

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HERBERT F. LAYTON

A Member of the State Bar

No. 88-O-12561

Filed March 17, 1993; reconsideration denied, April 23, 1993

SUMMARY

Respondent was found culpable of recklessly failing to perform legal services competently by failing to close a relatively simple probate case for over five years. Based on this misconduct and on respondent's prior misconduct, which also resulted from his failure to perform legal services competently in a single probate matter, the hearing judge recommended that respondent receive a two-year stayed suspension, three years probation, and actual suspension for six months. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent sought review, claiming numerous procedural errors and contending that he was not culpable of misconduct, and that if he was culpable, the discipline recommended was too severe. The review department rejected the claims of procedural error and concluded that the hearing judge's findings of fact and conclusions of law were supported by the record and adopted them with minor modifications. The review department also concluded that the discipline recommended was appropriate in light of the facts and circumstances of respondent's present misconduct and his past similar misconduct.

COUNSEL FOR PARTIES

For Office of Trials: Mary Schroeter

For Respondent: Herbert F. Layton, in pro. per.

HEADNOTES

[1] 101 Procedure—Jurisdiction
204.90 Culpability—General Substantive Issues

Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by a lay person, the services the attorney renders in the dual capacity all involve the practice of law, and the attorney must conform to the Rules of Professional Conduct in the provision of all of them. This rule applies to an attorney who is appointed both attorney and executor of a probate estate.

- [2] **106.20 Procedure—Pleadings—Notice of Charges**
 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where a notice to show cause alleged that respondent failed to perform services competently, and set forth in separate paragraphs specific facts which in the aggregate charged a lack of diligence upon which that violation was based, the alleged misconduct in the notice was pled with sufficient particularity and was adequately correlated with the rule violation charged to have provided respondent with reasonable notice of the specific charges at issue. There is no requirement that each paragraph of a single count in a notice to show cause must allege a violation of a rule or statute.
- [3] **120 Procedure—Conduct of Trial**
 139 Procedure—Miscellaneous
 162.20 Proof—Respondent’s Burden
A showing of specific prejudice is required to invalidate a hearing judge’s decision based on procedural errors. Where respondent did not allege and/or demonstrate that he suffered any specific prejudice as a result of numerous alleged procedural errors, he was not entitled to relief.
- [4] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
 162.20 Proof—Respondent’s Burden
No delay in bringing disciplinary charges occurred where complaint against respondent was sent to State Bar in July 1988, respondent’s last act of misconduct was in June 1989, and notice to show cause was filed in May 1990. In addition, where none of evidence allegedly lost due to delay was material to issue of respondent’s misconduct, no specific prejudice was demonstrated from alleged delay in bringing charges.
- [5] **113 Procedure—Discovery**
 139 Procedure—Miscellaneous
 162.20 Proof—Respondent’s Burden
Where discovery period was extended, giving respondent ample time to conduct discovery, and where respondent engaged in discovery, did not seek additional time for further discovery, and did not move to compel further responses or to compel attendance of witnesses at depositions, respondent’s contentions that errors occurred during discovery lacked merit.
- [6] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
 119 Procedure—Other Pretrial Matters
 162.20 Proof—Respondent’s Burden
State Bar’s pretrial dismissal of three out of four original counts in notice to show cause did not entitle respondent to any relief, where respondent did not demonstrate how such dismissal caused specific prejudice.
- [7] **120 Procedure—Conduct of Trial**
 139 Procedure—Miscellaneous
 159 Evidence—Miscellaneous
 162.20 Proof—Respondent’s Burden
 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Hearing judge’s refusal to permit respondent to present evidence that value of one estate asset increased during respondent’s delay in completing probate did not entitle respondent to relief, where such increase in value did not justify respondent’s misconduct in delaying distribution of other estate assets.

- [8] **115 Procedure—Continuances**
159 Evidence—Miscellaneous
162.20 Proof—Respondent’s Burden
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Hearing judge’s denial of respondent’s request for continuance to research probate practices in respondent’s county was not error, where respondent had had ample time prior to trial to prepare his defense, and evidence sought would have had very little probative value as custom and practice in respondent’s county would not explain or excuse respondent’s prolonged delay in closing estate at issue.
- [9] **119 Procedure—Other Pretrial Matters**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
Hearing judge’s request that respondent discuss mitigation evidence with examiner and try to “work something out,” in order to promote stipulations for the introduction of character letters, did not constitute an improper requirement that respondent obtain the State Bar’s prior approval to present mitigation evidence.
- [10] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
Transcript of superior court trial regarding probate matter which was subject of disciplinary proceeding was admissible pursuant to Bus. & Prof. Code, § 6049.2, and hearing judge did not err in admitting entire transcript, even though much of testimony was not relevant to disciplinary proceeding, where transcript was admitted subject to respondent’s motion to strike parts that were not material or relevant, and respondent failed to make such motion.
- [11] **162.20 Proof—Respondent’s Burden**
194 Statutes Outside State Bar Act
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Compliance with the time limitations set forth in the Probate Code is not a defense to a charge that the attorney failed to act competently, nor does noncompliance with such time limitations establish per se a failure to act competently. The focus of the inquiry on a charge of failure to act competently is whether the attorney intentionally, recklessly, or repeatedly failed to apply the learning, skill, and diligence necessary to discharge the duties arising from the attorney’s employment or representation. Compliance with the time limitations of the Probate Code is but one factor to be considered in making this determination.
- [12 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
An attorney has an obligation to perform services diligently and if the attorney knows he or she does not have or will not acquire sufficient time to do so, the attorney must not continue representation in the matter. Reckless or repeated inattention to client needs need not involve deliberate wrongdoing or purposeful failure to attend to duties in order to constitute wilful violation of duty to perform competently. Fact that respondent performed some services for a probate estate did not

excuse his misconduct in delaying closure of the estate, especially where respondent's asserted justification for delay was that he was busy on other matters. Respondent's repeated failure to perform acts needed to distribute assets and close estate for five years, knowing that beneficiaries desired earliest possible distribution, constituted wilful violation of the duty to perform services competently.

