STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRIAN STUTT RODRIGUEZ

A Member of the State Bar

Nos. 88-O-14072, 90-O-11274, 91-P-07029

Filed July 21, 1993

SUMMARY

Respondent was found culpable by a hearing judge of eleven counts of misconduct, involving three instances of misappropriating client funds and gross neglect of his trust account, sending letters in two cases threatening to file criminal or administrative charges to secure an advantage in litigation, failing to cooperate with the State Bar's investigation of two complaints against him, and misleading a superior court judge to excuse a failure to appear in court. Also, as a result of prior misconduct, respondent had been placed on actual suspension for a minimum of two years and ordered to comply with probation conditions and give notice of the suspension under rule 955, California Rules of Court. In this proceeding, respondent was found to have failed to give the required notice of his prior suspension, violated the terms of his probation, and, in one instance, practiced law while on suspension. The hearing judge recommended that respondent remain on actual suspension for an additional period of time. (Hon. Alan K. Goldhammer, Hearing Judge.)

The Office of Trials requested review, contesting the hearing judge's discipline recommendation and urging that respondent be disbarred. Respondent also sought review, requesting that the review department reverse the hearing judge's findings that respondent violated his probation conditions and dismiss the probation revocation case. The review department, on independent review, generally affirmed the culpability findings of the hearing judge, and found respondent culpable of three additional instances of unauthorized practice of law. While acknowledging the presence of some mitigating evidence, the review department concluded that the hearing judge gave greater weight to that evidence in the balance than was warranted by the serious and wide-ranging misconduct committed by respondent. A disbarment recommendation would have been appropriate based on the rule 955 violations alone. Further, respondent's prior suspension and probation had been ineffective to stem his misconduct, and he had been unable to comply with court orders. After reviewing comparable Supreme Court case law, the review department recommended disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Mark Torres-Gil

For Respondent: Tom Low

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

HEADNOTES

[1] **106.20 Procedure—Pleadings—Notice of Charges**
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]
Where respondent's description of his car problems in explaining his failure to appear for a court hearing differed only in degree from the actual events, the difference did not constitute deception or an attempt to mislead the court. The steps respondent took once he experienced the car problems might not have been adequate to excuse his failure to appear, but this aspect of his conduct was not charged as a disciplinary violation and thus could not form the basis of a culpability finding.

[2] **213.40 State Bar Act—Section 6068(d)**
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Where respondent represented to a judge that he had failed to attend an earlier hearing because he had been in another city appearing before another judge in a family law matter, when in fact he had had no court appearance but had been in the other courthouse on other errands, his statement was materially dishonest, because the proffered excuse was intended to carry more weight than the truth would have. Respondent's deception therefore constituted an act of dishonesty in violation of the moral turpitude statute, as well as a violation of the statute and rule of professional conduct prohibiting attorneys from misleading judicial officers.

[3] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
Wilfulness with regard to a rule of professional conduct violation does not require proof of an evil intent or bad purpose, but merely proof that the attorney intended to do that which the rule prohibits.

[4] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where respondent did not believe his client had a strong case and thought more evidence was needed in order to prevail, he had a choice: proceed diligently in advancing the client's legitimate claims, or promptly advise the client that she had no meritorious claims and withdraw from representation if the client insisted on pursuing her claim. He could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw so the client might consult other counsel. This course of action warranted a finding that respondent was culpable of incompetent representation.

[5 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Where respondent honestly believed that he was entitled to retain portions of his clients' cost advances, even though this belief was unreasonable and unsubstantiated, respondent's retention of the funds did not necessarily warrant a conclusion that his conduct was dishonest, especially where respondent's gross negligence in handling the same funds had already been held to violate the moral turpitude statute.

[6] **106.30 Procedure—Pleadings—Duplicative Charges**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Where hearing judge concluded that respondent misappropriated a portion of client's cost advance under trust account rule, and violated moral turpitude statute by gross negligence in supervising client trust funds, it was unnecessary for review department to amend hearing judge's conclusions to establish that those sections were violated, and review department declined to adopt additional conclusion that respondent acted dishonestly in misappropriating client's funds.

[7] **230.00 State Bar Act—Section 6125**
Where respondent knowingly permitted a civil complaint bearing his name as counsel to be filed after the effective date of his suspension from practice, respondent thereby violated statute prohibiting practicing while suspended. Even if respondent prepared complaint prior to suspension, did not intend to practice while suspended, and was only trying to assist client by having complaint filed, this did not constitute an excuse for respondent's conduct.

[8] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
1099 Substantive Issues re Discipline—Miscellaneous
1911.90 Rule 955—Other Procedural Issues
Claim that respondent's failure to give required notice of suspension in four different client matters should not have been charged as four separate violations was relevant to degree of discipline but not to culpability.

[9 a, b] **213.20 State Bar Act—Section 6068(b)**
221.00 State Bar Act—Section 6106
1913.29 Rule 955—Delay—Generally
1913.42 Rule 955—Compliance—Notice
Where respondent had been ordered to give notice of prior disciplinary suspension and to file affidavit of compliance with such order, and respondent failed to give timely notice and failed to notify opposing counsel in three matters, and respondent's affidavit of compliance was filed late and incorrectly stated that all courts and opposing counsel had been notified of his suspension, respondent's gross neglect and lack of diligence in complying with the order to give notice violated the statute requiring respect for courts, but did not constitute an intentional misrepresentation of facts to the Supreme Court in violation of statute prohibiting acts of moral turpitude and dishonesty.

[10] **230.00 State Bar Act—Section 6125**
While suspended from practice, an attorney may research any point of law or draft any legal document so long as it is done for the independent review of an active member of the State Bar in good standing who will take responsibility for the work to the client. Where respondent drafted a detailed points and authorities directly for a client while respondent was suspended, this conduct constituted unauthorized practice of law, regardless of respondent's laudable motive in attempting to aid the client at a critical time in the client's case.

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

Once an attorney is placed on suspension, he or she is prohibited from engaging in any law practice or even holding himself or herself out to opposing counsel as entitled to practice. Respondent's sending a counteroffer in settlement to opposing counsel in one matter the day after his suspension became effective, and his post-suspension use of his secretary in another matter to communicate with opposing counsel concerning a settlement offer pending at the time of his suspension, constituted unauthorized practice of law.

[12 a-c] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
141 Evidence—Relevance
171 Discipline—Restitution
745.51 Mitigation—Remorse/Restitution—Declined to Find

Restitution payments made under pressure of disciplinary proceedings are entitled to little or no weight in mitigation of discipline. However, whether restitution has been completed is important to deciding whether it should be required as a condition of probation, or, if disbarment is recommended, to whether respondent must make restitution as an issue bearing on rehabilitation for reinstatement. Thus, evidence of restitution payments made by respondent's father was relevant and properly admissible, even though not constituting mitigation, and review department granted motion to admit such evidence on review where hearing judge had declined to accept it. However, other evidence offered by respondent on review regarding Client Security Fund claim filed by respondent's client was not admitted by review department where it was not relevant to issues in proceeding. (See rule 570, Trans. Rules Proc. of State Bar.)

