failed to show that delay caused specific prejudice.
- [22 a-e] **543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted**  
**750.10 Mitigation—Rehabilitation—Found**  
**801.41 Standards—Deviation From—Justified**  
**824.59 Standards—Commingling/Trust Account—Declined to Apply**  
**1091 Substantive Issues re Discipline—Proportionality**  
Where respondent was culpable of failing to set aside \$942 of his legal fee in a trust account pending resolution of a dispute with his client; aggravating factor of bad faith arose from respondent’s intent to serve his clients rather than from any venal purpose; aggravating factors were outweighed by mitigating factors including long period of unblemished practice since misconduct, indicating unlikelihood of further misconduct; and prior similar cases indicated that it would be appropriate to depart from the 90-day minimum actual suspension for trust account violations, appropriate discipline was private reproof conditioned on passage of professional responsibility examination.

## ADDITIONAL ANALYSIS

**Culpability****Found**

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

**Not Found**

213.15 Section 6068(a)

213.45 Section 6068(d)

221.50 Section 6106

273.35 Rule 3-310 [former 4-101 &amp; 5-102]

**Aggravation****Declined to Find**

582.50 Harm to Client

**Mitigation****Found**

715.10 Good Faith

720.10 Lack of Harm

**Declined to Find**

710.53 No Prior Record

**Standards**

801.30 Effect as Guidelines

801.47 Deviation From—Necessity to Explain

802.30 Purposes of Sanctions

**Discipline**

1051 Private Reprimand—With Conditions

**Probation Conditions**

1024 Ethics Exam/School

## OPINION

NORIAN, J.:

This proceeding resulted from respondent's<sup>1</sup> handling of an antitrust case during the 1970's. Respondent represented six named plaintiffs in the case and achieved enormously positive, unexpected results, including a \$9 million settlement for the six plaintiffs. In addition, respondent negotiated a \$1 million settlement for hundreds of other clients in connection with the case. Although none of the six named plaintiffs complained about respondent, one of the other clients sued respondent for malpractice. In 1980, when the other client won a substantial verdict against respondent, the State Bar became aware that misconduct may have occurred. In 1987 the State Bar charged respondent with numerous ethical violations regarding the above matters.

After a lengthy State Bar Court trial, a hearing referee of the former, volunteer State Bar Court, concluded that respondent was not culpable of any of the misconduct alleged in the notice to show cause and recommended that the matter be dismissed. The State Bar examiner sought review before the former, volunteer review department. The former review department concluded that respondent had represented clients with conflicting interests without obtaining their written consent in wilful violation of former rule 5-102(B) of the Rules of Professional Conduct of the State Bar of California,<sup>2</sup> and section 6068 (a) of the Business and Professions Code.<sup>3</sup> The former review department then remanded the matter to the same hearing referee for a recommendation as to the degree of discipline. After further hearings, the referee recommended that respondent be privately reproved. Respondent requested review before us, basically arguing that no misconduct should be found,

or, in the alternative, that the misconduct does not warrant any discipline.

We have independently reviewed the record in this matter and have concluded that the majority of the referee's findings of fact are supported by the record and we adopt them. Our modifications to the referee's and former review department's conclusions of law, however, are substantially greater and we reject those conclusions of law not specifically adopted below.<sup>4</sup> With these modifications, we conclude that respondent wilfully violated rule 8-101(A)(2) by failing to keep the disputed portion of a legal fee in a trust account until the resolution of the dispute. Respondent received a \$50,000 legal fee from the \$1 million settlement and the disputed portion of that fee was \$942. Because the sole basis of culpability is this trust account violation and because the mitigating circumstances outweigh the aggravating circumstances in this proceeding, we impose a private reproof.

### I. FACTS

The hearing referee made detailed findings of fact regarding culpability. The former review department, without explanation, adopted its own factual findings which, for the most part, mirror the referee's findings. We must decide "whether, considering the record as a whole, the referee's findings are supported by the weight of the evidence." (*In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261.) In so doing, we give great weight to the referee's credibility determinations. (*Id.*) As indicated above, we adopt the referee's factual findings with modifications which we have concluded are supported by clear and convincing evidence in the record. Our modifications mainly involve the addition of facts to the referee's findings.

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1. In light of our disposition of this matter as a private reproof, we omit respondent's name from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

2. All references to rules herein are, unless otherwise stated, to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

3. All further references to statutes are to the Business and Professions Code unless otherwise noted.

4. This matter originally involved two respondents. Consequently, the referee's and former review department's decisions contain findings and conclusions with regard to both respondents. For reasons not relevant to the current proceeding, the charges against the other respondent were dismissed. In this opinion, we only adopt the findings and conclusions that pertain to respondent.

Instead of detailing every addition or change, we simply set forth our findings below. Where we have added facts to the referee's findings or changed facts found by the referee, we so modify his decision. In all other respects, we adopt the referee's factual findings.

In 1967, a number of beef producers, including D, approached attorney B regarding the apparent fixing of beef prices by major supermarket chains ("chains").<sup>5</sup> Attorney B was a rancher as well as an attorney specializing in personal injury matters. Concluding that the beef producers had good prospects for an antitrust case against the chains and lacking antitrust expertise, attorney B approached respondent's father in July 1967. Respondent's father had antitrust expertise and agreed to act as co-counsel for the beef producers.

The beef producers were told that \$25,000 would be needed to finance a "test case" by a small number of plaintiffs against the three biggest chains, E, F, and G, and that if the case was successful, other cases would then be brought by other plaintiffs against these three chains and other chains based on the evidence developed in the test case. In the early fall of 1967, this sum was raised by contributions from a group of 199 producers, whom the referee and former review department characterized as the "supporters." The contributions included \$1,000 from D, who was one of the four or five largest contributors. The 199 supporters did not sign retainer agreements with B or respondent's father, nor does the record identify all the 199 supporters. The primary objective of the proposed "test case" was to stop anti-competitive practices by the chains rather than to obtain substantial monetary damages, which were not expected.

For reasons not material to this proceeding, respondent's father stopped practicing law after 1967, and the antitrust case was handled by other attorneys in his firm. Six beef producers, consisting of five cattle ranchers and one feedlot operator, were selected by the attorneys to be plaintiffs in the test case. Each plaintiff signed a retainer agreement specifying

attorneys' fees as one-third of any recovery *plus* any attorneys' fee awarded by the court. In January 1968, the complaint was filed for the test case against E, F, and G.

Respondent became a member of the State Bar in January 1969 and assumed responsibility for handling the test case in 1970. A motion for summary judgment by the defendants was denied in 1972. This denial, which received wide publicity, substantially increased the prices paid to beef producers.

In February 1973, respondent negotiated a settlement with F for \$40,000 and a settlement with E for \$45,000. After the settlement, which was widely publicized, the prices paid to beef producers again rose substantially.

In July 1974, a jury returned a verdict in favor of the six plaintiffs and against G for a total amount of \$10,904,227. Thereafter, the trial court trebled the plaintiffs' damages and awarded attorneys' fees to the plaintiffs in the amount of \$3.2 million. Extensive publicity surrounding the verdict further increased the prices paid to beef producers.

G thereafter appealed. Fearing the reversal of the verdict, respondent negotiated a \$9 million settlement for the plaintiffs on July 22, 1975. The settlement included the dismissal of the appeal and the vacation of the judgment, which was done in due course.

Two meetings of the plaintiffs occurred in respondent's office after respondent negotiated the \$9 million settlement during which respondent claimed, as the attorneys' share of the settlement, the \$3.2 million court award of attorneys' fees, plus one-third of the remaining \$5.8 million. At the first meeting, there was discussion of the distribution of the settlement, including the \$3.2 million attorneys' fee. The discussion was somewhat heated and no conclusion was reached regarding the distribution. However, the plaintiffs agreed to accept G's offer and signed a settlement agreement.

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5. In keeping with the anonymity of this opinion (see fn. 1, *ante*), we have used single-letter abbreviations to identify the

persons involved in the facts and circumstances which generated this proceeding.

The second meeting was held on August 11, 1975. Two of the plaintiffs were accompanied by independent counsel. After significant disagreement and negotiation, the plaintiffs decided to agree to respondent's claim to \$3.2 million plus one-third of the remaining \$5.8 million. Underlying the plaintiffs' decision was a desire to preserve unanimity among themselves and to reward respondent for having represented them well. G paid the \$9 million settlement and the balance, after respondent deducted the above fee, was duly distributed to the plaintiffs.

In negotiating with his clients regarding the attorneys' fee, respondent referred to the \$3.2 million as "court awarded" fees when, in fact, the settlement included the vacation of the judgment, including the award of attorneys' fees. However, respondent did not assert that the attorneys' fee award survived the vacation of the judgment, nor did he explain that it did not.

Having arranged the \$9 million settlement for the plaintiffs, respondent negotiated another \$1 million settlement with G on the same day. Respondent told G's counsel that he had been meeting with a number of other beef producers for a long time and threatened to sue G on their behalf unless a settlement could be reached. G first offered \$250,000, then increased the offer to \$500,000, and eventually agreed to pay \$1 million. At this meeting, respondent drafted a settlement agreement by hand which stated, among other things, that respondent represented "600 plus or odd cattlemen." The agreement was reduced to typewritten form shortly after this meeting and signed by respondent. The typewritten agreement stated that respondent had represented to G that he had been instructed by the cattlemen to commence an antitrust action against G, and that he had been authorized to settle the claims of the cattlemen.

As indicated, the \$1 million was to go to "600 plus or odd cattlemen" whom respondent claimed to represent. These "600 plus or odd cattlemen" had not

signed retainer agreements with respondent. The estimate of "600 plus or odd" was based on membership representations by the officers of the beef producers associations at the time of the E and F settlements. The phrase "plus or odd" indicated uncertainty about the exact number of persons involved. G made no offer to settle with any fewer than approximately 600 people and wanted this number of people to execute covenants not to sue G.

On August 13, 1975, respondent wrote a letter to leading beef producers to inform them of the \$1 million settlement. According to the letter, the settlement was intended "to ensure at least some payment" to those who had been "behind the prosecution of" the test case, but would not prevent any producers from suing the other retail chains involved in the conspiracy to fix beef prices. The letter recognized that some producers had made cash donations, some had organized meetings and other events, some had testified at trial, some had furnished documentation, and some had done all of these things. The letter concluded by stating that respondent would meet with the producers in various western states during the next few months to discuss the settlement.