[13] **710.55 Mitigation—No Prior Record—Declined to Find**

710.59 Mitigation—No Prior Record—Declined to Find

Because respondent's first and second episodes of misconduct did not occur during same time period or within narrow time frame, his many years of practice before his first misconduct were not an important mitigating factor in his second discipline matter, especially where other facts in case indicated risk that misconduct would be repeated.

[14] **725.59 Mitigation—Disability/Illness—Declined to Find**

760.52 Mitigation—Personal/Financial Problems—Declined to Find

795 Mitigation—Other—Declined to Find

Office workload does not generally serve to substantially mitigate misconduct. Stressful personal problems may mitigate misconduct, but where respondent's asserted workload or personal problems occurred during first year of administration of probate estate, such problems did not adequately explain five-year delay in administration of estate, and did not constitute mitigation.

[15] **191 Effect/Relationship of Other Proceedings**

193 Constitutional Issues

545 Aggravation—Bad Faith, Dishonesty—Declined to Find

582.50 Aggravation—Harm to Client—Declined to Find

While respondent's motive in appealing superior court's reduction of his fees as attorney and executor of estate might have been suspect, where there was no clear and convincing evidence that such appeal was in bad faith or was otherwise improper, review department declined to consider respondent's appeal as an aggravating factor in light of the important policies favoring unfettered access to the courts.

[16 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

591 Aggravation—Indifference—Found

621 Aggravation—Lack of Remorse—Found

An attorney's failure to accept responsibility for, or to understand the wrongfulness of, his or her actions may be an aggravating factor unless it is based on an honest belief in innocence. Where respondent's assertions in defense of failure to perform services did not reflect an honest belief in innocence, but rather reinforced the conclusion that respondent simply did not understand or appreciate the requirement to devote diligence necessary to discharge duties arising from employment, respondent's assertions exhibited a disturbing lack of insight into misconduct which in turn caused concern that he would repeat his misdeeds.

[17 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

591 Aggravation—Indifference—Found

621 Aggravation—Lack of Remorse—Found

805.10 Standards—Effect of Prior Discipline

844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension

Where respondent's misconduct in both first and second disciplinary matters involved similar lack of diligence causing delay in closing a simple probate estate, discipline in second matter ordinarily

would warrant only slightly greater discipline than in first matter. However, where respondent had failed to understand or appreciate misconduct, causing concern about handling future cases, and in light of absence of mitigating factors and presence of several aggravating factors, significantly greater discipline than in first matter was appropriate in second matter, and review department recommended two-year stayed suspension, three years probation, and six months actual suspension.

**[18 a-c] 173 Discipline—Ethics Exam/Ethics School
196 ABA Model Code/Rules**

Normally, a respondent who has recently been ordered to take a professional responsibility examination is not required to do so in connection with subsequent discipline. Where respondent had not been ordered to take any professional responsibility examination in connection with prior discipline, review department recommended that respondent be ordered to take the California Professional Responsibility Examination, focusing on the California Rules of Professional Conduct, which is now routinely ordered in discipline cases involving suspension in lieu of the national Professional Responsibility Examination, which focuses on the ABA rules.

ADDITIONAL ANALYSIS

Culpability

Found

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

Aggravation

Found

511 Prior Record

582.10 Harm to Client

Discipline

1013.08 Stayed Suspension—2 Years

1015.04 Actual Suspension—6 Months

1017.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review this matter at the request of respondent, Herbert F. Layton, a member of the State Bar since 1959 who has a record of one prior discipline. A hearing judge of the State Bar Court found in the present matter that respondent was culpable of recklessly failing to perform legal services competently in a single probate case. Based on this current misconduct and on respondent's prior misconduct, which also resulted from his failure to perform legal services competently in a single probate matter, the hearing judge recommended that respondent be suspended from the practice of law for a period of two years, with the execution of the suspension stayed, and that he be placed on three years probation on conditions including actual suspension for six months. Respondent asserts on review that he is not culpable of misconduct for a variety of reasons, and that if he is culpable, the discipline recommended is too severe.

We have independently reviewed the record and conclude that the hearing judge's findings of fact and conclusions of law are supported by the record and with the minor modifications discussed below we adopt them as our own. Further, we conclude the discipline recommended is appropriate in light of the facts and circumstances of respondent's present misconduct and his past similar misconduct.

FACTS

We briefly summarize the hearing judge's findings of fact as they are for the most part undisputed.¹ In January 1984, respondent prepared a will for Virgie Rae Dixon. The will named respondent as executor and attorney and authorized him to receive fees both as executor and as attorney. The will left Dixon's personal property to Dixon's nieces, Floy Munk and Lexie Pollick, and the residue of the estate, consisting primarily of Dixon's residence, was left to Dixon's twelve nieces and nephews, which also included Munk and Pollick.

Dixon died February 5, 1984. Munk and Pollick were the only beneficiaries that attended Dixon's funeral. None of the beneficiaries lived in California and most lived in Utah. At the time of the funeral respondent was made aware of the desire of Munk and Pollick to have Dixon's personal property distributed immediately and the real property sold and the proceeds distributed as soon as possible. Pollick and Munk were concerned about the security of the personal and real property. Pollick made respondent aware that certain articles of Dixon's personal property were considered heirlooms and irreplaceable by the beneficiaries.