[13] **172.19 Discipline—Probation—Other Issues**
1712 Probation Cases—Wilfulness
1719 Probation Cases—Miscellaneous

It is the responsibility of an attorney on probation to comply with a probation condition requiring the attorney to meet with an assigned probation monitor referee. Even if respondent encountered difficulty in setting up such a meeting, where respondent did not seek the assistance of the State Bar Court's clerk's office, and instead permitted a substantial delay to pass before the required meeting occurred, respondent's neglect constituted a wilful breach of his probation duties.

[14 a, b] **172.17 Discipline—Probation Monitor—Powers and Duties**
172.19 Discipline—Probation—Other Issues
1712 Probation Cases—Wilfulness

It was unreasonable for respondent to believe that he had been excused by his probation monitor referee from filing one of the quarterly reports clearly required by his probation conditions, where respondent knew of his duty to file the quarterly reports timely and knew the exact dates on which those reports were due. Respondent therefore breached his probation duties by failing to file the report.

[15] **213.20 State Bar Act—Section 6068(b)**
802.69 Standards—Appropriate Sanction—Generally
861.10 Standards—Standard 2.6—Disbarment
1913.49 Rule 955—Compliance—Generally

In determining appropriate discipline to recommend for respondent found culpable of violating statute requiring respect for courts based on respondent's violation of Supreme Court order requiring him to give notice of his prior disciplinary suspension under rule 955, review department noted that respondent's failure to give timely and complete notice of suspension, and his filing of

an affidavit which was untimely and inaccurate, would have warranted a recommendation of disbarment, absent strong mitigating circumstances, in a referral proceeding for violation of rule 955.

[16 a, b] **213.20 State Bar Act—Section 6068(b)**
230.00 State Bar Act—Section 6125
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.00 Rule 4-100(A) [former 8-101(A)]
300.00 Rule 5-100 [former 7-104]
320.00 Rule 5-200 [former 7-105(1)]
420.00 Misappropriation
745.39 Mitigation—Remorse/Restitution—Found but Discounted
822.10 Standards—Misappropriation—Disbarment
831.40 Standards—Moral Turpitude—Disbarment
844.51 Standards—Failure to Communicate/Perform—No Pattern—Disbarment
861.30 Standards—Standard 2.6—Disbarment
Where respondent not only wilfully violated order requiring him to give notice of prior disciplinary suspension, but also misappropriated client funds by unilaterally taking cost advances as attorney fees; grossly neglected his trust fund responsibilities; misled a judge; failed to perform services competently; improperly threatened to bring criminal or administrative charges; practiced law while suspended; failed to participate in State Bar investigations, and breached his earlier disciplinary probation, then despite respondent's remorse, proper public protection would be realized by requiring respondent to demonstrate sustained evidence of rehabilitation in a reinstatement proceeding, with its higher standard of proof than the preponderance of the evidence.

[17 a, b] **165 Adequacy of Hearing Decision**
740.39 Mitigation—Good Character—Found but Discounted
745.39 Mitigation—Remorse/Restitution—Found but Discounted
802.62 Standards—Appropriate Sanction—Effect of Aggravation
802.63 Standards—Appropriate Sanction—Effect of Mitigation
802.69 Standards—Appropriate Sanction—Generally
A recommendation as to the degree of discipline properly results from a balanced consideration of all factors, requiring the State Bar Court to weigh mitigating and aggravating factors. Where respondent had committed serious and wide-ranging misconduct, his sincere expression of remorse and his favorable character references could not be weighed heavily, and had been given greater weight by the hearing judge than warranted by the record.

[18] **106.20 Procedure—Pleadings—Notice of Charges**
120 Procedure—Conduct of Trial
130 Procedure—Procedure on Review
141 Evidence—Relevance
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
565 Aggravation—Uncharged Violations—Declined to Find
In determining whether evidence of additional uncharged ethical misconduct should be admitted as aggravating evidence in the discipline phase of the hearing, the hearing judge must balance the desire for additional relevant evidence against the due process requirement of fair notice of all discipline charges. Where there was sufficient evidence in the record to warrant a recommendation of disbarment, it was unnecessary for the review department to resolve a claim that the hearing judge erred in failing to admit aggravating evidence of uncharged misconduct.

[19] **101 Procedure—Jurisdiction**
102.20 Procedure—Improper Prosecutorial Conduct—Delay
107 Procedure—Default/Relief from Default
139 Procedure—Miscellaneous
511 Aggravation—Prior Record—Found
802.21 Standards—Definitions—Prior Record
Where respondent challenged the use of a prior disciplinary matter as evidence in aggravation because he contended the matter had been time-barred, but respondent had defaulted in the earlier proceeding and the prior discipline had been ordered by the Supreme Court over three years earlier, only the Supreme Court could grant the requested relief.

[20] **106.90 Procedure—Pleadings—Other Issues**
131 Procedure—Procedural Issues re Admonitions
135 Procedure—Rules of Procedure
1094 Substantive Issues re Discipline—Admonition
Admonitions are not discipline and may be reopened and proceed anew as a formal disciplinary proceeding if a formal proceeding is brought with two years based on other misconduct. The rules of procedure define the start of a formal proceeding as the issuance of a notice to show cause. (Trans. Rules Proc. of State Bar, rules 415, 550.)

[21] **162.20 Proof—Respondent's Burden**
204.90 Culpability—General Substantive Issues
750.32 Mitigation—Rehabilitation—Found but Discounted
795 Mitigation—Other—Declined to Find
802.30 Standards—Purposes of Sanctions
1719 Probation Cases—Miscellaneous
Respondent's bitterness and disaffection over his prior disciplinary suspension might explain some misconduct toward his clients thereafter, but it could not excuse his misconduct, especially since the suspension and its terms were designed to seek respondent's rehabilitation. Also, respondent's evidence of rehabilitation was depreciated by his inability to comply with his probation conditions, which was relatively recent and occurred after respondent had time to become familiar with his responsibilities.

[22] **101 Procedure—Jurisdiction**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
2502 Reinstatement—Waiting Period
2503 Reinstatement—Showing to Shorten Waiting Period
The required five-year waiting period before a disbarred attorney can apply for reinstatement may be shortened to three years for good cause. By rule, the five-year and three-year periods run from the date of any interim suspension, and Supreme Court precedent has given the same effect to inactive enrollment. (Trans. Rules Proc. of State Bar, rule 662.) The issue whether the waiting period may run from the start of a suspension other than an interim suspension has not been decided, and did not need to be addressed by the review department in recommending disbarment, but could be raised by respondent before a hearing judge if respondent wished to seek reinstatement at the earliest possible time.