On August 15, 1975, respondent met in Grand Junction, Colorado, with 30 or so beef producers, including D and other supporters, to explain the \$1 million settlement and to seek covenants not to sue G. Respondent stated at this meeting that he expected one-third of the \$1 million as his attorney's fee and that there would have to be further discussion regarding the distribution of the balance. The record contains no evidence that anyone objected at this meeting to the fee which respondent claimed. During the early morning hours of August 16, 1975, respondent met privately with a leading rancher and D in D's hotel room. D expressed his opinion that the legal fees being collected were extraordinarily high. In response, respondent told D that his (respondent's) fee was his business, not D's.<sup>6</sup>

Another meeting was held on November 17, 1975, in Denver, Colorado, which was attended by

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6. The referee found that it was not clear whether D was referring to the legal fees from the \$9 million settlement or the

\$1 million settlement or both, but probably D was referring to both fees.

about 20 cattlemen, including representatives of the various beef producers organizations whose members were supporters or were potentially to be included as signatories of the covenants not to sue G, and D and his independent counsel. Most of the meeting was devoted to a discussion of how the \$1 million should be distributed. Respondent made a full disclosure of his attorney's fee at this meeting. D's attorney was emphatic that the distribution of both the \$9 million and the \$1 million, particularly the attorneys' fees, should be submitted to arbitration. Respondent acknowledged in his testimony in the subsequent malpractice case that D's attorney had objected to the attorneys receiving any part of the \$1 million settlement.

The beef producers attending the November 17, 1975, meeting advised respondent that they had been elected and authorized by their membership to agree to an allocation of the \$1 million settlement and to bind all the members. Feeling dissatisfied with the meeting and wanting to reach home before a winter storm hit, D and his attorney left the meeting early. Different proposals about the distribution of the \$1 million settlement were discussed at the meeting. After the departure of D and his attorney, the other beef producers approved an attorneys' fee of \$333,333 and a formula for distributing the remaining \$666,667. There is no evidence in the record that the other beef producers were authorized to act on behalf of D.

The formula divided the \$666,667 as follows: 45 percent (\$300,000) to those who contributed money to finance the test case, 30 percent (\$200,000) to those who submitted documentation about beef production for use in test case, 10 percent (\$66,667) to those who testified at the trial, 10 percent (\$66,667) to those who set up meetings and provided leadership in support of the test case, and 5 percent (\$33,333) to be distributed at respondent's discretion. At respondent's request, the beef producers signed an agreement for themselves and for all their members to specify the distribution of the settlement.

On November 24, 1975, respondent wrote a letter to the leading beef producers who had attended

the meeting a week earlier. Enclosed with the letter was a copy of the agreement reached by those who had remained at the meeting. This agreement had been signed by all the producers attending the November 17 meeting except D and another. In the letter, respondent stated that no one "except one or two individuals" had questioned the \$333,333 legal fee which he proposed to take. Also in the letter, respondent urged the leading beef producers to exert their very best efforts to obtain the required number of covenants.

Respondent's office distributed standard covenants to the leading beef producers, who were responsible for obtaining the signatures. Among other things, the covenants stated that the endorser had authorized and directed respondent to execute the \$1 million settlement and that the attorneys had fully advised the endorser about the covenant and all matters covered by it. As the original deadline for the submission of covenants drew near, D decided to share in the \$1 million settlement. However, D submitted a copy of the standard covenant with many corrections which D's attorney had made and which D had initialed. Among other corrections, D's covenant stated that the respondent had *not* been authorized and directed to execute the \$1 million settlement agreement and had *not* fully advised D. The covenant contained no provision allowing the attorneys to receive any of the \$1 million settlement.

D's covenant was delivered to respondent with a cover letter dated December 30, 1975, by a second attorney whom D had retained to represent him in the matter. The cover letter informed respondent that D had not accepted respondent's "proposal with respect to attorneys' fees."

In a letter dated January 20, 1976, respondent told the ranchers only 350 covenants had been received. To prevent the \$1 million settlement from unraveling, respondent reduced his fee from \$333,333 to \$50,000.<sup>7</sup> He used the resulting \$283,333 as a fund to encourage ranchers to provide the remaining covenants required by G.

7. The referee and former review department found that respondent reduced his fee in order to minimize the dilution of the interests of the supporters and other early participants in

the \$1 million settlement. We find that respondent's January 20, 1976, letter establishes that respondent reduced his fee in order to prevent the collapse of the settlement.

In a letter dated February 19, 1976, respondent expressed concern to D's attorney about D's modified covenant. Respondent stated that he could not be responsible for G's reaction to the covenant and suggested that D submit an unmodified covenant.

On June 4, 1976, respondent met with leading beef producers in Denver. Respondent's law office had received 711 covenants and it was unclear exactly how the \$1 million settlement was to be distributed. Two separate formulas were agreed to at this meeting for distributing the \$1 million settlement. The first formula involved the distribution of \$666,667 of the settlement as agreed at the November 17, 1975, meeting. Under the second formula, everyone who submitted a covenant was to receive an equal share of the \$283,333 fund created by the respondent's reduction of his fee. Not everyone who had attended the November 1975 meeting also attended this June 1976 meeting. Those attending this June 1976 meeting did not sign an agreement about the distribution of the \$283,333 as those attending the November 1975 meeting had signed an agreement about the distribution of the \$666,667.

Although only approximately 600 covenants were required for the \$1 million settlement, respondent accepted 711 covenants, which he transmitted to G. The \$1 million settlement was paid in four installments spread over three years. The attorneys' fee check was issued for the full \$50,000 from the first installment, all of which was deposited in July 1976 into a personal bank account. None of the \$50,000 fee was set aside in a trust account.

Respondent's office sent D four settlement checks. The first check, dated July 9, 1976, was for \$3,592.35. Approximately three weeks after the filing of the malpractice suit against him by D, respondent demanded that D return the \$3,592.35 check. Respondent's explanation was that since D was claiming in his malpractice suit that he should have shared in the \$9 million settlement, D could not also share in the \$1 million settlement. However, two of the test case plaintiffs shared in both settlements.

Respondent withheld the remainder of D's portion of the settlement from D until August 1978, when D was sent three more checks: a \$4,790.20 check dated August 1976; a \$4,801 check dated July 1977; and a \$4,715.40 check dated July 1978. Thus, D's share of the \$1 million amounted to \$17,898.95. After the attorneys' fee was deducted, a total of \$950,000 was available for distribution to the persons who submitted covenants. Because D's share was \$17,898.95, the disputed portion of the attorneys' fee amounted to approximately \$942.<sup>8</sup>

Dissatisfied with the respondent's handling of both the \$9 million and \$1 million settlements, D sued respondent and others for malpractice in July 1976. D alleged fraud, misrepresentation, breach of fiduciary duty, and other claims. D's lawsuit resulted in a judgment for compensatory and punitive damages for D against the defendants in 1980. The judgment was modified in an unpublished appellate opinion in 1984. As modified, the judgment totaled approximately \$3 million in compensatory and punitive damages.

## II. DISCIPLINARY PROCEEDINGS

Respondent requested review before us, contending that the former review department's finding of misconduct is void because of procedural errors, or, in the alternative, the misconduct does not warrant any discipline. In response, the State Bar examiner disputes each of respondent's contentions, argues that respondent is also culpable of making a material misrepresentation to his clients, and asserts that the recommended discipline should be increased. In reply, respondent argues that he cannot be found culpable of misrepresentation because it was not charged in the notice to show cause and, even if the allegation was properly charged, it was not proven by clear and convincing evidence.

Thereafter, we requested that the parties be prepared at oral argument to discuss whether respondent is culpable of violating rule 8-101(A)(2) or section 6106 by failing to retain the disputed portion

8. The disputed portion of the \$50,000 fee is calculated by dividing D's share (\$17,898.95) by the total amount available for distribution to all clients who participated in the settlement

(\$950,000) and then by multiplying the quotient (0.0188) by the fee (\$50,000). The referee found that the amount was \$850.

of his legal fee in trust pending resolution of an alleged objection by his client to the fee; and whether respondent is culpable of violating sections 6068 (d) or 6106 by claiming the court award of attorneys' fees without explaining that the court award of fees in the test case belonged to the plaintiffs, that the settlement would vacate the award, and that the attorneys would have no legal right to the award after the settlement. The parties subsequently filed briefs addressing the above issues.

Respondent argues that his alleged failure to retain the disputed portion of a fee in trust is a charge that was dismissed by both the hearing referee and the former review department and therefore the charge is not properly before us now, and there is no clear and convincing evidence in the record to support the charge even if it is properly before us. Respondent also argues his alleged failure to explain the legal effect of the \$9 million settlement on the court award of attorneys' fees was not charged in the notice to show cause, that he did disclose this information to his clients, and that section 6068 (d) does not apply to the conduct at issue because the alleged misrepresentation or omission was not directed to a court.

The State Bar, in response to our letter, asserts that respondent is culpable of failing to retain the disputed portion of the legal fee in trust, that respondent concealed the effect of the settlement on the award of attorneys' fees as indicated in our letter, that respondent also misrepresented the status of the fees as court awarded after the settlement, that respondent had many conflicts of interest, and that these issues are all properly before the current review department.

### III. DISCUSSION OF PROCEDURAL ISSUES

As indicated above, respondent argues that the current review department cannot consider any of the charges that were dismissed by the former review department and that the former review department's finding of misconduct is void because of procedural errors. We address these issues first.

#### A. Obligation of Independent De Novo Review

Respondent "strenuously objects" to our independent de novo review of the record on the ground

that such review "would amount to relitigation of old matters already disposed of . . ." Respondent argues that the former review department's decisions bind us and that once the former review department dismissed all the charges against respondent other than an alleged violation of rule 5-102(B), such charges "were no longer part of the proceedings before the State Bar Court." Respondent cites no authority in support of this argument, which is inconsistent with his position that the decision of the former review department is void because it lacked a proper quorum.

[1a] Respondent acknowledges that pursuant to *In the Matter of Respondent A*, *supra*, 1 Cal. State Bar Ct. Rptr. 255, the law of the case doctrine does not preclude us from reviewing the former review department's decision de novo. According to respondent, however, *Respondent A* merely indicates our "authority to conduct [an] independent review," but "does not suggest or require that every decided issue be revisited." In *Respondent A*, we stated that if review is sought in a proceeding which had been previously decided by the former review department, "the entire matter is before us for independent de novo review." (*In the Matter of Respondent A*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 261.) Rule 453(a) of the Transitional Rules of Procedure of the State Bar requires us to conduct an independent review of the entire record. If we discover errors, rule 453(a) authorizes us to adopt findings, conclusions, and a decision or recommendation to correct such errors. Further, rule 453(a) authorizes us to take action on an issue regardless of whether the request for review or the briefs of the parties have raised the issue. Thus, as the examiner observes, respondent's request for review places all issues before us and obligates us to undertake an independent de novo review.