The petition for probate was filed in early February 1984 and letters testamentary were issued to respondent as executor in early March 1984. The letters authorized respondent to administer the estate under the Independent Administration of Estates Act. The time for filing creditor's claims expired in early July 1984. Creditor's claims of approximately \$3,060 were filed and approved.

Pollick continued to press her desire for a quick resolution of the Dixon estate and distribution of the real and personal property when she spoke to respondent which was approximately at monthly intervals. Pollick became dissatisfied with respondent's responses which were that he continued to be busy with other more urgent matters. At the request of Munk and Pollick, Jan Stewart, who was Pollick's brother and also a beneficiary of the real property, phoned respondent early in October 1984 to urge the immediate distribution of the personal property and distribution or sale of the real property. Respondent indicated that the real property could not be listed for sale until the personal property was removed, but did not indicate when any distribution of the personal property would take place.

By early October 1984, the beneficiaries, particularly Pollick, Munk, and Stewart, were dissatisfied with respondent due to his inattentiveness to the Dixon estate and lack of responsiveness to the requests of Pollick, Munk and Stewart to move the

1. Respondent does argue that a few of the factual findings are not supported by the record. However, as we discuss below, the challenged findings are of minor importance.

estate forward. On October 10, 1984, Pollick and Munk filed a petition for the preliminary distribution of the personal property of the estate. The petition was not pursued.

Respondent filed an inventory and appraisal of the estate in early November 1984, showing an estate of approximately \$121,700. The household furniture and furnishings were valued at \$1,000 and the car was valued at \$500.²

In March 1985, Munk and Pollick filed a petition to revoke respondent's authority as executor because of respondent's alleged failure to file the inventory and appraisal within three months after his appointment, to transfer title to the decedent's automobile, to make a preliminary distribution of the personal property, and to rent, lease or sell the decedent's real property. The hearing on the petition was scheduled for April 1985 and was continued to May 1985 so that respondent and Stewart, on behalf of the beneficiaries, could reach some agreement. Respondent wished to have until after April 15, 1985, to prepare the final accounting because he was busy until then with income tax filing obligations. Stewart continued to be dissatisfied because he could not get a commitment from respondent as to distribution of the personal effects or sale of the real property. Respondent wanted authority from Stewart for respondent personally to sell the property rather than going through a real estate broker and although Stewart reiterated that the beneficiaries wanted the property sold, he refused to commit on behalf of the beneficiaries to respondent personally selling the property. No appearance was made at the May 1985 hearing and the petition to revoke respondent's authority as executor was dropped.

On May 1, 1985, respondent filed the first and final accounting. A hearing was scheduled on the accounting for May 29, 1985. Attorney Clifford Egan appeared for the beneficiaries on May 29. The

hearing on respondent's accounting was continued to July 3, 1985, to permit Egan to file a new petition to remove respondent as personal representative of the estate. On June 25, 1985, Egan filed the petition to remove respondent and to reduce respondent's fees as executor and/or attorney because of his delay in the handling of the estate. On July 3, 1985, counsel stipulated to immediate preliminary distribution of the personal property and an order to that effect was filed on July 15, 1985.

The petition to remove respondent was scheduled for trial on September 20, 1985. At that time, both the petition to remove respondent and the hearing on respondent's first and final accounting were heard. Following the hearing, the superior court denied the petition to remove respondent and reserved the issue of respondent's fees, finding "unnecessary wait in the sale of the property." The court further ordered: an immediate distribution of the real property in kind to the beneficiaries, and, after payment of fees and taxes, a distribution of the remaining property on the basis of one-twelfth to each beneficiary without need for further court order; that respondent not proceed against Bank of America as to two old bank accounts; and that respondent prepare the order of distribution. On September 23, 1985, the superior court signed an order that essentially cut respondent's requested fees and commissions in half.³

An order to correct the order settling the first and final accounting had to be requested by Egan because the final judgment prepared by respondent had failed to state the real property was in the name of Rae S. Dixon who was the same person as Virgie Rae Dixon, the decedent. The order to correct was signed on January 2, 1986.

In November 1985, respondent appealed the order reducing his commissions and fees. In November 1986, the Court of Appeal affirmed the trial

2. Dixon's house was valued at \$97,000 and the balance consisted of cash, certificates of deposit and savings bonds.

3. Respondent requested approximately \$3,600 for executor's commissions, approximately \$3,600 for attorney's fees, and

\$350 for extraordinary services. The court awarded approximately \$1,800 each for the commissions and fees and the \$350 for extraordinary services.

court's order; denied sanctions; and awarded costs to Pollick, who had opposed the appeal. The Court of Appeal found the time taken for the administration of the estate exceeded the time permitted under former Probate Code section 1025.5 and that respondent "failed to sell or rent the real property, did not keep [Pollick] apprised of the status of the estate, and did not timely file the final distribution."

A supplemental accounting distributing the balance in the estate was not filed until June 2, 1989. The accounting stated that respondent waited to file the accounting "in the event [the Internal Revenue Service] decided to audit" the Dixon estate before making a final distribution. The order settling the supplemental accounting was filed on June 2, 1989.

DISCUSSION

A. Introduction

The amended notice to show cause in this matter charged that respondent failed to perform services competently in the Dixon probate matter in violation of former rule 6-101(A)(2) of the Rules of Professional Conduct.⁴ The hearing judge concluded that respondent wilfully violated rule 6-101(A)(2) in that he recklessly exceeded the time allowed for the administration of the estate; recklessly failed to sell or distribute the real property for an unreasonable period of time; recklessly failed to timely settle the supplemental accounting; and recklessly failed to notify the beneficiaries or communicate with them regarding his intentions not to sell or lease the real property.