ADDITIONAL ANALYSIS

Culpability
Found
213.21 Section 6068(b)

213.41 Section 6068(d)
213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.12 Section 6106—Gross Negligence
230.01 Section 6125
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
300.01 Rule 5-100 [former 7-104]
320.01 Rule 5-200 [former 7-105(1)]
420.12 Misappropriation—Gross Negligence
420.13 Misappropriation—Wrongful Claim to Funds

Not Found

213.15 Section 6068(a)
213.25 Section 6068(b)
213.45 Section 6068(d)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.05 Rule 4-100(A) [former 8-101(A)]
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]
320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

521 Multiple Acts

Declined to Find

535.90 Pattern
582.50 Harm to Client

Mitigation

Found but Discounted

720.30 Lack of Harm
725.31 Disability/Illness
725.36 Disability/Illness
725.39 Disability/Illness
745.31 Remorse/Restitution
745.32 Remorse/Restitution

Standards

801.30 Effect as Guidelines
824.10 Commingling/Trust Account Violations

Discipline

1010 Disbarment
1810 Disbarment
1921 Disbarment

Other

175 Discipline—Rule 955
1751 Probation Cases—Probation Revoked
1915.10 Rule 955—Violation Found

OPINION

STOVITZ, J.:

Respondent, Brian S. Rodriguez, was admitted to practice law in California in 1977. In 1990, he was suspended actually for two years and until he makes the required showing under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) In this consolidated review of two original disciplinary proceedings and a separate probation revocation proceeding, we now review two decisions of a State Bar Court hearing judge each recommending additional suspension.

The State Bar's Office of Trials seeks our review of the hearing judge's decision in the original disciplinary proceedings. While disputing only some of the hearing judge's conclusions, the Office of Trials contends that disbarment, rather than suspension, is the appropriate discipline. Respondent seeks our review in the probation revocation case, urging that we reverse the hearing judge's findings that respondent violated his probation and dismiss that proceeding.

Independently reviewing the records in both proceedings, we have concluded that respondent engaged in misconduct regarded as very serious by the Supreme Court. He wilfully failed to comply with rule 955, California Rules of Court. In three matters, he misappropriated clients' cost advances by unilaterally satisfying his claim for fees and was grossly negligent in supervising trust funds. In four matters, he practiced law while under suspension. In two matters, he threatened criminal or administrative charges to gain a civil advantage. In one matter, he misled a superior court judge as to his inability to attend an earlier hearing. In another matter, he repeatedly failed to perform legal services competently and in two matters, he failed to participate in the State Bar investigation as required by the State Bar Act. Finally, he violated his probation in two respects.

Although we acknowledge the presence of some mitigation, including respondent's remorse and favorable character evidence, respondent's offenses were of the type which warrant disbarment. As we shall discuss, respondent's wilful violation of rule 955, standing alone, would warrant disbarment under guiding decisions. Accordingly, we shall recommend disbarment as urged by the Office of Trials.

I. THE ORIGINAL DISCIPLINARY PROCEEDINGS

A. Culpability.

In 2 consolidated original disciplinary proceedings, respondent was charged with a total of 12 counts of misconduct and found culpable of professional misconduct in 11 of the counts. The parties stipulated to many of the underlying facts in most of the counts and, on review, do not dispute many of the hearing judge's findings. We shall review the counts generally in the order charged and set forth in the hearing judge's decision after stating the following background facts.

Respondent was a sole practitioner. His father was also a lawyer with offices in the same general suite but with a separate practice. Respondent's practice emphasized employment discrimination and wrongful termination matters. At the time of his prior disciplinary suspension in February 1990 (see *post*), respondent had 48 active cases. Many of his clients were executive or professional employees and respondent considered the cases complex. He was without any attorney or paralegal help and often worked 16-hour days and weekends on his cases.

1. Sullivan matter.

In 1988, while representing an executive employed by a transit district, respondent was charged with having failed repeatedly to comply with court orders, failed to appear at scheduled court hearings, misrepresented to the court why he failed to appear at hearings and threatened criminal or administrative charges to gain a civil advantage. (Bus. & Prof. Code, §§ 6068 (b), 6068 (d), 6106; Rules Prof. Conduct, rules 7-104, 7-105.)[1]

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code and all references to rules are to the provisions of the former Rules of Professional Conduct of the State Bar in effect prior to May 26, 1989. References to "present rule" are to the Rules of Professional Conduct effective May 27, 1989, and references to "rule 955" are to the California Rules of Court (see footnote 2, *post*).

Most of the basic findings in this matter rest on stipulated facts. On review, neither party disputes the following basic findings and conclusions of the hearing judge and we adopt them as supported by clear and convincing evidence.

Respondent represented one Sullivan, a transit district executive, in a wrongful discharge action against his public employer. After the district denied Sullivan's claim, respondent filed suit on behalf of Sullivan at the end of 1987 in Alameda County Superior Court. The case was designated as one under the court's program implementing the Trial Court Delay Reduction Act of 1986. Respondent failed to appear for two court hearings in January 1988 in response to defense motions under local court rules, but he appeared at a February 1988 hearing. In June 1988, the superior court directed respondent to file a joint at-issue memorandum. Respondent failed to file the memorandum by its due date or to appear as required. Although respondent appeared at August and October 1988 superior court hearings, he had not filed the memorandum, claiming lack of cooperation from other counsel. When respondent did not appear at a November hearing directing him to show cause why Sullivan's action should not be dismissed, the court dismissed it and denied respondent's later motion to set aside the dismissal. Respondent grounded his motion upon the failure of opposing counsel to have returned the at-issue memorandum to him. He also represented to the superior court that he was unable to appear at the November court hearing because he had had a car fire which had occurred as he was leaving another courthouse in which he claimed to have had a court appearance in a family law matter.

In November 1988, to gain an advantage in Sullivan's civil case, respondent wrote counsel for the transit district, stating that if the suit could not be settled, "appropriate action" would be taken before the district attorney and other named public agencies to bring to the attention of voters alleged unethical and illegal conduct of the transit district's board. Respondent never filed such charges and had no intent to do so if the district settled the Sullivan case. Five days later, respondent wrote another letter to defense counsel reaffirming earlier threats to generate publicity by bringing action before public agencies unless the case settled.

According to respondent, he appealed successfully the superior court's dismissal order and the action was later settled.

The hearing judge concluded that respondent's actions did not violate sections 6068 (a) and 6103 either in the Sullivan matter or in any of the other matters charged. (See, e.g., *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609; *Baker* v. *State Bar* (1989) 49 Cal.3d 809, 815.) The judge concluded that respondent's failure to make court appearances in Sullivan's matter did not violate section 6068 (b) since there was a lack of clear and convincing evidence that that conduct involved bad faith or was disciplinable. However, the hearing judge found that respondent violated section 6068 (d) and rule 7-105 because his representations to the civil court in December 1988 about his failure to appear in November 1988 were deceptive. The hearing judge declined to conclude that this conduct violated section 6106 because he concluded that respondent's misrepresentations were not material to the issues before the superior court and that while "misleading, deceptive, and false," respondent's representations were not "truly dishonest." Finally, for writing the two threatening letters, the hearing judge concluded that respondent violated rule 7-104.