#### B. No Violation of Former Procedural Rule 511

[2a] Respondent argues that pursuant to former rule 511 of the Rules of Procedure of the State Bar, the entire disciplinary proceeding against him should be dismissed. We disagree. Former rule 511, which was in effect from September 1, 1980, until September 1, 1984, provided that subject to certain exceptions, "the decision of a staff attorney . . . that a formal proceeding shall not be instituted is a bar to further proceedings against the member upon the

same alleged facts.” Citing the declaration and deposition of Francis Bassios, the State Bar attorney who originally handled this matter, respondent asserts that the State Bar decided in the fall of 1980 not to file a formal proceeding against him and that this decision triggered the provisions of rule 511 barring further proceedings.

[2b] The State Bar, however, made no such decision. In the cited paragraph of his declaration, Bassios stated that he began his investigation of respondent in the fall of 1980 after the malpractice case had been appealed and that his office decided to monitor the appeal rather than pursue a formal investigation in the belief that the appellate decision would resolve many issues. On the cited page of his deposition, Bassios stated that the decision to monitor the appeal was a collective decision by his office. Neither statement by Bassios establishes a decision by the State Bar not to prosecute respondent. Both statements made it clear that the State Bar merely decided to monitor developments in the malpractice case.

As the examiner points out, respondent cuts off Bassios’s deposition in mid-sentence. The omitted portion of this sentence explained that because the State Bar investigation was not completed in the fall of 1980, the matter was not forwarded for further proceedings. As the examiner observes, the State Bar’s decision in favor of continuing the investigation of respondent did not constitute a decision against prosecuting him.

#### C. Moot Issue of Quorum Requirement

Respondent argues that the former review department’s original decision filed in May 1989, and modified decision filed in July 1989, were void because, in reaching these decisions, the department lacked a quorum. Former rule 452 of the Rules of Procedure of the State Bar of California, which was in effect through August 1989, provided that eight

members constituted a quorum. [3] Even if the former review department lacked a proper quorum under the rule, as discussed above, all issues are now before us pursuant to our obligation of independent de novo review. (See *In re Morales* (1983) 35 Cal.3d 1, 7.) Thus, as the examiner points out, the current review renders the prior quorum issue moot.

#### D. No Prejudice from Evidentiary Ruling

Certain exhibits, which were excluded by the hearing referee at the disciplinary trial, were admitted by the former review department at the review level. Respondent argues that he was denied due process because the former review department relied on these exhibits in reaching its decision without affording him an opportunity to rebut the evidence in the exhibits.

In its May 1989 decision, the former review department admitted into evidence 16 exhibits which the referee had excluded: exhibits 1 through 10, 42, 89, 109, 140, 141, and 161. Exhibit 1 is the unpublished opinion by the civil appellate court in the malpractice case. Exhibits 2 through 10 are documents from the malpractice case: the appellate judgment nunc pro tunc and several trial documents, including the jury verdict, reduction of judgment, first amended judgment, order denying motion for judgment notwithstanding the verdict, second amended judgment, notice of intended decision regarding prejudgment interest, order and judgment regarding prejudgment interest, and findings and conclusions regarding prejudgment interest. The remaining six exhibits are not at issue in the current proceeding.<sup>9</sup>[4 - see fn. 9]

[5a] We agree with respondent that the former review department should not have admitted the above exhibits without allowing him the opportunity to present rebuttal evidence. Nevertheless, no error in admitting or excluding evidence invalidates a finding of fact, decision or determination unless the

9. Respondent does not argue that the exhibits are inadmissible under the rules of evidence. [4] We note that the appellate opinion is relevant to the current disciplinary proceeding because it cites reasons for the decision of the civil courts and we find that there is an essential identity of factual issues in

both the civil and discipline proceedings. We therefore conclude that the above nontestimonial evidence from the civil proceedings is admissible. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 622, fn. 11, 634; Cal. Rules of Court, rule 977.)

error resulted in a denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar.) Respondent must show that the admission of the documents deprived him of a fair hearing. (*Stuart v. State Bar* (1985) 40 Cal.3d 838, 845.) Respondent has not made such a showing.<sup>10</sup> Instead, he merely asserts, without explanation, that if he had the opportunity, he would have presented rebuttal evidence.

[5b] In its May 1989 decision, the former review department cited exhibit 1, but only to support the finding that the appellate court affirmed the jury verdict in the malpractice case. In determining respondent's culpability, the former review department did not cite any of the exhibits excluded by the referee. In the decision on remand concerning the degree of discipline, the referee considered the previously excluded exhibits in determining whether certain standards of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) applied to respondent. Because the referee determined that those standards did not apply, the admission of the exhibits did not result in the denial of a fair trial. All issues are now before us for independent review. We have not relied on the exhibits in reaching our decisions regarding culpability and discipline.

[6] In addition, we note that the preponderance of the evidence standard of proof in the civil malpractice trial is lower than the clear and convincing evidence standard of proof in the current disciplinary proceeding. (*In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 329; see *Arden v. State Bar* (1987) 43 Cal.3d 713, 725.) Thus, the conclusions reached by the civil courts and which are contained in the exhibits are not dispositive of any of the disciplinary charges. (*Rosenthal v. State Bar, supra*, 43 Cal.3d at p. 634.) Most important, in terms of whether respondent is culpable of professional misconduct, is the evidence introduced at the civil trial. A significant part of that evidence was introduced at the discipline trial and respondent had ample opportunity to rebut the evidence. Under the above circumstances, we conclude that the admis-

sion of exhibits 1 through 10 did not deprive respondent of a fair hearing.

#### IV. DISCUSSION OF CULPABILITY

##### A. Mishandling of a Disputed Fee

The notice to show cause in this matter charged that D had objected "to the amount of the attorney fees" before the distribution of the funds from the G settlement and that respondent had failed to retain "the disputed portion of the attorney fees in trust" in violation of rule 8-101(A).<sup>11</sup> The referee found that D told respondent at the private meeting in D's hotel room that the fees respondent was collecting were inordinately high; however, the referee determined that it was unclear whether D was referring to the fees from the \$9 million settlement or the \$1 million settlement, but that D was probably referring to both fees. The State Bar contended at trial that D objected to the fee from the \$1 million settlement and respondent should have retained that portion of the fee in trust. The referee concluded that since the disputed amount was \$850, the State Bar's contention was "de minimis at best."

The former review department found that despite D's dispute as to the determination of the attorneys' fee, respondent did not deposit the disputed amount in a trust account. Without explanation, the former review department did not conclude that respondent thereby violated rule 8-101(A)(2).

Respondent's argument with regard to this issue is twofold. [1b] First, he argues that the current review department cannot reopen this charge because it was dismissed by the former review department. We disagree as set forth above in our discussion of the procedural issues. Second, respondent argues that there is no clear and convincing evidence that D ever objected to the proposed one-third fee from the \$1 million settlement or the eventual \$50,000 fee, and that the referee properly concluded that the matter was de minimis and does not warrant any discipline. Again, we disagree.

10. Respondent even relies upon exhibit 6.

11. Rule 8-101(A)(2) provided that funds belonging in part to a client and in part, presently or potentially, to the attorney must

be deposited into a client trust account and when the right of the attorney to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

[7] We first note that the amount of money mishandled goes to the issue of discipline, not culpability, and the mishandling of even an insignificant amount can constitute a disciplinable offense. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1078; Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 2.2.) The amounts mishandled have sometimes been extremely modest. (*Silva-Vidor v. State Bar, supra*, 49 Cal.3d at p. 1078 [\$760]; *Alberton v. State Bar* (1984) 37 Cal.3d 1, 12 [\$345]; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 350-352, 358 [\$790.30].) No de minimis exception applies to the determination of culpability for mishandling trust funds. Thus, respondent may be disciplined for mishandling \$942 of a \$50,000 fee.

We believe that, contrary to respondent's argument, there is clear and convincing evidence in the record to support the conclusion that D objected to respondent taking any fee from the \$1 million settlement. The referee found that at the November 17, 1975, meeting, D's attorney was emphatic that the distribution of both settlements, "particularly the attorneys' fees," be submitted to arbitration. Respondent has not argued that this finding is not supported by the record. In addition, respondent admitted at the malpractice trial that at the November 17 meeting, D's attorney had objected to the attorneys taking any fee from the \$1 million settlement. Respondent also acknowledged in his letter of November 24, 1975, that one or two individuals had objected at the November 17 meeting to the legal fee from the \$1 million settlement. Furthermore, the cover letter accompanying D's covenant informed respondent that D had not accepted respondent's proposal with respect to the legal fees. Finally, respondent's counsel conceded during oral argument before the current review department that D had objected to the attorneys receiving fees from the \$1 million settlement.

[8a] We agree with respondent that the record contains no evidence that D specifically objected to the legal fee after respondent reduced it to \$50,000. However, D objected to respondent taking any fee

from the \$1 million settlement. We are not aware of any authority that interprets rule 8-101(A)(2) as requiring D to have specifically objected to the reduced fee in such circumstances. D's objection was sufficient to inform respondent that D disputed respondent's right to receive any fee from the settlement.

[8b] D's objection to the taking of any attorneys' fee from the \$1 million settlement triggered the requirement of former rule 8-101(A)(2) that respondent deposit and retain in a trust account some portion of the \$50,000 fee pending the resolution of the dispute with D. As explained above, the sum respondent should have retained was \$942. By not setting aside this sum in a trust account pending a resolution of the dispute with D, respondent wilfully violated former rule 8-101(A)(2).

We do not, however, find respondent's conduct in failing to set aside a portion of the fee to have also violated section 6106. Neither the referee nor former review department found a violation of section 6106 and the State Bar does not argue that respondent should be found culpable of violating the section with respect to this issue. No clear and convincing evidence establishes that respondent's failure to segregate the \$942 involved moral turpitude, dishonesty or corruption.

#### B. Representation of Conflicting Interests

The notice to show cause charged that the terms of the settlement which respondent negotiated with G included the dismissal and vacation of the judgment in the test case, the payment of \$9 million to the six plaintiffs in that case, and the "[p]ayment of \$1,000,000 to other cattle ranchers," including the beef producers who had contributed to the original \$25,000 litigation fund and had not been plaintiffs in the test case. The notice charged that by so agreeing to settle the claims against G, respondent had "represented conflicting interests without the written consent of all parties concerned; and specifically without the written consent of [D]." The notice concluded that the respondent had violated rule 5-102(B).<sup>12</sup>

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12. Rule 5-102(B) provided that an attorney "shall not represent conflicting interests, except with the written consent of all parties concerned."