As indicated above, respondent seeks review of the hearing judge's culpability conclusions and discipline recommendation. On review, we must independently review the record. (Rule 453(a), Trans. Rules Proc. of State Bar.) We may adopt findings and conclusions which differ from the hearing judge's, but we must accord great weight to the hearing judge's findings of fact which resolve credibility issues. (*Ibid.*)

[1] We note at the outset that respondent was appointed both the executor and attorney for the Dixon estate. As such, much of the work he performed was done in his capacity as executor. Executors are not required to be attorneys and are not subject to the Rules of Professional Conduct of the State Bar. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904.) Nevertheless, part of the services respondent rendered to the estate were performed in his capacity as an attorney and, in addition, "where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them. [Citations.]" (*Ibid.*)

B. Procedural Contentions

Respondent raises a number of procedural contentions which we address first. Respondent attacks the sufficiency of the amended notice to show cause, claiming the notice did not adequately apprise him of the charges and, therefore, the State Bar Court lacked jurisdiction in this matter. The hearing judge found that the misconduct alleged in the notice was pled with sufficient particularity and adequately correlated with the rule of professional conduct allegedly violated.

Respondent is entitled to reasonable notice of the specific charges that the State Bar intends to prove. (Bus. & Prof. Code, § 6085; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928, 929; *In the Matter of Glasser* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 163, 171.) The amended notice to show cause charged that respondent became the executor and administrator of the Dixon estate and thereafter failed to perform services competently (paragraph 1); that he exceeded the time allowed by former Probate Code section 1025.5 and the superior court reduced his fees on account of the delay (paragraph 2); that he failed to sell, rent, or lease the real property until ordered by the superior court (paragraph 3); that

4. All further references to rule 6-101(A)(2) are to the former rule in effect from October 23, 1983, until May 26, 1989, which provided: "A member of the State Bar shall not inten-

tionally or with reckless disregard or repeatedly fail to perform legal services competently."

he failed to petition for settlement of the supplemental accounting for over five years from the issuance of the letters (paragraph 4); that he failed to communicate with the beneficiaries (paragraph 5); and that the above specific acts were committed in wilful violation of rule 6-101(A)(2).

[2] Respondent contends that each of the paragraphs of the notice to show cause did not allege a rule or code section that was violated or that required the action that the paragraph alleged was not done. Respondent's assertions are without merit. The notice alleged that respondent violated rule 6-101(A)(2) in that he failed to perform the services competently and alleged specific facts charging a lack of diligence upon which that violation was based. There is no requirement that each paragraph of a single count in a notice allege a violation of a rule or statute. Indeed, such a pleading in this case would have been misleading because this notice alleges a single violation of rule 6-101 based on the aggregate of the acts set forth in the five paragraphs, not five separate violations of the rule. As did the hearing judge, we conclude that the alleged misconduct in the notice was pled with sufficient particularity and was adequately correlated with the rule violation charged to have provided respondent with reasonable notice of the specific charges at issue in this matter.

We also note that respondent's prior discipline involved very similar misconduct. The notice to show cause in that prior matter charged that respondent failed to perform services competently in that he failed to timely file estate tax returns, failed to preserve estate assets, and failed to timely distribute estate property, in violation of rule 6-101(A)(2). The Supreme Court adopted the State Bar's conclusion that respondent recklessly and repeatedly failed to perform services competently in violation of rule 6-101(A)(2). (*Layton v. State Bar, supra*, 50 Cal.3d at p. 898 ["Over five years elapsed from the time letters of administration were issued to Layton in this simple estate to the time he was removed by the court as executor, having failed to bring the Estate to closure. This delay in accomplishing the purposes for which he was retained was accompanied by numerous instances of lack of diligence in performing his duties as an attorney as well as his duties as an executor."].) It is rather disingenuous for respondent

to argue that the present notice to show cause failed to adequately apprise him that unwarranted delay in the administration of an estate could be grounds for discipline under rule 6-101(A)(2) when he had already been disciplined based on similar charges and findings.

Finally, we note that there was an extensive pretrial conference in this matter at which the hearing judge discussed in great detail with respondent the charges and the anticipated evidence in support of those charges.

[3] Respondent next complains that the hearing was not fair. In support of this assertion, respondent alleges some 17 procedural errors. A showing of specific prejudice is required to invalidate a hearing judge's decision based on procedural errors. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 778 ["The rules of criminal procedure do not apply in attorney discipline proceedings, and reversible error will be found only when the errors complained of resulted in a deprivation of a fair hearing"]; *Stuart v. State Bar* (1985) 40 Cal.3d 838, 845.) Even assuming for the sake of argument that each of the 17 errors occurred as asserted by respondent, he has not alleged and/or demonstrated that he suffered any specific prejudice as a result. In any event, we have examined each of the 17 alleged errors and have concluded that each lacks merit and that respondent received a fair hearing.

We have previously discussed and rejected respondent's first alleged error that the notice to show cause failed to notify him of the charges. [4] Respondent next complains that there was prejudicial delay in bringing the charges. The complaint against respondent was sent to the State Bar in July 1988, the last act of misconduct was in June 1989 when respondent settled the supplemental accounting, and the notice to show cause was filed in May 1990. We do not find delay under these circumstances. In addition, neither the documentary evidence respondent claims was destroyed nor the events respondent claims certain witnesses could not remember is material to respondent's delay in the administration of the estate. Respondent has never claimed that any of these people said or did anything that caused delay or that what these witnesses could

not remember was material to the issue of delay. In short, even if there was delay, respondent has not demonstrated specific prejudice.