The deputy trial counsel does not dispute any of the findings or conclusions in this matter. Respondent disputes only those conclusions that he deceived the civil court in violation of section 6068 (d) and rule 7-105.

[1] As applied to the facts of this matter, section 6068 (d) and rule 7-105 sanction the same conduct: failing to employ such means only as are consistent with truth and seeking to mislead a judicial officer by artifice or falsity. In seeking to excuse his failure to attend an earlier hearing, respondent made two statements to the superior court judge in December 1988: that he was late because he had experienced a car fire and that he had originally gone to a courthouse in another city and had been in court before another judge on a family law matter. The hearing judge appears to have concluded that respondent's statement as to his car fire was deceptive, but we do not agree. While there appears not to have been any actual car fire, respondent testified without dispute that his car was billowing smoke which he traced to

the leak of oil onto hot engine surfaces. We do not believe the difference in degree between the car problems respondent actually suffered and those he described to the superior court transgressed either section 6068 (d) or rule 7-105. Instead, we see the real problem revealed by the colloquy between respondent and the superior court judge in December 1988 as to respondent's explanation of car trouble to be not one of deceit but one of adequacy; that is, whether the steps respondent took once he experienced car trouble were an adequate excuse for him not to have appeared in court. This aspect of respondent's conduct was not addressed by the charges, and therefore cannot form the basis of any culpability finding.

[2] We agree with the hearing judge, however, that respondent's misstatement to the superior court judge that he was in court before another judge in another city on a family law matter just before his car trouble was deceptive and we conclude it was dishonest as well. We believe that the hearing judge interpreted the facts too generously when he concluded that these statements of respondent were literally true. Respondent testified below that he had no court appearance before another judge. Although he went to the courthouse in the other city, he did so to pick up some family law forms and he may have also called at the family services office in that courthouse. He testified that his representation to the judge was a "factual error." We also find it materially dishonest because it had to be intended to carry more weight than the truth would have carried with the judge from whom respondent was seeking an excuse for not having appeared. (See *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 262; *Bach* v. *State Bar* (1987) 43 Cal.3d 848, 855.) Therefore we conclude that respondent's deception violated section 6106 as an act of dishonesty as well as section 6068 (d) and rule 7-105.

2. Williams matter.

As supplemented by the record, the hearing judge's undisputed findings and conclusions in this matter may be summarized as follows. In 1988, one Williams, manager of two retail outlets of a vision care chain, hired respondent to represent her in a wrongful termination action. In September 1988, respondent wrote a lengthy demand letter to the chain's president, alleging a number of violations by the chain of health or safety laws or regulations about which Williams had earlier complained to chain management. In this letter respondent threatened to present administrative charges to state and local agencies if the chain's president did not respond. In November 1988, respondent wrote to the chain's counsel. Respondent repeated to that counsel his earlier threat of administrative investigation unless a "reasonable and viable counteroffer" was presented within five days. The hearing judge concluded that these letters constituted violations of rule 7-104.

[3] We adopt the judge's findings and conclusions in this matter and we also conclude that the violations were wilful within the meaning of section 6077 and rule 1-100. It has long been settled that wilfulness with regard to a rule of professional conduct violation does not require proof of an evil intent or bad purpose, but merely proof that the attorney intended to do that which the rule prohibits. (*Gadda* v. *State Bar* (1990) 50 Cal.3d 344, 355 [rule 2-101]; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976 [rule 8-101]; *Abeles* v. *State Bar* (1973) 9 Cal.3d 603, 610-611 [former rule 12].) Here the proof was ample to show that respondent acted purposefully.

3. Failure to participate in two State Bar investigations.

As in the preceding count, the findings and conclusions of the hearing judge are not disputed. In January and February 1989, respondent failed to reply to two letters addressed to him from a State Bar investigator concerning the Williams matter. Both letters cited respondent to his statutory duty to cooperate and participate in such an investigation. (§ 6068 (i).) In March 1989, respondent failed to reply to the same investigator's letter concerning the Sullivan matter. This letter also cited respondent to section 6068 (i). From these findings, the judge concluded that respondent wilfully violated section 6068 (i). We adopt these findings and conclusions together with the additional finding that all three letters which respondent failed to answer requested or invited a reply.

4. Bryant matter.

There are only relatively minor disputes among the parties concerning the hearing judge's findings and conclusions of respondent's culpability. In about November 1988, one Bryant, a buyer of supplies for a public transit district, hired respondent to represent her in a claim of discrimination against the district after it allegedly failed to follow employment posting procedures for a senior buyer position and promoted another to that position.

Bryant and respondent entered into a contingent fee contract. Between November 1988 and June 1989, Bryant paid respondent $3,500 in advanced costs called for by the contract. The record is clear that respondent deposited in his trust account about $1,000 of Bryant's $3,500 cost advance. The record is not clear whether any of the remaining $2,500 was so deposited. However, respondent did not use any of the $3,500 for costs, but used it all for attorney fees. Moreover, between November 1988 and his February 1990 suspension, respondent failed to file any claim or action for Bryant and the only legal work he performed was the preparation of a draft of a claim which he sent to Bryant in November 1989.

Respondent's two-year minimum actual suspension was effective February 5, 1990. He had until March 7, 1990, to notify Bryant by certified mail of his suspension as required by rule 955.[2] He notified Bryant on April 4, 1990. Sometime after April 4, respondent refunded $3,000 to Bryant, but kept $500 for investigative and secretarial expenses. The hearing judge found that respondent "sincerely believed" he was entitled to keep the $500, but did not have a reasonable basis for doing so.

The hearing judge concluded that respondent did not improperly withdraw from employment but that he did violate section 6068 (b) by failing to give Bryant timely notice of his suspension as required by rule 955, California Rules of Court (hereafter, rule 955). The judge found respondent culpable of failing to perform services competently as required by former rule 6-101 and present rule 3-110(A) by recklessly failing to take sufficient steps to advance Bryant's claim despite receiving a substantial cost advance during the more than one year between the time Bryant retained him and the start of his prior suspension. Based on a lack of clear and convincing evidence, the hearing judge concluded that respondent did not violate the rules requiring the deposit of cost advances in a trust account. Finally, the judge concluded that respondent misappropriated $500 of Bryant's cost advance (rule 8-101(A); present rule 4-100(A)) and through gross neglect of his duty to oversee entrusted funds also violated section 6106.