[9a] Approximately six months after the issuance of the notice to show cause and more than five months before the beginning of the initial disciplinary hearing, respondent served interrogatories on the examiner. Interrogatory number 31 asked that the examiner “identify every conflicting interest represented by [respondent].” In response, the State Bar identified the following conflicts of interest: (1) the test case plaintiffs versus the supporters; (2) the majority of the supporters versus D and other supporters who had objected to the G settlement; (3) the test case plaintiffs and the donors to the \$25,000 litigation fund versus the other persons who had participated in the \$1 million settlement; and (4) respondent versus the test case plaintiffs, the donors to the \$25,000 litigation fund, the other supporters, and the other participants in the \$1 million settlement.

The referee determined that respondent had violated rule 5-102(B) by failing to obtain a written consent from each person who signed a covenant not to sue G. According to the referee, the participation of each of the extra 111 signatories reduced the shares received by the required 600. Yet the referee concluded that because the State Bar did not establish “that any of the 711 in fact suffered any damage,” respondent’s misconduct did not merit any discipline.

The former review department concluded that respondent failed to deal properly with the following alleged conflicts: (1) the interests of C (who had ceased to be a cattle producer) conflicted with those of the other test case plaintiffs in respect of settlement with any defendant; (2) the interest of the test case plaintiffs similarly was not the same as that of the supporters as a whole, and was conflicting as to the relative value of funds received in settlement or judgment and benefits from a rise in beef prices; (3) the interests of the supporters in a settlement conflicted with that of the other cattle producers, and (4) the interest of the first 600 signatories conflicted with the additional, superfluous, 111 included in the final group sharing the proceeds. Thus, the former review department concluded that respondent violated rule 5-102(B) by failing “to obtain written consents to his representation and continuing representation of the various conflicting groups.”

[9b] An attorney can be disciplined only for misconduct charged in the notice to show cause or in

an amendment to the notice to show cause. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 775.) The use of interrogatories is appropriate in disciplinary proceedings. (Trans. Rules Proc. of State Bar, rules 315, 321; Code Civ. Proc., § 2030; *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301, 305.) Interrogatories serve as “an adjunct to the pleadings” insofar as they “clarify the contentions of the parties . . . .” Courts should permit and encourage the “[l]iberal use of interrogatories for the purpose of clarifying and narrowing the issues made by the pleadings . . . .” (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 281.) Thus, the examiner’s answer to respondent’s interrogatory number 31 limited the charge against respondent to the four identified conflicts of interest.

The only conflict of interest found by the referee or former review department that was properly charged, as framed by the interrogatory answers, was the alleged conflict between the test case plaintiffs and the supporters. The examiner asserts that a conflict between these two groups existed because the plaintiffs could recover damages from the test case defendants whereas the supporters could not.

Few published California disciplinary opinions deal with violations of rule 5-102(B) and its predecessor, former rule 7. (See, e.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300; *Kapelus v. State Bar* (1987) 44 Cal.3d 179; *Gendron v. State Bar* (1983) 35 Cal.3d 409; *Codiga v. State Bar* (1978) 20 Cal.3d 788; *Black v. State Bar* (1972) 7 Cal.3d 676; *Lee v. State Bar* (1970) 2 Cal.3d 927; *Arden v. State Bar* (1959) 52 Cal.2d 310.) None of these cases has facts analogous to the facts of the current proceeding. [10a] However, in *Kapelus v. State Bar*, the Supreme Court found a violation of rule 5-102 where the attorney had favored one client at the expense of another client. (*Kapelus v. State Bar, supra*, 44 Cal.3d at p. 196.)

[10b] In *Anderson v. Eaton* (1930) 211 Cal. 113 (cited in *Lee v. State Bar, supra*, 2 Cal.3d at p. 942), the Supreme Court stated that an attorney had a duty to secure as large a recovery as possible for a client and that the attorney had violated this duty when his representation of one client might have induced him to negotiate a low settlement for another client. (*Anderson v. Eaton, supra*, 211 Cal. at pp. 117-118.) The Court stated: “It is . . . an attorney’s duty to protect his client in every possible way, and it is a

violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances . . . . The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]” (*Id.* at p. 116.) In *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713, the court stated that a “[c]onflict of interest between jointly represented clients occurs whenever their common lawyer’s representation of one is rendered less effective by reason of his representation of the other.”

The State Bar must prove disciplinary charges by clear and convincing evidence and all reasonable doubts must be resolved in favor of the respondent. (*Kapelus v. State Bar, supra*, 44 Cal.3d at p. 184, fn. 1.) In a disciplinary proceeding, a culpability determination must not be debatable. (See *Aronin v. State Bar* (1990) 52 Cal.3d 276, 289.)

[11a] We do not believe that the State Bar has proven by clear and convincing evidence that the interests of the six test case plaintiffs conflicted with the interests of the supporters. Certainly, the plaintiffs recovered damages from the test case whereas the supporters did not. Nevertheless, the primary objective of both the plaintiffs and supporters was to stop the anti-competitive practices of the chains rather than to obtain damages. To the extent that a rise in prices paid to beef producers was a measure of success in achieving this goal, each “victory” (defeat of the summary judgment motion, E and F settlements, and jury award) the plaintiffs achieved increased the prices and thereby furthered the goal of both the plaintiffs and supporters. The greater the success in the test case, the greater the success in stopping anti-competitive practices.

[11b] Assuming that the plaintiffs were only interested in obtaining a large monetary award and the supporters were only interested in stopping anti-competitive practices, their interests seem to have been compatible, not conflicting, as a large damage

award would have advanced both interests. Thus, respondent was not put in a position of choosing between conflicting duties or of attempting to reconcile conflicting interests. Even assuming that both groups were only interested in obtaining a large damage award, no clear and convincing evidence establishes that respondent’s representation of either the plaintiffs or supporters induced him to negotiate a lower settlement for the other, or establishes that his representation of one group rendered his representation of the other less effective.

With regard to the other charged conflicts of interests as well as to the other conflicts found by the former review department, the only “interests” of any of respondent’s clients that were established by clear and convincing evidence were the interest in stopping anti-competitive practices and the interest in obtaining a large damage award. As explained above, no clear and convincing evidence establishes that these interests were conflicting. In addition, there is no clear and convincing evidence that D or any other supporter objected to the \$1 million settlement.

[11c] We can only speculate as to the other interests of respondent’s clients as no clear and convincing evidence was introduced to establish those interests. For example, it seems logical that respondent’s 700 plus clients had differing interests that may very well have been conflicting. However, other than as stated above, no clear and convincing evidence was introduced to establish what the various interests were and how they were conflicting.

[11d] It also seems logical that representing over 700 clients by majority rule may well have involved the representation of clients with conflicting interests. Respondent owed the same ethical obligations to each client, not just those in the majority. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1149.) Presumably, all 711 clients had legitimate, and individual, claims against G based on the damages to each caused by G’s anti-competitive practices. Each of the 711 clients was required to release G from these claims in return for participation in the \$1 million settlement. Respondent had an obligation to maximize the recovery for each client or to obtain the client’s written consent. Instead, certain leading producers decided on formulas for distributing the \$1

million that, for the most part, heavily favored the supporters at the expense of the remaining clients. Thus, respondent's representation of the supporters may have rendered his representation of the other clients less effective. Again, however, no clear and convincing evidence establishes that the \$1 million settlement was actually distributed pursuant to the formulas. Without knowing how the money was distributed, we cannot determine whether the potential conflict ever materialized.

[11e] Similarly, respondent's distribution of the \$1 million settlement may have involved a conflict of interest in another respect. The distribution formula provided for respondent's distribution of 5 percent of the settlement at respondent's discretion. Thus, respondent was placed in a position of possibly favoring some of his clients over others. (See *Kapelus v. State Bar*, *supra*, 44 Cal.3d at p. 196.) Again, however, no clear and convincing evidence establishes that respondent distributed the funds in a manner that favored some of his clients at the expense of others.

[12a] We do agree with the referee and former review department that the interests of the initial 600 signatories conflicted with the interests of the additional 111. The money that resulted from respondent's reduction of his legal fee was to be distributed to all who signed covenants not to sue G. Only 600 covenants were required.<sup>13</sup> Thus, the extra 111 reduced the amount received by the first 600.<sup>14</sup> In this respect, respondent failed to maximize the recovery of the first 600. Regardless of whether the 711 signatories represented two separate identifiable groups, the interests of the first 600 conflicted with the interests of the extra 111 because the amount received by the first 600 was reduced by each of the extra 111.<sup>15</sup> Respondent also diluted the share of each unnecessary late signatory by accepting covenants from the other unnecessary late signatories. Respondent did

not obtain written consents from his clients. Thus, he violated rule 5-102(B).

[9c] Respondent's violation of this rule, however, cannot be a basis of culpability in the current proceeding as it was not one of the conflicts identified in the interrogatory responses. Although uncharged misconduct can be used to establish an aggravating circumstance (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36), we give minimal weight to the violation, as discussed below.

### C. No Misrepresentation

The notice to show cause charged that respondent had an adverse interest in the settlement with G, insofar as he "asserted a right to the \$3,200,000 designated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement." By this and other actions, respondent was accused of various types of misconduct, including the violation of his oath and duties as an attorney (section 6068) and the commission of acts involving moral turpitude, dishonesty, or corruption (section 6106).

Respondent's interrogatory 44 asked the State Bar to state every act or omission on which it based the allegation that respondent violated his oath and duties as an attorney. The answer to interrogatory 44 included "[t]he assertion [by respondent] of the right to the \$3,200,000 designated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement [with G]." Interrogatory 45 asked the State Bar to state every act or omission on which it based the allegation that respondent committed acts involving moral turpitude, dishonesty, or corruption. Like the answer to interrogatory 44, the answer to interrogatory 45 included "[t]he assertion of the right to the \$3,200,000

13. Although the \$1,000,000 settlement agreement indicates that 600 "plus or odd" covenants were required, respondent stated in a brief on review before us that G "insisted on 600 signatures as a condition of the settlement."

14. We also note that some clients were eligible to receive part of the \$666,667 and part of the \$283,333, whereas other clients were only eligible to receive part of the \$283,333.

Thus, as a percentage of the total amount received, the monetary diminution caused by the acceptance of more covenants than necessary was greater for those clients that were only eligible to receive part of the \$283,333.