[5] Respondent also alleges that several errors occurred during discovery. We note that discovery, which usually must be completed within 90 days after service of the notice to show cause (rule 316, Trans. Rules Proc. of State Bar), was extended until early June 1991. Thus, respondent had ample opportunity to conduct discovery. Respondent propounded interrogatories and deposed witnesses. He did not seek additional time for further discovery beyond the June 1991 cut-off. He also did not move to compel further responses to any discovery he deemed inadequately answered, nor did he seek to compel the attendance at depositions of out-of-state witnesses. We find no merit to respondent's contentions that errors occurred during discovery in this matter.

[6] Respondent next complains that he was prejudiced because the State Bar successfully moved to dismiss three of the four counts of the original notice to show cause. Respondent does not support this rather novel argument with authority. He does not allege, nor is there any evidence to suggest, that the State Bar did not have good cause to file the three counts. Respondent has not demonstrated how the dismissal of three counts against him in 1990 caused specific prejudice.

[7] Respondent next argues that the hearing judge did not allow him to present evidence that the market value of the house increased during the pendency of the estate which would have established that his decision not to sell the house was reasonable. Even if we accepted respondent's contention, it would not provide justification for his inaction. The heirs repeatedly requested the earliest possible distribution and respondent did not consult with them regarding his decision to hold the property, nor did he seek probate court approval to hold the property beyond the one year. In addition, increasing market value of the house did not justify respondent's failure to seek a partial distribution of the personal property, or failure to file the inventory within three months, or failure to distribute the remaining assets of the estate for over five years.

Respondent next contends that several evidentiary rulings by the hearing judge were in error. He first alleges that certain credibility determinations of the hearing judge are not supported by the evidence. Respondent has not directed our attention to any evidence in the record that would support our modification of the allegedly erroneous credibility determinations. Respondent also complains that the hearing judge permitted a State Bar witness to give expert testimony even though not qualified. We agree with the examiner that the witness was a percipient witness, not an expert. [8] Respondent further asserts that the hearing judge refused to allow testimony regarding respondent's research on probate practices in the county where he practiced, which respondent claimed would show that probate cases routinely take longer than one year in the county. Respondent's specific request was for a continuance to gather and present the evidence. The hearing judge denied this request on the grounds that respondent's research would be self-serving and the evidence would not be material to whether respondent improperly delayed the administration of the estate. As indicated above, respondent had more than ample time prior to trial to prepare his defense. Thus, we do not find the denial of the continuance was error. However, even if it was error, we agree with the hearing judge that the evidence would have very little probative value to the issues in this case. The custom and practice in his county would not explain or excuse respondent's failure to close the estate for over five years.

[9] Respondent's next complaint that he was not allowed to present mitigating evidence without the prior approval of the State Bar is simply not true. The hearing judge requested that respondent discuss his evidence in mitigation with the examiner to see if they could "work something out" with regard to the evidence. Essentially, the hearing judge was seeking to promote stipulations for the introduction of character letters. Respondent was not required to obtain prior approval of the State Bar to present mitigating evidence.

[10] Respondent next argues that he was not able to present an adequate defense because the hearing judge permitted the introduction into evi-

dence of the transcript of the superior court trial even though much of the testimony was not relevant to the State Bar trial. Respondent also contends that the hearing judge failed to inform him of the transcript testimony that would influence the hearing judge. The transcript in question is of the September 1985 hearing on the heirs' petition to remove respondent. The transcript was admissible pursuant to Business and Professions Code section 6049.2. The hearing judge admitted the transcript subject to respondent's motion to strike those parts that were not material or relevant. Respondent never moved to strike particular parts of the transcript.

Respondent apparently believes that the hearing judge should have "prejudged" the evidence so respondent could be informed of those parts of the transcript to which the judge would give weight. He does not cite authority in support of this contention and we are aware of none. The examiner notified respondent in her pretrial statement that she would seek to introduce the 106-page transcript. The hearing judge indicated to respondent at the pretrial hearing in January 1991 that he would probably allow the transcript to be introduced. Respondent had ample opportunity to prepare a defense to the matters in the transcript. Respondent also claims that the hearing judge allowed the State Bar to indicate the parts of the transcript that it was relying on after the close of trial when it was too late for respondent to give testimony regarding those matters. Again, respondent had ample notice and opportunity to prepare his defense to any matter contained in the transcript.

Respondent asserts that he was prejudiced because the State Bar was allowed to change the order of witnesses which deprived him of the opportunity to prepare to cross-examine those witnesses. The examiner indicated in a pretrial conference in response to respondent's inquiry regarding the length of time she needed for her case in chief that she would be calling four witnesses, including respondent. The examiner specifically stated that she was not representing the "sequence of events now, I'm just talking in terms of bulk time." Respondent objected at trial when the examiner called Stewart as her first witness and not respondent. Respondent indicated that he

thought he was going to be first and therefore had not prepared to cross-examine Stewart. Stewart was an out-of-state witness and rescheduling his testimony would have created problems. Respondent was aware of the identity of all of the State Bar's witnesses at least from the January 1991 pretrial statement and conference and therefore had ample opportunity to prepare his cross-examination of any or all of them on any given day. Furthermore, the examiner did not make any representations as to the order of the witnesses she would be calling.