[4] The only dispute respondent offers on review in this matter is that he is not culpable of incompetent representation. His objection is not well taken. In the more than one year between his agreement to represent Bryant and his suspension, he did meet with Bryant and his investigator and reviewed facts pertinent to Bryant's case but he prepared only a draft of a claim. He testified that he did not believe Bryant had a strong case and more evidence was needed to prevail. Bryant testified that respondent never told her that he needed more evidence in order to proceed. Bryant did recall respondent saying that more evidence would result in a larger recovery. The hearing judge heard the testimony of both Bryant and respondent and reviewed the documentary evidence. He resolved this issue against respondent. We affirm. In representing Bryant, respondent had a choice: proceed diligently in advancing her legitimate claims or give his best advice to his client that she had no meritorious claims promptly after so concluding, withdrawing if necessary, on proper notice, if the client insisted on pursuing her claim. (See present rule 3-700.) He could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw so that she might consult other counsel. (See, e.g., *Bernstein* v. *State Bar* (1990) 50 Cal.3d 221, 232.)

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2. As pertinent, rule 955 required respondent to notify clients, courts and opposing counsel by certified mail of his 1990 suspension within 30 days of its effective date, and of the clients' entitlement to their papers and property and to file with the Supreme Court within 40 days of the start of his suspension an affidavit that he sent the required notices.

[5a, 6] The deputy trial counsel accepts the findings of the judge in the Bryant matter, but would also find that respondent had no reasonable entitlement to the $500 of Bryant's cost advance he kept and that respondent failed to maintain that cost advance in trust. We adopt these requested supplemental findings. However, the deputy trial counsel would also have us conclude that respondent acted dishonestly in misappropriating Bryant's funds in violation of section 6106. We hold that on this record, the hearing judge's conclusions were appropriate. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465.) Respondent believed he was entitled to Bryant's funds, albeit that his claim was unreasonable and unsubstantiated. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 332; *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099; cf. *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 166-169.) Moreover, since the hearing judge concluded that respondent misappropriated $500 of Bryant's cost advance under rule 8-101(A) and was grossly negligent in supervising these trust funds in violation of section 6106, it is unnecessary to amend the legal conclusions in this count to establish that those sections were violated. We note again that respondent has not challenged the hearing judge's findings and conclusions relative to the Bryant cost advance.

5. Davalos matter.

The hearing judge found no culpability in this matter and the deputy trial counsel has not disputed those findings and conclusions. We summarize them briefly. Davalos, a bus driver for a public transit district, hired respondent in 1987 to defend him after being cited following an accident while driving a district bus. Respondent represented Davalos on the citation matter. In 1988, solely as a favor, respondent wrote several letters for Davalos concerning an employment issue and a suit filed against him and the district arising out of the accident. As of his February 1990 suspension, respondent was not representing Davalos in any matters.

Based on the hearing judge's assessment of the credibility of witnesses, the judge concluded that respondent was not culpable of charges that he failed to act competently, improperly withdrew from employment or failed to notify Davalos of his February 1990 suspension. On our review of the record, we adopt the hearing judge's findings and conclusions.

6. Schillinger matter.

The parties dispute only a small portion of the judge's decision in this matter. As supplemented by the record, we adopt the following findings. One Schillinger had been a police department captain. At age 55, he was hired as a security official of a California bank. He became a vice president and "chief special agent" of the bank. Eight years later, in June 1985, his job duties were consolidated with those of another bank officer and his position was eliminated. He was offered two months paid leave, six months severance pay, outplacement counseling and an additional two months leave permitting him retirement benefits. Shortly thereafter, he was hired by a residential community as its director of public safety.

Schillinger had hired other counsel to sue the bank for wrongful termination as a result of age discrimination. In March 1988, he retained respondent to take over his representation. Schillinger agreed to a contingent fee for respondent's services and a $10,000 advance for costs. At this time, a motion for summary judgment filed by the bank was pending in San Francisco Superior Court. In April 1988 the motion was granted on the grounds that the National Bank Act (12 U.S.C. § 24, et seq.) authorized the bank to terminate the jobs of bank officers such as Schillinger, as at-will employees, and that that federal law pre-empted Schillinger's state claims.

In August 1988, respondent appealed on behalf of Schillinger from the summary judgment, briefed the issue and, one month before his February 1990 suspension, argued it before the appellate court. In April 1990, the appellate court affirmed the trial court's judgment.

Respondent did not notify Schillinger timely of his suspension as required by rule 955. In March 1990, after Schillinger had learned from another that respondent had been suspended, Schillinger requested an accounting from respondent of costs advanced. Respondent did not reply. As we shall discuss, *post*,

two years later respondent repaid Schillinger $10,687. Receipts respondent had given Schillinger earlier showed that respondent had spent only about $1,300 for costs. Schillinger was able to hire new counsel and he ultimately settled his suit against the bank.

The hearing judge concluded that respondent's failure to timely give notice of his suspension violated section 6068 (b). That conclusion is not disputed and we adopt it. With respect to respondent's handling of Schillinger's $10,000 cost advance, the judge concluded that respondent misappropriated all but $1,300 of that advance but his misappropriation was one in violation of present rule 4-100(A), not section 6106. The judge did conclude that respondent committed moral turpitude in violation of section 6106 based on his gross negligence in handling his contingent fee contract with Schillinger and in not seeking to amend that contract to provide for fees for the work he did for Schillinger on the summary judgment appeal. The hearing judge concluded that respondent violated present rule 4-100(B)(4) by not promptly paying Schillinger the cost advance funds he was entitled to receive, but that respondent did not violate rule 4-100(B)(3) because he did not fail to render Schillinger an appropriate accounting.

At trial, respondent defended the charge of misappropriation of Schillinger's cost advance, by testifying that when he lost the summary judgment motion and agreed to appeal, Schillinger agreed that the $10,000 cost advance, less what respondent had already used for costs, would be his attorney fee for the appeal, based on an hourly fee of $150. Schillinger denied that he had so agreed, pointing to his understanding of his contingent fee agreement with respondent. That agreement did not specifically provide for fees for an appeal and it was never amended in writing.

Respondent's only attack on review on the hearing judge's decision in this matter is his argument that, although he may have mistakenly thought himself entitled to keep most of Schillinger's cost advance, that conduct did not involve moral turpitude. This argument rests on a mistaken understanding of the hearing judge's decision. The decision below did not find respondent culpable of violating section 6106 because of a dishonest belief of entitlement to funds, but rather because of gross neglect in securing his client's trust funds.

[5b] The deputy trial counsel's only dispute with the findings centers around the contention that respondent had no reasonable belief in his entitlement to $8,700 of Schillinger's cost advance. As in the Bryant matter, the deputy trial counsel also urges that we find respondent's use of Schillinger's funds to be dishonest. We adopt the one change in the findings urged by the deputy trial counsel, concerning the status of respondent's trust account balance, but, in our view, and consistent with our holding in the Bryant matter, *ante*, there is no reason to change the hearing judge's conclusions which did include respondent's misappropriation under present rule 4-100(A) and his gross neglect violating section 6106.