15. Contrary to the referee's conclusion, the reduction in the amount received by the clients, however small, establishes that the clients were damaged.

designated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement [with G].”

The referee found that although respondent did refer to the \$3.2 million as “court awarded” fees, the reference was for definition only and was not a representation that the award survived the vacation of the judgment. The former review department found that there was no indication that respondent’s use of the term was intended to give it a status it did not have. Neither the referee nor the former review department found a violation of section 6068 or 6106. As indicated above, respondent argues before us that neither a misrepresentation nor an omission was properly charged in the notice to show cause, and even if they were, he is not culpable of misconduct.

Section 6068 (d), requires an attorney “[t]o employ . . . such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” The Supreme Court has stated that section 6068 (d), requires an attorney to refrain from acts which mislead or deceive. (*Rodgers v. State Bar*, *supra*, 48 Cal.3d at p. 315.) Pursuant to section 6106, “[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension.” Section 6106 applies to the misrepresentation and concealment of material facts. (*In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154-155; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) [13a] Contrary to the examiner’s assertion, a representation in violation of section 6106 requires an intent to mislead. (*Wallis v. State Bar* (1943) 21 Cal.2d 322, 328; see also *Gold v. State Bar* (1989) 49 Cal.3d 908, 914 [“an attorney who intentionally deceives his client is culpable of an act of moral turpitude”].) Negligence in making a representation does not constitute a violation of section 6106. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 360, 367-369.)

We agree with respondent that even if he was properly charged with this misconduct, his culpability has not been established by clear and convincing evidence. The examiner argues that respondent’s references to the \$3.2 million as court-awarded attorneys’ fees were misrepresentations because the judgment had been vacated pursuant to the settlement agreement. According to the examiner, there is no basis in the record to support the finding that respondent used the term “court awarded” only for definition. The examiner cites to the testimony of two of the test case plaintiffs and asserts that these witnesses “testified to the exact contrary.”

Respondent testified at the disciplinary hearing that he did not tell any client during the settlement discussions that he was entitled to the \$3.2 million as a legal matter because the court had awarded it to him. The referee’s finding that respondent did not represent that the award survived the vacation of the judgment is consistent with respondent’s testimony. To the extent that the witnesses’ testimony, as cited by the examiner, conflicts with respondent’s testimony, the referee resolved the conflict in respondent’s favor. We must afford this determination great weight. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931.) The State Bar has not directed our attention to any evidence in the record that would support our modification of the referee’s finding.

[13b] Accordingly, respondent did not misrepresent the status of award of the attorney’s fee. We also do not find any evidence in the record that indicates that respondent specifically explained to his clients that the award of the fee did not survive the vacation of the judgment. Nevertheless, given the referee’s finding that respondent did not use the phrase “court awarded” other than as a term of reference, we conclude that no clear and convincing evidence establishes that respondent’s omission was an act of deception. As no misrepresentation or culpable omission occurred, respondent did not violate either section 6068 (d) or section 6106.<sup>16</sup>

16. In light of our conclusion, we need not address respondent’s contention that section 6068 (d) applies only to representa-

tions made to a court. (But see *Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1089.)

#### D. Summary

We conclude that respondent wilfully violated rule 8-101(A)(2) by failing to set aside \$942 of his legal fee from the \$1 million settlement pending a resolution of the dispute regarding the fee with D, but that this conduct did not also violate section 6106. Contrary to the former review department's conclusion, we do not find that respondent violated rule 5-102(B) as charged in the notice to show cause, nor do we find a factual basis for the section 6068 (a) violation on this record. (See *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561-562.) We also conclude that no misrepresentation or culpable omission occurred with regard to respondent's reference to his legal fee as "court awarded." Finally, we conclude that the referee's and former review department's dismissal of the remaining charges in the notice to show cause are supported by the record and we adopt them.

#### V. DISCIPLINE

After further hearings on remand from the former review department, the referee recommended that respondent be privately reprovved. The recommendation is based on the misconduct found by the former review department and the referee's conclusion that no aggravating circumstances and several mitigating circumstances are present in this matter.

The State Bar argues that respondent is culpable of additional misconduct, as indicated above, and that several aggravating circumstances are also present. In light of the additional grounds for culpability and the aggravating circumstances, the State Bar recommends that respondent be suspended from the practice of law for one year, with the execution of that suspension stayed, and that respondent be placed on probation for a period of two years on conditions, including that he be actually suspended for thirty days. Respondent argues that he is not culpable of additional misconduct, that the aggravating circumstances alleged by the State Bar are not present, and that several mitigating circumstances are present. Respondent concludes that no discipline should be imposed.

We first note that the referee's decision on remand contains very few factual findings with re-

gard to the evidence that was introduced at the discipline phase of the trial. Most of the live evidence on remand consisted of respondent's character evidence. The referee concluded this evidence was credible and not contradicted by the State Bar, without detailing the facts that resulted from the evidence. We accept the referee's credibility determination and set forth our factual findings regarding this testimony below in our discussion of standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) (hereafter "standard(s)"). We also note, however, that cross-examination of these witnesses did reveal matters which bear on the weight to be accorded the testimony, which we also discuss below.

#### A. Aggravating Circumstances

##### 1. Standard 1.2(b)(iii)

Standard 1.2(b)(iii) provides that it shall be considered an aggravating circumstance where the attorney's misconduct is surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the Rules of Professional Conduct. The examiner requests that we find aggravating circumstances pursuant to this standard on the basis of three of the exhibits excluded by the referee but admitted by the former review department: the appellate court opinion, the jury's answers to special interrogatories, and the trial court's order denying a motion for a judgment notwithstanding the verdict. According to the examiner, these documents from the malpractice action demonstrate that respondent committed fraud, intentional misrepresentation, intentional concealment, and breach of his fiduciary duties. The examiner also requests that we find an aggravating circumstance under this standard because respondent attacked D "for taking a position different from respondent's other clients on the covenant not to sue."

The examiner argued to the referee that the referee was bound by the conclusions reached by the civil courts as evidenced by the above exhibits. The examiner is apparently making the same argument before us. The greater standard of proof in this disciplinary proceeding disproves this argument.

(See *Rosenthal v. State Bar*, *supra*, 43 Cal.3d at p. 634.) In addition, the malpractice judgment was against several defendants, including respondent. None of the documents from the malpractice action cited by the examiner makes clear what conduct, if any, was attributed to respondent. Nevertheless, based on our independent review of the record, we conclude that the following establishes that respondent's misconduct was surrounded by bad faith pursuant to standard 1.2(b)(iii).

The referee concluded that while respondent should have treated D differently, no bad faith was involved. We disagree. As the referee found, D had an attorney-client relationship with respondent through at least the \$1 million settlement. In light of this, respondent owed D the most conscientious fidelity. (*Doyle v. State Bar* (1976) 15 Cal.3d 973, 978.)

[14a] D modified his covenant not to sue to reflect the facts that he had not authorized and directed respondent to execute the \$1 million settlement agreement and that respondent had not fully advised him of his rights. In a December 1975 letter to D's attorney, respondent expressed concern about G's reaction to these modifications and urged D to submit a covenant without them.<sup>17</sup> Thus, respondent urged his client to make misleading warranties. In addition, as all the covenants were in the same form, respondent in effect urged all his clients to make misleading warranties because at the time he signed the \$1 million settlement agreement, he had not been authorized and directed to do so by 711 clients.

[14b] In July 1976, respondent's office sent D the first of four settlement checks from the \$1 million settlement. In early August 1976, three and one-half weeks after the filing of the initial malpractice com-

plaint, respondent requested that D repay the money on the grounds that respondent would not have paid D from the \$1 million settlement had respondent known D claimed part of the \$9 million settlement. Respondent also stated that if D did not repay the money, he would sue him for the return of the money and would claim that D's acceptance of the check amounted to a waiver or estoppel with regards to the malpractice suit. Yet, participation in the \$9 million settlement did not prevent participation in the \$1 million settlement. Two of the test case plaintiffs shared in both settlements.

The referee acknowledged that respondent's treatment of D "leaves much to be desired" and that respondent's demand for D to return the first settlement check "creates some doubts" and "seems disingenuous." However, the referee did not "find it to be a serious breach of good faith" because, apparently on the advice of counsel, D had not cashed the check and did not intend to cash it. D's decision not to cash the check is not relevant to respondent's demand for the return of funds to which D was entitled.

[14c] Respondent also withheld two other settlement checks, dated August 1976 and July 1977, from D. These two checks were finally sent to D in early August 1978, along with D's last settlement check, which was dated July 14, 1978. D was entitled to these checks promptly after respondent's receipt of the settlement monies. The record contains no valid reason for the delay in payment.<sup>18</sup>

[14d] In addition to his treatment of D, respondent made misleading statements in negotiating the \$1 million settlement. The settlement agreement signed by respondent stated that he represented approximately 600 persons who had instructed him to

17. The examiner cites to this letter in support of his argument that respondent "attacked" D for taking a position different than respondent's other clients with respect to the covenant. Although we do not consider respondent's letter an "attack" on D, we do view the letter as evidence supporting our conclusion.

18. We do not find that respondent's refusal to provide D with information regarding the attorneys' fees at the August 1975

meeting to have involved bad faith, as the dissent suggests. The referee found that it was not clear whether the conversation concerned the fee from the \$9 million settlement, to which D was not a party as he was not a plaintiff, or the \$1 million settlement. In addition, respondent made a full disclosure of his fees at the November 1975 meeting. Under these circumstances, we do not find clear and convincing evidence of bad faith or concealment with regard to respondent's refusal.

sue G, and who had authorized him to settle their claims. At that point in time, respondent had not been instructed by 600 clients to bring an action on their behalf nor had he been authorized to settle their claims. Based on the foregoing, we conclude that respondent's misconduct was surrounded by bad faith pursuant to standard 1.2(b)(iii).

[12b] Respondent also committed the uncharged violation of rule 5-102(B) as explained above. Although not an independent basis for discipline, such uncharged misconduct does constitute an aggravating circumstance under standard 1.2(b)(iii).

[12c] This uncharged violation of rule 5-102(B) resulted from respondent's negotiation of an extremely unusual settlement and his failure to limit the number of participants in the settlement. Respondent offered money to ranchers throughout several states, urged leading beef producers to scour their areas for persons to sign the covenants, and did not limit the number of covenants in order to maximize the recovery of all his clients. Nevertheless, because of the novelty of the situation confronting respondent, we give minimal weight to the uncharged violation. (Cf. *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602.)