Finally, respondent complains that the hearing judge did not review the depositions of Stewart or Pollick. Both Stewart and Pollick testified at trial and respondent had ample opportunity to cross-examine them. In addition, after trial the hearing judge permitted respondent to submit those portions of the deposition transcripts that respondent wanted the hearing judge to review, which respondent did in September 1991. There is no indication in the record that the hearing judge did not review and consider the portions of the depositions submitted.

C. Culpability

Respondent argues that it was not unethical for him to refuse to distribute the personal property of the estate without first obtaining a court order for the distribution. Respondent asserts that the hearing judge found that he should have allowed the beneficiaries to remove the personal property at once. The hearing judge did not make such a finding. Rather, the hearing judge concluded that it was not below the standard of care nor wrong for respondent to have refused distribution of the personal property until there was an order for distribution. As respondent indicates in his brief on review, the earliest time for filing a petition for preliminary distribution was early May 1984. Despite the requests of the beneficiaries for early distribution, an order for preliminary distribution was not obtained until early July 1985 when respondent and Egan stipulated to the distribution. Our reading of the hearing judge's decision in this matter indicates that the unwarranted delay in seeking an order for preliminary distribution is the basis for the judge's decision with regard to this issue.

Respondent next argues that it was not unethical for him to take a full year from the date of the issuance of the letters testamentary to complete the administration of the estate, as authorized by former Probate Code section 1025.5. Respondent asserts that the legislature set the one-year time standard and the State Bar Court cannot change that standard.

[11] The hearing judge concluded that respondent's obligation to perform services competently under rule 6-101(A)(2) applied regardless of whether the estate was distributed in over or under one year. We agree. Respondent does not cite any authority, nor are we aware of any, that indicates that compliance with the time limitations set forth in the Probate Code is a defense to a rule 6-101(A)(2) charge, or that indicates that noncompliance with the time limitations establishes a per se violation of the rule. The focus of the inquiry for a rule 6-101(A)(2) charge is whether the attorney intentionally, recklessly, or repeatedly failed to apply the learning, skill, and diligence necessary to discharge the attorney's duties arising from his or her employment or representation. Compliance with the time limitations of the Probate Code is but one factor to be considered in making this determination. (Cf. *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 57 [an attorney's failure to bring a client's lawsuit to trial within the statutory time period was not a violation of rule 6-101(A)(2) because there was no evidence that such failure resulted from anything other than the attorney's simple error in miscalculating the date].)

In any event, respondent failed to comply with the time limitations of former Probate Code section 1025.5 in that he did not file the petition for final distribution until May 1985, which was 14 months after the issuance of the letters. Moreover, respondent did not distribute the balance of the estate until 1989, approximately five years after the letters were issued and approximately two and one-half years after his appeal was decided. The record shows no reason justifying these delays. Again, it is these time

frames that we find to be the basis for the hearing judge's decision.

Respondent next contends that the hearing judge's decision is not supported by the record. In support of this argument, he attacks two minor factual findings and argues that he had a good faith belief that the superior court consented to the filing of the accounting after the one-year deadline, that he performed services for the estate during the first year, and that his time was limited during the first year because of other pressing personal and professional matters. Respondent concludes that his actions were not wilful or intentional and that he "did not have any 'reckless disregard' for the estate."

Respondent asserts that he first met Floy Munk before Dixon's death, not the day before the funeral as found by the hearing judge; and that the beneficiaries had indicated that the personal property included "jewelry," "valuables," and items that were "precious and important" to them, not "heirlooms" as the hearing judge found. Both findings are inconsequential to the hearing judge's conclusion that respondent recklessly failed to perform services competently. Thus, even if respondent's assertions are correct and we were to change these two factual findings, no modification of the hearing judge's conclusion would be warranted.⁵

Respondent argues that the superior court consented to the late filing of the petition for distribution of the estate because the court continued the hearing on the beneficiaries' petition to remove respondent from April 1985 to May 1985. The hearing judge rejected respondent's testimony at the State Bar trial that the April hearing was continued to allow him to file the final accounting by May 1, 1985, and that the petition to have him removed was dropped because he filed the accounting. On review, we must give great weight to the hearing judge's credibility rulings. (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 931; *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 42.) Respondent has not

5. Respondent and Munk apparently did converse during Dixon's hospitalization just prior to her death. (Exh. 2, pp. 42-43.) "Heirloom" is not a term of art and is defined as "something

of special value handed on from one generation to another." (Webster's Ninth New Collegiate Dictionary (1990) p. 562.)

directed our attention to any evidence in the record, nor are we aware of any, that would cause us to modify this credibility determination. In any event, we agree with the hearing judge that the few weeks between April and May 1985 are of no consequence. The significant part of this case is respondent's failure to bring this estate to closure for over five years.

Respondent's arguments regarding the services he did perform and the limitations on his time during the first year of the estate seem to be in support of his conclusion that his actions were not wilful or intentional and were not with reckless disregard. Respondent argues that during the first year of the estate, he marshalled most of the assets of the estate, sent the inventory to the referee, and was willing to distribute the estate property pending a ruling on the beneficiaries' petition to remove him, and that the estate was not harmed by his actions. Furthermore, during that first year of the estate, his time was limited because of the illness of his granddaughter, funerals for two relatives, the hospitalization and death of his mother-in-law, and the manslaughter trial of an indigent friend.