7. Szoboszlay matter.

The parties have disputed only some of the findings and conclusions of respondent's culpability in this matter. We adopt the following findings and conclusions as amply supported by the record. In July 1988, one Szoboszlay, a bank officer, hired respondent to represent her in a worker's compensation case and in an action against the bank based on alleged sex discrimination and harassment. Respondent entered into an oral contingent fee agreement with Szoboszlay for representation in her civil case against the bank and, in October 1988, Szoboszlay advanced respondent $3,000 to be used for costs. Respondent deposited this sum in his trust account and used $1,446.39 for expenses, including investigation and filing fees.

Following investigation of Szoboszlay's case, respondent prepared a civil complaint, but it was not filed in superior court until March 5, 1990, a month after his suspension started.[3] Respondent did not notify Szoboszlay in writing of his suspension until

3. Respondent signed and dated Szoboszlay's complaint and an accompanying civil court cover sheet on February 1, 1990. He testified that the delay in filing them was due to a backlog of typing in his office.

April 7, 1990, one month after he was required to do so by rule 955. In May 1990, Szoboszlay requested an accounting from respondent of her $3,000 costs advance. Four days later, considering that he was discharged, respondent submitted a lien claim for quantum meruit attorney fees of $15,000 and refused to refund the $1,553.61 of the $3,000 which respondent had not used for costs. He claimed this sum for attorney fees despite Szoboszlay's objection and his lack of entitlement to them under his contingent fee agreement.

The hearing judge concluded that respondent wilfully violated section 6068 (b) by failure to timely give notice of his suspension. Respondent was also found culpable of violation of present rule 4-100(A) and rule 4-100(B)(4) by failing to use $1,553.61 of the cost advance for its proper purpose and failing to pay it promptly to Szoboszlay. He also violated rule 4-100(B)(3) by not rendering an appropriate accounting to Szoboszlay of her advanced costs. Following his conclusion in the Bryant matter, *ante*, the hearing judge concluded that respondent grossly neglected the handling of Szoboszlay's funds in violation of section 6106,[4] but he did not violate section 6125 by filing Szoboszlay's complaint after the effective date of his suspension.

Respondent disputes only the hearing judge's conclusion of moral turpitude by gross neglect in handling Szoboszlay's funds. Respondent's claim seems based on the same rationale as in the Bryant and Schillinger matters and we reject it for the same reason as it misinterprets the hearing judge's rationale for his conclusion.

The deputy trial counsel requests supplemental findings in three respects. We adopt the first and third requests directed at respondent's handling of Szoboszlay's cost advance. However, since the requested supplemental finding as to the filing of Szoboszlay's complaint after respondent's suspension is more in the nature of a recital of evidence rather than a finding of fact, we decline to adopt that requested supplement. **[5c]** For the same reasons as in the Bryant and Schillinger matters, we decline to adopt the deputy trial counsel's claim that respondent's handling of Szoboszlay's funds was dishonest, noting that, as in those matters, the hearing judge did conclude that respondent was culpable of violating rule 8-101(A) or present rule 4-100(A) and also section 6106.

[7] In this matter, the deputy trial counsel also urges us to conclude that respondent violated section 6125 by engaging in the unauthorized practice of law. The deputy trial counsel's point is well taken. As the hearing judge observed on page 25 of his decision, respondent's filing of the complaint after he was suspended "appeared to be the practice of law." Yet the judge exonerated respondent of the charges of violation of section 6125 mainly on the grounds that respondent did not intend to practice while under suspension and was only trying to help Szoboszlay. Respondent's position was that he had completed the complaint before the suspension's effective date, but it had been delayed in being filed by press of business in the office. Szoboszlay's testimony on this point, which was deemed credible, was to the effect that respondent was aware that he filed her complaint after his suspension but that he claimed he had "bar association" permission to do it. No evidence was introduced that the Supreme Court or this court had given respondent any relief from his suspension order. While we properly give great deference to the hearing judge's findings resolving testimonial matters, we are unable to consider that respondent's explanation, even if believed, constitutes an excuse. The objective facts which occurred here show that respondent violated section 6125 by knowingly permitting a complaint bearing his name as counsel to be filed after the effective date of his suspension. (Cf. *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.)

8. Failures to comply with rule 955 and additional violations of section 6125.

In five additional counts of this proceeding, involving, respectively, clients Potter, Gutierrez,

4. In explaining his conclusions of respondent's violation of section 6106 in the Szoboszlay matter, the hearing judge compared the matter to the Bryant and Potter matters. Reviewing the record, we interpret the judge's comparison to Potter to instead mean a reference to the Schillinger matter. In any case, the difference is insignificant.

Costin, Peerson and one general count, the hearing judge concluded that respondent violated section 6068 (b) by his failure to comply timely with the Supreme Court's February 1990 order under rule 955. Four of these counts involved the failure to give notice to proper parties in specific cases in which respondent represented clients. The fifth such count charged respondent with committing an act of moral turpitude in violation of section 6106 by filing a false affidavit with the Supreme Court as to his compliance with rule 955. **[8]** On review, respondent does not object to the hearing judge's findings in four of these matters that he violated section 6068 (b) by not complying timely with rule 955. He takes issue only with the State Bar's urging of each rule 955 violation as a separate act. Since we deem respondent's claim as one going to the degree of discipline to recommend, we shall defer consideration of it until we consider the issue of discipline.

[9a] With regard to the four specific counts of failure to give timely notice as required by rule 955, we need not detail the findings in each matter. Respondent acknowledged in his testimony below that his program for rule 955 compliance was "poorly organized." He did not take any steps to deal with his suspension order until his father confronted him with it on about February 23, 1990, 18 days after its effective date and less than 2 weeks before his rule 955 notices were due to be mailed. Although he had only 48 open or active cases at that time, he did not send out the rule 955 notices all at once, but rather in "waves" over the entire month of March and into early April. Moreover, after he sent them, he learned from his counsel that they had to be sent certified mail so he re-mailed them. He conceded that opposing counsel in three of the matters did not receive notice. We therefore conclude that there is ample support for the judge's conclusions with respect to respondent's violation of section 6068 (b).

[9b] Respondent's April 10, 1990, rule 955 affidavit filed in the Supreme Court was almost a month overdue and incorrectly stated that all courts and opposing counsel had been notified of his suspension. On this record, we agree with the hearing judge that respondent did not intentionally misrepresent facts to the Supreme Court as proscribed by section 6106 but rather was culpable of violating section 6068 (b) by his gross neglect in not complying diligently with the order. We do acknowledge, as the hearing judge was aware in the Bryant, Schillinger and Szboszlay matters, that an attorney's practice of gross neglect in the handling of client matters or client funds has been held to equal moral turpitude under section 6106. Yet we believe that respondent's culpability is adequately addressed by the hearing judge's conclusion that he violated section 6068 (b). (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

[10] In one of the matters discussed here, involving Peerson, the hearing judge concluded that respondent also practiced law while suspended in violation of section 6125. We agree with the hearing judge, noting that neither party disputes these conclusions. Respondent's position below was that, although he knew he was suspended, he sought only to aid Peerson as a paralegal at a critical time in Peerson's superior court lawsuit. However, respondent drafted very detailed points and authorities specific to Peerson's case directly for Peerson's use. After his suspension, respondent was ethically allowed to research any point of law or draft any legal document so long as done for the independent review of another active member of the State Bar in good standing who would take responsibility for it to the client. (See *Crawford* v. *State Bar* (1960) 54 Cal.2d 659, 667-668.) When respondent undertook this work directly for Peerson, however, he violated section 6125, regardless of his laudable motive. (See *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 603-604.)