### 2. Standard 1.2(b)(iv)

Standard 1.2(b)(iv) provides that an aggravating circumstance be found if an attorney's misconduct significantly harmed a client. Without explanation, the examiner asserts that we should find such an aggravating circumstance because 600 clients suffered harm. The examiner made a similarly unexplained argument to the referee. The referee concluded that no harm occurred as a result of the conflicts of interest found by the former review department to be the basis for respondent's culpability. As we have concluded that respondent is culpable of violating rule 8-101(A)(2), we examine the harm done to D that resulted from this violation. As discussed above, respondent mishandled approximately \$942 of trust funds attributable to D's share of the \$50,000 attorneys' fee from the \$1 million settlement. Even if D was entitled to that \$942, we do not find this to be significant harm for purposes of standard 1.2(iv) in light of the amount involved.

The examiner may be contending that respondent harmed 600 clients by accepting 111 unnecessary covenants and thus diluting the interests of the first 600 clients. The extra covenants diluted the share of the first 600 by approximately \$74 each. We do not view this as significant harm. In any event, our culpability conclusion is based on respondent's mishandling of a disputed fee, not on representing conflicting interests.

### 3. Standard 1.2(b)(v)

Standard 1.2(b)(v) provides that an aggravating circumstance be found if an attorney demonstrates indifference towards rectifying, or atoning for, the consequences of his or her misconduct. The examiner asserts that respondent demonstrated indifference by demanding that D return the first settlement check, by refusing to talk to D regarding respondent's legal fee, and by doing what the consensus of his clients wanted him to do "even when in conflict with the interests of his client" D. Similar arguments were made to, and rejected by, the referee.

The record contains no clear and convincing evidence either proving or disproving indifference towards rectification or atonement by respondent to D. As the examiner observes, respondent refused to discuss attorneys' fees with D in August 1975 and improperly demanded the return of D's first settlement check in August 1976. In addition, there may have been many problems representing the clients by consensus, assuming all of the clients had not so agreed. Yet the examiner does not explain how these acts constituted indifference toward rectifying, or atoning for, misconduct. We find no clear and convincing evidence establishing aggravation pursuant to standard 1.2(b)(v).

### 4. Standard 1.2(b)(vi)

Standard 1.2(b)(vi) provides that an aggravating circumstance be found if an attorney displayed a lack of candor and cooperation with any victims of the attorney's misconduct or with the State Bar during the disciplinary investigation or proceedings. The examiner argues that respondent's lack of candor and cooperation is demonstrated by respondent's

concealment of the actual number of his clients from his clients and opposing counsel, by respondent's failure to notify "anyone" when the distribution formula for the \$1 million settlement changed, and by respondent's demand that D return the first settlement check. Again, similar arguments were made to, and rejected by, the referee.

The examiner contends that respondent concealed from his clients and from opposing counsel a discrepancy between the number of clients whom he claimed to represent "and the actual number." We first note that the opposing attorneys were not the "victims" of respondent's misconduct. In addition, when respondent confronted problems in securing the number of covenants required for the \$1 million settlement, he obtained an extension of the deadline for obtaining covenants and informed the leading beef producers responsible for obtaining covenants of the need for more covenants. Thus, as the referee found, respondent's clients were made aware of the fluctuations in the total.

The examiner also claims that respondent "failed to notify anyone" when "the distribution formula [for the \$1 million settlement] changed." The record does not contain clear and convincing evidence of such failure to notify. Further, it is not accurate to suggest that the original distribution formula changed. What the record shows is that the formula adopted at the Denver meeting in November 1975, for the distribution of the \$666,667 was unchanged and that an additional formula was used to distribute the \$283,333 fund which respondent created by the reduction of his claimed legal fee. The record also indicates that the leading beef producers were aware of the plan to distribute the \$283,333 fund equally among all who signed covenants.

[15] Next, even if respondent's demand for D to return the first settlement check demonstrated a lack of candor or cooperation with D, we would not consider it to be a separate aggravating circumstance pursuant to standard 1.2(b)(vi) because we have already found that it was a factor establishing aggravation under standard 1.2(b)(iii). (Cf. *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11 [misconduct forming a basis of culpability not counted again as a separate aggravating circumstance].)

Finally, the examiner does not argue that respondent lacked candor and cooperation with the State Bar during the investigation of this matter and the referee found that respondent was candid. We conclude no clear and convincing evidence establishes that respondent displayed a lack of candor and cooperation with D or the State Bar.

## B. Mitigating Circumstances

### 1. Standard 1.2(e)(i)

Standard 1.2(e)(i) provides that a mitigating circumstance be found if an attorney has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious. The referee found mitigation pursuant to this standard on the grounds that respondent had been in practice since 1970 without prior discipline and that the misconduct found by the former review department was not serious. The examiner argues that respondent had not practiced law long enough prior to the misconduct to warrant a finding under this standard. Respondent was admitted to the bar in January 1969. His violation of rule 8-101(A)(2) occurred in July 1976, after he had been in practice for seven and one-half years. We conclude that respondent's absence of a prior disciplinary record for this period of time warrants little weight in mitigation. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 [attorney's seven and one-half years of practice before misconduct was not especially commendable: "Petitioner had been practicing long enough to know that his misconduct was wrong, but not so long as to make his blemish-free record surprising."]; *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1115 [six years practice before misconduct entitled to little weight in mitigation].)

### 2. Standard 1.2(e)(ii)

Standard 1.2(e)(ii) provides that a mitigating circumstance be found if the attorney acted in good faith. Relying on expert testimony about the novelty and complexity of the \$1 million settlement, the referee found that respondent acted in good faith. Respondent argues that the evidence fully supports this finding. The examiner contends that standard 1.2(e)(ii) cannot apply because of respondent's bad faith pursuant to standard 1.2(b)(iii).

As discussed above, respondent displayed bad faith in his dealings with D and G. Such aggravating circumstances, however, do not prevent a finding that respondent acted in good faith in his dealings with clients other than D. We conclude that the record contains clear and convincing evidence that respondent acted in good faith with regards to the participants in the \$1 million settlement other than D.

Respondent arranged meetings with the leading beef producers, explained the settlement, received approval from almost all of the leading beef producers for \$333,333 in attorneys' fees, and obtained an agreement about the distribution of the remaining \$666,667. To save the settlement, he drastically reduced the attorneys' fees and created a \$283,333 fund to induce the necessary number of beef producers to sign covenants. He perceived no conflict of interest among the participants in the \$1 million settlement and wanted to provide some recovery for many producers before he filed an action against other supermarket chains. Viewing the entire record, we conclude that respondent believed he was serving these clients' interests and, as urged by respondent, this factor mitigates his misconduct. (*Arm v. State Bar, supra*, 50 Cal.3d at pp. 779-780.)

### 3. Standard 1.2(e)(iii)

Standard 1.2(e)(iii) provides that a mitigating circumstance be found if no harm occurred "to the client or person who is the object of the [attorney's] misconduct." The referee found that no harm occurred as a result of the conflicts of interest found by the former review department. Respondent argues that the evidence fully supports these findings. As we have determined, respondent mishandled approximately \$942. Nevertheless, he achieved enormous unexpected economic benefits for his clients. In addition, the record indicates that D received a total economic benefit from the rise in beef prices of approximately \$1,533,354, and the profits of all ranchers in the United States, including those whom respondent represented, increased by approximately \$3.5 billion in 1974. Thus, we do find lack of harm as a mitigating circumstance.

### 4. Standard 1.2(e)(v)

[16a] Standard 1.2(e)(v) provides that a mitigating circumstance be found if the attorney displayed spontaneous candor and cooperation to the victims of the attorney's misconduct and to the State Bar during disciplinary investigation and proceedings. The examiner argues that this standard does not apply because respondent still believes he has done nothing wrong. We agree with the referee that respondent's vigorous defense of the charges brought against him by the State Bar does not evidence a lack of candor or cooperation. The examiner does not cite to any evidence in the record to suggest that respondent's defense of the charges was motivated by anything other than his honest belief in his innocence. (Cf. *Van Sloten v. State Bar, supra*, 48 Cal.3d at pp. 932-933.)

[16b] The referee found that respondent was candid and his conduct was exemplary during the disciplinary proceedings. As respondent suggests, the evidence fully supports these findings. We also conclude based on our review of the record that respondent was cooperative during the disciplinary proceedings. We thus find mitigation pursuant to standard 1.2(e)(v).

### 5. Standard 1.2(e)(vi)

An extraordinary demonstration of the attorney's good character attested to by a wide range of references in the legal and general communities who are aware of the full extent of the attorney's misconduct is a mitigating circumstance under standard 1.2(e)(vi). The referee found that respondent introduced credible evidence from lawyers and lay persons of his high reputation. The examiner argues that respondent's witnesses were impressive, but few.

Citing no testimony or other evidence, respondent claims that the strongest recommendation of his good character comes from his clients. Two of the test case plaintiffs testified on respondent's behalf during the culpability phase, but not the discipline phase, of this proceeding. Although both praised respondent's handling of the test case, neither expressed any awareness of the exact disciplinary charges against respondent.

The only other clients who offered evidence were two of the supporters who were deposed in April 1990. According to one, respondent did what he said he would do. This client expressed gratitude for respondent's having handled the test case litigation and stated "We liked him. We trusted him. We trusted him very much. And we thought he was doing us a real service." The other supporter admired respondent's "outstanding job" in the test case and stated that "if there was [*sic*] a chance to go again [*sic*], [respondent] would be the first lawyer [I would] talk to." Yet neither of the supporters expressed any awareness of the exact disciplinary charges against respondent or of the culpability determination by the former review department.

During the discipline phase of this proceeding, four persons provided character evidence on respondent's behalf: an educator, the director of a nonprofit organization, a business executive, and a partner in a large law firm. The educator has known respondent since 1984 and testified respondent has a good reputation in the community. The educator, however, was aware of the disciplinary charges against respondent "only to the extent that [counsel for respondent had informed him] that the charges involve a conflict of interest between clients represented by [respondent] in 1976."

The director of the nonprofit organization has known respondent for seven or eight years and testified that respondent is "very sincere" and "very honest." When asked whether he had an understanding of the basis of the disciplinary proceeding against respondent, he replied, "Very basic, I mean it was very legalese [*sic*]." When asked to explain his understanding, the director stated, "[T]here was somehow an accusation that [respondent] represented more than one party or something like that in a case, but it was very legalese [*sic*]." When asked whether he understood that respondent had been found to have represented conflicting interests, he responded, "Right."