Respondent refuses to focus on the fact that he failed to close this relatively simple estate for over five years. During that period of time, he failed to file the inventory within three months after his appointment as administrator (former Prob. Code, § 600); failed to petition for a partial distribution despite the beneficiaries' repeated requests; failed to file the final accounting within the one-year time frame (former Prob. Code, § 1025.5); and failed to file for settlement of the supplemental accounting and distribute the remaining assets of the estate for over five years from the issuance of the letters and two and one-half years after his appeal was decided. [12a] The fact that respondent performed some services for the estate does not excuse his failure to distribute the assets and close the estate for over five years, especially where, as here, respondent asserts that he was busy on other matters. An attorney has an obligation to perform services diligently (rule 6-101(A)) and if the attorney knows he does not have or will not acquire sufficient time to do so, he must not continue representation in the matter (rule 6-101(B)).

[12b] A wilful violation of the Rules of Professional Conduct is established where it is demonstrated that the attorney "acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) As we recently noted in *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179, "An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. [Citations.] Such misconduct need not involve deliberate wrongdoing [citation] or a purposeful failure to attend to the duties due to a client. [Citation.] . . . [A]n attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. [Citations.]" Respondent's actions were wilful. He repeatedly failed to perform the acts necessary to close the estate for over five years despite knowing that the beneficiaries desired the earliest possible distribution. As a result, we conclude that respondent wilfully violated rule 6-101(A)(2) by recklessly and repeatedly failing to perform services diligently.

DISCIPLINE

Respondent contends that even if culpability is found, the discipline recommended is too severe. He asserts that two years stayed suspension and six months actual suspension is tantamount to disbarment at his age. Furthermore, he argues that he was attempting to serve and increase the estate for the benefit of the beneficiaries and the petition for distribution was "only 56 days" late. Finally, he contends that the misconduct in his prior discipline was more egregious than the present misconduct and the discipline in the prior matter was significantly less. Respondent does not argue that the hearing judge's factual findings with regard to the aggravating and mitigating circumstances are not supported by the record.

[13] The only mitigating factor found by the hearing judge was respondent's years of practice since his admission to practice law in 1959 with only one prior discipline. (Std. 1.2(e)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V ("standard[s]").) The absence of

a prior disciplinary record over many years of practice is considered an important mitigating factor. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 798-799.) Even where the attorney has a record of prior discipline, many years of blemish-free practice prior to the first act of misconduct has been considered a mitigating circumstance where the prior and present misconduct occurred during the same time period and within a narrow time frame. (*Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) Respondent's prior and present misconduct did not occur during the same time period or within a narrow time frame. His past misconduct occurred from roughly 1979 to 1984 and his present misconduct occurred from roughly 1984 to 1989. Thus, we do not view respondent's years of practice as an important mitigating factor. In addition, we note that the absence of a prior disciplinary record over many years of practice is considered a mitigating circumstance because it indicates that the misconduct under consideration is aberrational and therefore less likely to recur. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245.) As discussed below, there are facts present in this case which increase the risk that respondent will repeat his misdeeds.

[14] Respondent testified at trial that he had other pressing personal and professional obligations during the first year of the administration of the estate. The hearing judge did not find these obligations mitigated the misconduct. We agree. Office workload does not generally serve to substantially mitigate misconduct. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101.) Stressful personal problems may mitigate misconduct in the appropriate case. (See std. 1.2(e)(iv).) However, respondent's workload or personal problems, which he asserts occurred during the first year, do not adequately explain his five-year delay in completing the administration of the estate. (*Carter v. State Bar, supra*, 44 Cal.3d at p. 1101.)

In aggravation, the hearing judge found that respondent has a record of prior discipline (std.

1.2(b)(i)), the misconduct significantly harmed the beneficiaries (std. 1.2(b)(iv)), and respondent manifested indifference toward rectification of or atonement for his misconduct (std. 1.2(b)(v)). In May 1990, the Supreme Court suspended respondent from practice for three years, stayed that suspension and placed him on three years probation on conditions, including thirty days actual suspension from practice. (*Layton v. State Bar, supra*, 50 Cal.3d at p. 906.)⁶ As indicated above, the prior matter also involved a single probate matter in which respondent was found to have failed to perform services competently as both executor and attorney to the estate. Respondent failed to timely file estate tax returns, failed to preserve estate assets, and failed to timely distribute estate property. The misconduct in the present matter occurred before the Supreme Court disciplined respondent in the prior matter in May 1990. Nevertheless, the notice to show cause, hearing department decision and review department decision in the prior matter all predated the last acts of misconduct in the present matter. In addition, respondent was removed as executor in the prior matter in August 1984, which was before the expiration of the one-year time period of former Probate Code section 1025.5 in the present matter. None of these events apparently served to heighten respondent's awareness and understanding of his ethical duties.

The hearing judge found that respondent significantly harmed the beneficiaries in that they had to hire another attorney in order to have respondent removed as executor and had to pay more in attorney fees to defend against respondent's appeal than the amount of fees involved in the appeal. In the hearing judge's view, "Although respondent's appeal was not frivolous in the sense that he was legally entitled to appeal the reduction of his fees, his doing so because he was unwilling to consider himself wrong when he was egregiously wrong was not an ethical or moral thing to do." (Decision, p. 27.)

[15] While respondent's motive in appealing the reduction of his fees may be suspect in light of the

6. The State Bar record of the prior discipline was filed with the court on August 5, 1991, but was not introduced into

evidence. We correct this oversight by admitting the record into evidence.

amount involved, there is no clear and convincing evidence in the record that the appeal was in bad faith or was otherwise improper. In light of the "important policies favoring unfettered access to the courts" (*Lubetzky v. State Bar* (1991) 54 Cal.3d 308, 317), we decline to consider respondent's appeal of the reduction of his commissions and fees an aggravating factor. Nevertheless, we agree with the hearing judge that respondent's failure to act competently did cause harm to the beneficiaries in that they incurred attorney's fees and expenses in seeking to remove respondent. In addition, the beneficiaries were harmed in that they were deprived for an unwarranted period of time of the use of the money and/or property that was eventually distributed to them.⁷

[16a] The hearing judge further found that respondent manifested indifference toward rectification of or atonement for his misconduct in that he showed no insight or recognition of his misconduct. We agree. Respondent was removed as executor in the prior matter; he was disciplined in that prior matter based on conduct that closely parallels his conduct in the present matter; and he was found responsible for the unwarranted delays in the administration of the estate in the present matter by the superior court, the Court of Appeal and the State Bar Court. Despite these events, respondent asserts on review before us that his inaction should be excused because he performed some services for the estate, he was busy with other personal and professional matters, and the original petition to distribute the estate was only 56 days late.