[11a] In the Potter matter, the hearing judge found no violation of section 6125. The deputy trial counsel disagrees, contending that respondent violated the statute by sending a counteroffer in settlement to opposing counsel the day after his suspension became effective. Although the hearing judge found that respondent had caused such a letter to be drafted just before his suspension, it was not sent until the day after suspension. The hearing judge also found that respondent notified opposing counsel three days later of his suspension. From these findings, the judge concluded that respondent engaged in misconduct for sending the counteroffer to opposing counsel after suspension, but that that misconduct was better addressed under section 6068 (b). We disagree and agree instead with the deputy trial counsel. Section

6068 (b) adequately addressed respondent's failures to comply with the provisions of rule 955 of the California Rules of Court. However, once his suspension went into effect, section 6125 prohibited him from engaging in any law practice or even holding himself out to opposing counsel as entitled to practice. (See *Morgan* v. *State Bar*, *supra*, 51 Cal.3d at pp. 603-604.)

[11b] The Costin matter was similar to Potter in that the hearing judge declined to conclude that respondent violated section 6125 by causing his secretary to communicate with opposing counsel after his suspension. The deputy trial counsel argues otherwise and we agree with the deputy trial counsel. The hearing judge found that while representing his client, Costin, in a worker's compensation matter, respondent received a settlement offer. Apparently coincidentally, the offer was set to expire the day respondent's suspension became effective, February 5, 1990. On that day, February 5, respondent replied to opposing counsel's offer by hand-delivered letter. The next day, respondent instructed his secretary to phone opposing counsel and to relay several instructions concerning the settlement. Ten days after respondent was suspended, he instructed his secretary to place another call to opposing counsel, to convey the message that respondent accepted counsel's offer and to request that counsel forward a compromise and release. In the face of the evidence and findings, the hearing judge concluded that respondent did not violate section 6125 even though he used his secretary as a "subterfuge." We disagree and hold that it was as much a violation as if respondent had personally conducted settlement discussions with opposing counsel after suspension from practice.

B. Mitigating and aggravating evidence.

In mitigation, respondent testified to the "head-in-the-sand" attitude he had taken about his earlier suspension. He expressed remorse that he had let down so many clients involved in the disciplinary proceedings and attributed his earlier lack of cooperation with the State Bar to a big ego, which he has since balanced by involvement in church and parenting activities. He testified to a sincere change in his life and attitude and that he has learned new skills as an editor for a legal publication.

Respondent's father testified in support of his son. As we noted, it was respondent's father who forced respondent to face the responsibilities of his 1990 suspension. The senior Rodriguez testified to the remorse respondent demonstrated and to his current sense of responsibility and rehabilitation. He attributed respondent's earlier problems to both stress and ego.

Respondent presented character reference letters from his minister, his father and four other attorneys. These references had a varying knowledge of the findings in respondent's two disciplinary proceedings, but all were highly favorable to his being allowed to continue to practice. The references cited his remorse; most attributed his problems to lack of adequate support and management skills and discussed his growth in recent years.

The principal evidence in aggravation was respondent's 1990 suspension. Respondent did not participate in that prior disciplinary proceeding. He was found to have committed misconduct in two client matters.[5] In a third matter, he was found to have failed to participate in 1986 in the State Bar investigation of one of the two matters.

In one of the two client matters, a wrongful discharge matter removed to federal court, respondent did not oppose defense motions to dismiss or for summary judgment and concealed from his client the dismissal of the action in 1984. For a six-month period in 1985, respondent failed to answer numerous requests of his client for information. When the client learned that his case had been dismissed, he asked for his files. Respondent gave him some but not all of them.

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5. Before us, respondent complains that one of these matters was barred since it flowed from resumption of proceedings after the two-year period specified in rule 415, Rules of Procedure of the State Bar. We shall deal, *post*, with respondent's claim. At this point we note that the Supreme Court's order of suspension has been final for over three years.

In the other client matter, respondent provided legal services in probate of an estate. For a two-year period (1980-1982), he failed to respond to requests of his client for information about the probate. He again failed to communicate with his client for another two-year period (1982-1984). During that latter period, the client consulted another attorney and finally the State Bar before respondent resumed contact with the client and moved forward. The matter was not set for trial until 1985, over five years after respondent was hired.

The Supreme Court adopted the State Bar's recommendation of a three-year suspension, stayed on conditions of a two-year actual suspension and until respondent showed his rehabilitation, fitness to practice and learning in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (hereafter "standards"). Respondent has remained on this actual suspension continuously since February 5, 1990.

[12a] We now discuss respondent's motion presented on review for leave to produce additional evidence concerning mitigation. Accompanying his brief on review, respondent requested us to allow him to present in evidence copies of three checks written by his father in March 1992 (in the Bryant, Schillinger and Szoboszlay matters) representing repayment by respondent and a letter from a State Bar investigator as to a complaint brought by Schillinger. Finally respondent asks us to judicially notice the State Bar Client Security Fund's file in the Schillinger matter which was opened after Schillinger filed an application for reimbursement from the fund. The deputy trial counsel opposes respondent's motion, noting that as to the checks, the same motion was presented to and denied by the hearing judge and none of the proffered evidence was relevant to establishing mitigation.

[12b] Restitution made under pressure in a disciplinary proceeding has been held entitled to little or no weight in mitigation of discipline. (See, e.g., *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 778.) However, the question of whether restitution has been completed is important to deciding whether it should be required as a condition of probation or suspension, if that degree of discipline is chosen (see, e.g., *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 684-685); and if disbarment is deemed the appropriate recommendation, to the question of whether respondent is obligated to make restitution as an issue later bearing on rehabilitation for reinstatement. The deputy trial counsel has not challenged the proffered evidence of restitution on grounds other than relevance. We have determined that respondent's motion should be granted as to the admission in evidence of the three checks. We will admit them as respondent's exhibits next-in-order. We deny respondent's motion in all other respects.

[12c] Although rule 570 of the Transitional Rules of Procedure of the State Bar provides for admissibility of certain Client Security Fund documents in the trial of a disciplinary proceeding, we have determined that at this review stage, respondent's other proffered evidence is not relevant to the issues in this proceeding and we decline to admit this proffered evidence.

II. THE PROBATION REVOCATION PROCEEDING

Respondent disputes that he is culpable of wilful violations of his probation. However, the essential facts on which the hearing judge based his findings are largely undisputed. They focus on two aspects of his probation duties: required contact with his assigned probation monitor referee and filing of a required quarterly probation report.