The business executive has known respondent since respondent was a young man and testified that he has been involved in litigation against respondent. The executive asserted that respondent was "very forthright, up front, and honest"; "an honest, decent

human being"; and "an honest, forthright individual." Although the executive had read the former review department's decision, he found the "allegations" against respondent "a little confusing" and "couldn't find any guilt on [respondent's] part." When asked whether he knew that respondent had been found to have committed an ethical offense, he replied, "There are allegations that [respondent] appears to have been accused of something." When asked several more times about his understanding of respondent's ethical offense, he was unable to articulate a clear summary of the former review department's decision.

The partner had opposed respondent in litigation and testified that respondent was a "great" lawyer, who was "very creative" and "totally ethical." Having read the former review department's decision, the partner stated that respondent had "an excellent reputation for good character" and "an unimpeachable reputation for honesty." On cross-examination, the partner clearly summarized the former review department's decision.

[17] Thus, the character witnesses expressed high opinions of respondent's honesty and praise of his legal ability and good reputation. Nevertheless, respondent presented a limited range of character witnesses, none of the clients expressed knowledge of the charges against respondent, and only one witness who testified on remand revealed a full understanding of the former review department's culpability decision. For these reasons, the weight to be accorded to this evidence is diminished somewhat. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131; *Grim v. State Bar* (1991) 53 Cal.3d 21, 33.)

[18] Civic service can deserve recognition as a mitigating circumstance under this standard. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 529.) Undisputed testimony by a character witness and by respondent establishes that respondent has done valuable fundraising, organizational, educational, and lobbying work since 1981 on behalf of the paralyzed. The referee did not consider whether respondent's civic service constitutes a mitigating circumstance. We, however, agree with respondent that his civic service is a mitigating circumstance. Based on the above, we conclude that respondent has demonstrated mitigation pursuant to standard 1.2(e)(vi).

#### 6. Standard 1.2(e)(vii)

Standard 1.2(e)(vii) provides that a mitigating circumstance be found if the attorney has promptly taken objective steps “spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any consequences of the [attorney’s] misconduct.” The referee found that it was unrealistic to expect respondent to demonstrate remorse when he was still contesting the charges, and even though the record was not clear whether respondent had paid D any of the malpractice judgment, to the extent he had, he atoned for his misconduct. The examiner argues that this standard does not apply because respondent fails to understand his misconduct and has failed to show that he made restitution of the malpractice judgment to D. Respondent argues that his honest belief in his innocence cannot be used against him.

[19] Respondent has the burden of proving mitigation by clear and convincing evidence. (Std. 1.2(e).) As indicated above, we do not consider respondent’s honest belief in his innocence to be a factor in aggravation. Nevertheless, we cannot conclude that he has presented clear and convincing evidence of his recognition of his wrongdoing when he does not believe he has committed any wrongdoing. Standard 1.2(e)(vii) does not require false penitence, but it does require acceptance of culpability. (*In re Rivas* (1989) 49 Cal.3d 794, 802; *In the Matter of Katz* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 502, 511.)

In addition, even if we were to consider respondent’s payment of the malpractice judgment as a recognition of his disciplinary misconduct, we agree with the referee that the record is not clear as to whether the judgment has in fact been paid. We therefore conclude that respondent has failed to establish mitigation pursuant to standard 1.2(e)(vii) by clear and convincing evidence.

#### 7. Standard 1.2(e)(viii)

Standard 1.2(e)(viii) provides that a mitigating circumstance be found if “considerable time” has passed “since the acts of professional misconduct occurred followed by convincing proof of subse-

quent rehabilitation.” The referee found mitigation pursuant to this standard because it had been 14 years since the wrongdoing and respondent had not been culpable of misconduct since then. The examiner asserts that respondent should not be entitled to this mitigation because he has not demonstrated rehabilitation in that he has not made any attempt to make amends and continues to show a lack of understanding of his misconduct.

The examiner does not articulate what “amends” respondent should have attempted. The record does not contain any evidence that respondent attempted to resolve the fee dispute with D or attempted to address his uncharged violation of rule 5-102(B). Nevertheless, the circumstances of the present case are far different than in *Wood v. State Bar* (1936) 6 Cal.2d 533, cited by the examiner. There, the attorney had obtained a \$100 loan from the employees of a client in order to secure his own release from jail, repaid the loan with a check drawn on a bank account that had been closed for more than six months, and then failed to make good on the bad check for more than six years. (*Id.* at p. 534.) Respondent’s failure to make amends for misconduct which he honestly believes he did not commit pales in comparison.

[20a] We also do not find that respondent’s good faith defense of that which he honestly believes is a lack of understanding of his misconduct. Furthermore, respondent offered evidence about his sensitivity to the misconduct found by the former review department. He testified that he has referred clients to other attorneys because of conflicts of interest, or potential conflicts, and that he has obtained written waivers from clients who wanted him to represent them when conflicts of interest were present. Respondent also testified that if confronted today with the situation he faced in the 1975, he would explain the conflicts in writing, obtain written consents, ask another lawyer to review the situation, and consult with the bar. For the above reasons, we do not find the examiner’s argument persuasive.

[20b] The review department has held that postmisconduct practice for several years without any further disciplinary offense constitutes a mitigating circumstance under this standard. (*In the Matter of Blecker* (Review Dept. 1990) 1 Cal. State

Bar Ct. Rptr. 113, 126.) Without reference to standard 1.2(e)(viii), the Supreme Court has found mitigation where there was no specific showing of rehabilitation, other than the practice of law for a period of time without further misconduct. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 256 [three years unblemished postmisconduct practice]; *Rodgers v. State Bar, supra*, 48 Cal.3d at pp. 316-317 [eight years unblemished postmisconduct practice].) The review department has done the same. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [12 years unblemished postmisconduct practice].) We conclude that respondent's unblemished 16 years of practice since his mishandling of trust funds and 14 years of practice since his uncharged misconduct is a mitigating circumstance under this standard.

8. *Standard 1.2(e)(ix)*

Standard 1.2(e)(ix) provides that a mitigating circumstance be found if excessive delay occurred in the conduct of the disciplinary proceedings, if the delay was not attributable to the attorney, and if the delay prejudiced the attorney. The referee found that there was excessive and unconscionable delay by the State Bar after 1980 when the bar became aware of the malpractice judgment. Even though the referee determined that respondent was able to establish most of the matters for which he claimed that the unavailability of witnesses prejudiced him, the referee concluded that respondent was undoubtedly prejudiced to some extent because of the unavailability of witnesses. The examiner argues that respondent was not prejudiced as a result of the delay.

[21a] Whether a delay constitutes a mitigating factor must be determined on a case-by-case basis. (*Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431-432.) Even when a delay in pursuing disciplinary proceedings is excessive, an attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. (*Amante v. State Bar, supra*, 50 Cal.3d at p. 257.) A delay in a disciplinary proceeding merits consideration only if it has caused specific, legally cognizable prejudice. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 774.)

The publicity surrounding the malpractice action alerted the State Bar to possible ethical violations

by respondent. Because the parties stipulated to sealing the record, the State Bar did not become aware of the malpractice matter until the early fall of 1980. From 1980 until 1984, the State Bar monitored the civil appeal instead of actively pursuing its own investigation. The civil appellate court filed its decision in April 1984, and the Supreme Court denied review in July 1984. The State Bar issued a notice to show cause to respondent in June 1987. A delay as short as 22 months can be excessive. (See *Amante v. State Bar, supra*, 50 Cal.3d at p. 257.) As the referee pointed out, the delay in the current proceeding from 1980 to 1987 was excessive. It was unnecessary to wait four years for the outcome of the civil appeal and then three more years for no reason explained in the record. None of this seven-year delay was attributable to respondent.

Respondent argues that he was not able to preserve testimony favorable to him because of the delay. Specifically, respondent asserts that several witnesses died which made it more costly and difficult for him to prevail on the issue of the enforceability of the E and F settlement agreements, and deprived him of favorable testimony regarding the allocation of attorneys' fees, regarding his cooperation and candor with his clients, and regarding the absence of a conflict of interest among the supporters. Respondent also argues that he was prejudiced by the loss of documents, such as sign-in sheets, tape recordings, and notes of meetings, that would have enabled him to demonstrate his full disclosure to his clients and the absence of conflicts.

[21b] We, like the referee, find that respondent was able to present evidence on all of the issues for which he claims he was prejudiced. In addition, respondent has not specified what information the witnesses would have revealed and what the missing documents would have shown, other than the general assertions noted above. Respondent's assertions are too vague to find he has been specifically prejudiced by the delay.

We also note that the enforceability of the E and F settlement agreements is not an issue in our opinion; we have not found respondent culpable of any misconduct regarding the allocation of attorneys' fees; we found that he was candid and cooperative with the State Bar; and the only conflict involved is

the uncharged conflict that resulted from his acceptance of more covenants than was necessary.

The victim of respondent's misconduct was D. Respondent does not argue that any of the evidence that he asserts he was unable to preserve pertains to his candor and cooperation with D. We did not find clear and convincing evidence of a lack of candor and cooperation with D. Finally, the documentary evidence that respondent asserts he was unable to preserve would not establish that respondent obtained written consent from his clients regarding the dilution of their recovery from the \$1 million settlement. [21c] Based on the foregoing, we conclude that the delay in the disciplinary proceeding did not cause respondent specific prejudice and therefore, we do not find mitigation under standard 1.2(e)(ix).

### C. Discipline

The purpose of attorney discipline is to protect the public, the courts, and the legal profession; and the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. (*Sands v. State Bar* (1989) 49 Cal.3d 919, 931; std 1.3.) [22a] As noted above, we have concluded that respondent is culpable of violating rule 8-101(A)(2) for failing to set aside \$942 of his legal fee pending a resolution of the dispute with D. This misconduct is aggravated by respondent's bad faith toward D and G, and the uncharged violation of rule 5-102(B). The misconduct is mitigated by respondent's good faith toward his clients in the \$1 million settlement other than D; the lack of harm to D; respondent's candor and cooperation during the disciplinary proceeding; his demonstration of good character; and his unblemished postmisconduct practice.

[22b] Standard 2.2(b) calls for a minimum 90-day actual suspension for violations of rule 8-101 which, as the violation in the present case, do not involve wilful misappropriation of trust funds. Although we look to the standards as guidelines, they do not mandate a particular result. (*In re Young* (1989) 49 Cal.3d 257, 268; see also *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 401.) We must also look to relevant case law for guidance as to the appropriate discipline.