[16b] We also agree with the hearing judge that respondent's indifference toward his misconduct is a substantial factor in the discipline recommendation. "An attorney's failure to accept responsibility for, or to understand the wrongfulness of, her actions may be an aggravating factor unless it is based on an honest belief in innocence." (*Harris v. State Bar*

(1990) 51 Cal.3d 1082, 1088.) As in *Harris*, respondent merely repeats his version of the events. Respondent's assertion before us that he is not culpable because he performed some services, was busy with other matters, and was only 56 days late in filing the original petition is not in our view an honest belief in innocence. Rather, this argument reinforces the hearing judge's conclusion that respondent simply does not understand or appreciate the requirement that he devote the diligence necessary to discharge his duties arising from his employment. We find respondent's assertions exhibit a disturbing lack of insight into the misconduct which in turn causes concern that he will repeat his misdeeds.

We agree with respondent that the misconduct in his prior discipline was more egregious in terms of the financial harm suffered by the estate than the present misconduct. Respondent failed to file a federal tax return on behalf of the estate in that prior case, which resulted in penalties and interest against the estate of approximately \$4,000, and he allowed estate funds to accumulate in a non-interest-bearing account for considerable periods of time. (*Layton v. State Bar, supra*, 50 Cal.3d at p. 896.)

[17a] Nevertheless, in both the prior and current matters, respondent's lack of diligence delayed distribution of the assets in these two relatively uncomplicated estates for over five years. In both matters, respondent simply failed to apply the diligence necessary to bring the estates to closure for exceedingly lengthy periods of time without justification. Because of the similarity between the past and present misconduct, we would ordinarily view the present misconduct as warranting only slightly greater discipline than imposed in the prior matter. (See std. 1.7(a) [discipline imposed in a second or subsequent disciplinary matter against an attorney should be greater than the discipline imposed in the first or preceding disciplinary matter].) However, respondent's failure to understand or appreciate his

7. The hearing judge also believed that respondent deliberately failed to distribute the remaining assets of the estate promptly after the court order in September 1985 in order to "annoy" the beneficiaries. The hearing judge did not find this to be a factor in aggravation and there is no indication in the

record as to the extent to which, if any, the belief affected the hearing judge's discipline recommendation. We do not find clear and convincing evidence in the record to support the hearing judge's belief.

present misconduct causes concern regarding his handling of future cases, and, in our view, is the primary justification for imposing significantly greater discipline than imposed in the prior matter. Based on our independent review of the record, we conclude that the hearing judge's recommended discipline is appropriate in light of respondent's present and past misconduct, the lack of mitigating factors in the present matter and the presence of several aggravating factors, including respondent's failure to accept responsibility for, or understand the wrongfulness of, his misconduct.

[18a] Finally, we note that the hearing judge recommended that respondent be ordered to take and pass the California Professional Responsibility Examination ("CPRE") recently developed by the State Bar for use in disciplinary proceedings. Although we do not adopt the hearing judge's reasoning for recommending the California examination,⁸ [18b - see fn. 8] we adopt the recommendation as it does not appear that respondent was ordered to take the CPRE or PRE in his prior discipline matter. (*Layton v. State Bar*, *supra*, 50 Cal.3d at p. 906.) We therefore recommend in this proceeding that respondent be ordered to take and pass the California examination. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)⁹ [18c - see fn. 9]

FORMAL RECOMMENDATION

[17b] For the reasons stated above, we recommend that respondent be suspended from the practice of law for a period of two years, with the execution of the suspension stayed, and that he be placed on three years probation on the conditions specified in the hearing judge's decision filed November 6, 1991, including actual suspension for six months.¹⁰ We further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State of California within one year from the effective date of the Supreme Court order in this matter and furnish satisfactory proof of such passage to the Probation Unit, Office of Trials, Los Angeles. We also recommend, as did the hearing judge, that respondent be ordered to comply with rule 955 of the California Rules of Court. Finally, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

8. [18b] The hearing judge was under the impression that the respondent had previously been ordered by the Supreme Court to take the national Professional Responsibility Examination ("PRE") and that the hearing judge was ordering a second examination. Normally, if a respondent has recently been ordered to take a professional responsibility examination, he is not required to do so in connection with subsequent discipline. (See, e.g., *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490.)

9. [18c] In *Segretti*, *supra*, the Supreme Court imposed the PRE developed to test attorneys' knowledge of the ABA Model Code of Professional Responsibility (since replaced by

the ABA Model Rules of Professional Conduct) and indicated that it should be routinely ordered in cases serious enough to require suspension of the attorney. The new CPRE which focuses on the California Rules of Professional Conduct is now routinely ordered by the State Bar Court and Supreme Court in cases where the national PRE was previously ordered. (See, e.g., *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 715.)

10. We modify the conditions of probation where appropriate to refer to the newly created Probation Unit in the Office of Trials instead of the former Probation Department of the State Bar Court.