(*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 648.) Prior similar cases indicate that a departure from standard 2.2(b) is appropriate in this case.

In *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, the clients made ambiguous statements as a result of which attorneys Dudugjian and Holliday honestly, but mistakenly, believed that the clients had authorized the application of certain funds to the payment of attorneys' fees. (*Id.* at p. 1095.) The attorneys received a check for \$5,356.94 and informed the clients, who owed them more than this sum in attorneys' fees. Pending the resolution of any questions about fees, Dudugjian put the check in a drawer. Two weeks later, believing there to be no such unresolved questions, Dudugjian deposited the check in the firm's general account. Before the check cleared, the clients requested the funds and the attorneys falsely represented that they would comply with the request. Later, without authorization from the clients, the attorneys applied the funds to the payment of the clients' bill and so informed the clients. (*Id.* at p. 1096.)

The Supreme Court concluded that the attorneys' mishandling of client funds violated rules 8-101(A), for depositing the settlement check into their general account instead of a client trust account, and 8-101(B)(4), for refusing to pay the funds over on request. (*Id.* at pp. 1099-1100.) The Supreme Court found no aggravating circumstances and several mitigating circumstances, the most significant of which was the attorneys' honest belief that they had permission from the clients to retain settlement funds. The Court also found that the attorneys were not likely to commit such misconduct in the future, that they generally exhibited good moral character, and that their failings were aberrational. (*Id.* at p. 1100.) The discipline for each attorney was a public reproof conditioned on restitution with interest and passage of the professional responsibility examination. (*Id.* at pp. 1100-1101.)

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, a newly hired bookkeeper mistakenly billed a client of the attorney for \$1,753.94 as a cost advanced in litigation. The

client paid the bill, and the client's check was deposited in the attorney's general operating account. Nearly three years later, the attorney discovered the mistake, indicated to the client's new attorneys that he would take care of the matter, and requested a meeting to settle disputed fees and costs. When no settlement was reached, arbitration followed. During arbitration, the attorney offered to credit the client for the erroneously paid \$1,753.94 as an offset against other unpaid costs in almost the same amount. The client's new attorneys did not object, and the arbitration award concluded that the client had paid all actual costs. (*Id.* at pp. 722-723.)

The review department held that the attorney violated former rule 8-101(A)(2) by failing to put \$1,753.94 in a trust account when he discovered the mistake, pending the resolution of the dispute with the client. (*Id.* at p. 728.) The review department found no aggravating circumstances and several mitigating circumstances, including no prior record of discipline during long years of practice, extensive pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability. The discipline was a private reproof conditioned on the passage of the California Professional Responsibility Examination.

[22c] Although respondent's culpability is similar to the culpability in the above cases, his misconduct is surrounded by several aggravating circumstances not found in the above cases. We have not characterized the aggravating circumstances as grave, as does the dissent, but we do not minimize their seriousness. Respondent's bad faith toward D and G cannot be condoned. Nevertheless, while the covenants were misleading, there is no evidence that respondent intended to deceive D or G for his own personal gain or for any other venal purpose. Rather, his intent was to serve his clients in a unique set of circumstances involving a \$1 million offer to settle the claims of a large, ill-defined group of claimants/clients. The lack of evil intent serves to partially lessen the seriousness of the aggravating circumstances regarding the covenants. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 921 [seriousness of attorney's misconduct lessened because attorney thought he was acting in his clients' best interests]; *In re Higbie* (1972) 6

Cal.3d 562, 573 [attorney's misconduct lessened because attorney's misconduct not motivated by personal enrichment].)

[22d] On balance, we conclude that the mitigating circumstances significantly outweigh the aggravating circumstances and indicate that discipline similar to that imposed in the above cases is appropriate here. [20c] The most significant mitigation is respondent's unblemished postmisconduct practice of law. He has practiced for 14 years since the uncharged misconduct and 16 years since the charged misconduct. We are not aware of any other discipline case that involved such a lengthy period of practice following the misconduct. The unblemished postmisconduct practice demonstrates that respondent is able "to adhere to acceptable standards of professional behavior." (*Rodgers v. State Bar, supra*, 48 Cal.3d at pp. 316-317.) Thus, respondent is not likely to commit such misconduct in the future.

[22e] Respondent's many years of postmisconduct practice are similar to the many years of premisconduct blemish-free practice in *Respondent E*. Such lengthy periods of practice without misconduct are a significant indicator of the lack of potential for future misconduct. Respondent's postmisconduct practice is especially significant because it is an affirmative demonstration of his ability to maintain high professional standards. Coupled with the other mitigating circumstances, respondent's mitigation is thus greater than Dudugjian's, Holliday's and Respondent E's. We recognize that, unlike in *Respondent E*, several aggravating circumstances exist in the present matter. Nevertheless, "the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." (*In re Kreamer* (1975) 14 Cal.3d 524, 532.) We are convinced, after careful review and consideration of the record as a whole, including aggravating and mitigating circumstances, that the discipline imposed in *Respondent E* will suffice to ensure that respondent is fit to continue as an attorney without threat to the public, courts, and legal profession. In light of the prophylactic nature of attorney discipline (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245) we conclude that a private reproof

conditioned on passage of a professional responsibility examination will best achieve the goals of attorney discipline in this case.

Based on the foregoing, we hereby order that respondent be privately reprovved. We also order that, as a condition of this private reprovval, respondent take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State of California within one year of the effective date of the reprovval and provide satisfactory proof of such passage to the Probation Unit, Office of Trials, Los Angeles.

I Concur:

VELARDE, J.\*

GEE, Acting P.J.\*\*, concurring in part and dissenting in part:

I concur in part and respectfully dissent in part. Although I agree with the majority's discussion of procedural issues and culpability, I disagree with their assessment of the mitigating and aggravating evidence and the discipline ordered. Despite significant mitigating circumstances, the aggravating circumstances are so egregious that the maintenance of high professional standards and the preservation of public confidence in the profession require acknowledgement of the seriousness of the conduct and imposition of public discipline.

In the discussion of aggravating circumstances under standard 1.2(b)(iii) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), the majority acknowledges the existence of the aggravating factors. Respondent knowingly misrepresented to G that he had authority to enter into the \$1 million

settlement when he negotiated it in July 1975. In August 1975, when D first questioned respondent's fee demand, respondent characterized the attorneys' fees as his business and not D's and refused to provide D with any information. Since respondent had claimed to represent D in negotiating the \$1 million settlement, D had every right to information about the fees respondent was seeking from the \$1 million settlement.<sup>1</sup>

Several months later, respondent urged D to make the false warranty to G that respondent had been authorized to sign the \$1 million settlement agreement at the time he signed it. Respondent knew the warranty was false but submitted to G the standard covenants containing the false warranty from over 700 clients. Although D was unquestionably entitled to a share of the \$1 million settlement, respondent demanded that D repay D's initial distribution from the settlement when D initiated a legal malpractice action against respondent, and respondent threatened to sue D if D did not repay the money. Respondent then improperly withheld D's second and third settlement distributions for two years and one year, respectively.

The majority characterizes these serious aggravating factors as merely bad faith. Certainly, respondent's treatment of D constitutes bad faith. However, his misrepresentation to G about his settlement authority and his involvement of over 700 clients in submitting covenants with warranties which he knew to be false were serious acts of dishonesty, and not simply acts of bad faith. Moreover, contrary to the majority's conclusion, respondent's deception of G to obtain the settlement was motivated, at least in part, by a desire for personal gain. Undisputed evidence shows respondent claimed one-third of the \$1 million settlement as legal fees as soon as the

\* By appointment of the Acting Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

\*\* By appointment of Acting Presiding Judge Stovitz pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

1. The majority implies that respondent might have been confused about which fees D was challenging. The majority states that the referee found it was unclear whether D was

challenging respondent on the fee from the \$9 million settlement or the \$1 million settlement, but probably both. The referee's original decision, in fact, found that, at the least, D was challenging respondent's claim to the fees in the \$1 million settlement. The referee says, in pertinent part, that it was not clear whether D referred "only to the one-third of the \$1,000,000 or to both that and the fees from the \$9,000,000 . . . probably the latter." (Referee's original decision, finding 65, p. 30, emphasis added.)

settlement was finalized. Additionally, though I agree with the majority's conclusion that respondent demonstrated good faith towards almost all his clients, I disagree that his good faith towards his other clients constitutes a mitigating circumstance under standard 1.2(e)(ii). Standard 1.2(e)(ii) applies to the "good faith" in the context of the particular act of misconduct. Lack of harm to other clients, or even to the individual who was the victim of the misconduct, is not the same as "good faith."

In *Arm v. State Bar* (1990) 50 Cal.3d 763, which is cited by the majority, the attorney's "good faith" was considered a mitigating factor because he believed that his conduct was necessary to protect his client's interests. There was no evidence of any good faith on respondent's part when he refused to respond to D's initial inquiries about the fees or when he threatened to sue D if D did not return his share of the settlement funds. More importantly, there is no evidence that respondent had any good faith belief that D at any time gave up his challenge to respondent's entitlement to the attorney fees.

The majority correctly asserts that the protection of the public, the courts, and the legal profession is a primary purpose of a sanction for professional misconduct. Disciplinary proceedings, however, serve two other very important purposes which the majority fails to mention: the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. (Std. 1.3; *Rose v. State Bar* (1989) 49 Cal.3d 646, 666; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126.)

A private reproof is appropriate where an attorney is culpable of a minor trust fund violation

and where there are no aggravating circumstances and substantial mitigating circumstances. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17.) In this proceeding, culpability rests solely on such a minor violation, namely, respondent's failure to comply with the requirements of former rule 8-101(A)(2).

However, unlike *Respondent E* and *Respondent F*, this proceeding presents the grave aggravating circumstances discussed above. These aggravating circumstances significantly outweigh the mitigating circumstances and make a private reproof inappropriate. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205.) Respondent engaged in exactly the type of conduct which undermines professional standards and public confidence in attorneys. He made misrepresentations to an opposing party in order to generate a settlement and mistreated an unhappy client. He even threatened to sue the client and withheld substantial funds to which the client was unquestionably entitled. Specifically, he improperly withheld D's second (\$4,790.20) settlement check for two years and D's third (\$4,801) settlement check for one year. He also forced D to go through the time and expense of seeking, conferring with, and retaining new independent counsel in an attempt to secure the fair treatment owed him by respondent in the first place.

Although the mitigating circumstances are significant, they do not offset the egregious aggravating circumstances and do not justify imposition of a private reproof. The maintenance of high professional standards and the preservation of public confidence in the legal profession require at least a public reproof.