A. Failure to contact probation monitor referee.

Respondent's probation terms required that he promptly review the terms and conditions of his probation with his assigned probation monitor referee ("referee"), furnish requested reports to the referee and cooperate fully with the referee, meeting with him in person at least once every three months. The amended notice to show cause charged respondent with having failed to make himself available to review, and with not having reviewed, his probation conditions with the referee.

The hearing judge found that within about two months after his probation started, respondent met

with the first referee assigned to monitor his probation, George Poole, and reviewed with him his conditions of probation. Poole directed respondent to schedule future quarterly meetings with him and to be punctual regarding reports and meetings. Although the hearing judge found that respondent needed to be reminded by Poole twice to schedule the required meetings, this aspect of probation violation concerns respondent's failure to meet with another referee, Bruce Anderson, assigned by the State Bar Court[6] in March 1991 to replace Poole. At the same time, the State Bar Court clerk's office wrote to respondent at an address ("Alameda address") other than his address of record, advising him that the State Bar Court would communicate with him only at his address of record and if he wished to change that address, he had to notify the State Bar's member records office. The newly-assigned referee, Anderson, wrote to respondent twice, in March and April 1991, at his address of State Bar record to attempt to contact him. In May 1991, Anderson reported that respondent had not contacted him. Sometime in May 1991, respondent telephoned Anderson and left a message to return his call. Anderson returned the call but did not reach respondent.

On May 17, 1991, respondent filed his quarterly report due April 10, 1991. In it, he stated that he had "established contact" with Anderson. He testified that by so stating, he meant that he had mailed Anderson a copy of his probation report. A few days later, Anderson wrote to respondent at his Alameda address that Anderson did not consider that respondent had made contact with him and instructed respondent to call Anderson's office to set up a personal meeting.

Anderson reported to the State Bar Court clerk's office in June, August and October 1991 that respondent had still not contacted him. Respondent testified that he placed calls to Anderson in July, October and December 1991, leaving messages each time to return respondent's calls. In December 1991, respondent wrote Anderson that he was ready and willing to meet with him. Later that month, respondent reached Anderson by phone and a meeting was held in January 1992.

The hearing judge concluded that respondent wilfully violated his probation duty to meet with his referee. He received actual notice of Anderson's substitution and of the need to schedule a meeting with him no later than May 15, 1991. The judge concluded that respondent's sporadic telephonic messages to Anderson over many months did not fulfill adequately his duty as a probationer.

[13] Respondent contends that he made adequate attempts to reach his referee who knew at all times where respondent could be reached. In his brief, respondent focuses on the early 1991 chronology to depict a scenario in which he did all that was necessary in good faith to bridge the transition between referees. However, respondent ignores that it was clearly *his* responsibility to arrange for a meeting with Anderson and that the delay which passed after March of 1991 until such a meeting occurred was substantial. The hearing judge pointed this out in his decision and made it clear that he did not find culpable respondent's failure to meet with Anderson shortly after his assignment to monitor respondent's probation. The hearing judge's observations are well-taken. Moreover, if respondent did experience difficulty in setting up a meeting with Anderson, he never reported that fact to the State Bar Court clerk's office to seek its aid in contacting Anderson. Under these circumstances, we must conclude, as did the hearing judge, that respondent wilfully breached his probation duties.[7]

B. Failure to file quarterly probation report.

Respondent's probation also required him to file reports by the tenth day of January, April, July and

6. During the times described, disciplinary probation was administered and monitored by the State Bar Court. Those functions have recently been assigned to the State Bar's Office of the Chief Trial Counsel.

7. The examiner asks us to supplement or modify the hearing judge's findings. While most of the examiner's suggested changes might be warranted, they are not necessary to our adoption of the hearing judge's essential findings and conclusions that respondent failed to communicate as required with his probation monitor referee.

October of each year of his probation, covering the preceding quarter-year and attesting to compliance with the conditions of his probation. The amended notice to show cause charged that respondent failed to file the report due January 10, 1992. As mentioned *ante*, respondent filed a 1991 report late and the record also shows that the State Bar Court clerk's office reminded respondent during 1991 of his duty to file timely reports and of the compliance dates. There is no dispute that respondent filed his report due January 10, 1992, on February 10, 1992,[8] and after receiving a letter from Anderson dated February 4 that his report had been due January 10.

[14a] Respondent's sole stated reason for filing his January 1992 report late was that he was confused by his first meeting with Anderson on January 10, 1992. On that day (the last day for filing of the probation report covering the fourth quarter of 1991), respondent asked Anderson when his next report was due. Assuming respondent had filed his January report, Anderson replied that his next report was due by April 10, 1992. On January 15, 1992, five days after his January report was due, respondent wrote Anderson stating in part, "As you confirmed, the next... report... is due on or before April 10, 1992." When Anderson learned that respondent had not filed his January report, he wrote to respondent to tell him that he needed to file that report as soon as possible. Respondent's position below and before us was that he assumed from his meeting with Anderson on January 10 that he could dispense with the January report and he thus claims to have been misled.

[14b] The hearing judge had the chance to evaluate the testimony of respondent and Anderson. He found Anderson credible but not respondent. We agree with the hearing judge's discussion of his conclusions that respondent failed to file timely his January 1992 report which discussion emphasized the knowledge respondent had not only of his duties to file reports timely but exactly when those reports were due. We agree with the hearing judge that it was unreasonable for respondent to believe that Anderson excused him from a clear requirement of his probation terms. We therefore uphold the hearing judge's conclusion that respondent breached his probation duties.

III. THE APPROPRIATE DISCIPLINE TO RECOMMEND

We must now recommend the appropriate aggregate discipline based on the record in the original disciplinary and the probation revocation proceedings.

[15] At the outset, we note that in five of the matters, the hearing judge appropriately concluded that respondent violated section 6068 (b) by failing to comply with rule 955. As was found, some parties required to be notified of respondent's suspension never were and others who were notified were not given timely notice as required by rule 955(a). Respondent's affidavit required by rule 955(c) was not only untimely but inaccurate. Respondent admitted that his notification method was poorly designed. Were this a rule 955 referral proceeding instead of an original proceeding, under Supreme Court decisions we recently followed in other cases, these failures of respondent, standing alone, would cause us to recommend disbarment based on respondent's rule 955 violations, if there were no strong mitigating circumstances militating against such recommendation. (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131; *Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382; *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322.)

[16a] Also, in this proceeding, respondent committed far more misconduct than wilfully violating rule 955. His other misconduct was very wide-ranging. It involved his misappropriation in three matters in wilful violation of rule 8-101(A) or successor rule 4-100(A) in which he unilaterally took as

8. The hearing judge's decision incorrectly referred to the year 1991 instead of 1992 in making this finding. (Decision in case number 91-P-07029, p. 9.)

attorney fees a total of about $13,000 in cost advances from clients. In those same matters, he engaged in acts of moral turpitude because of his gross neglect of his responsibilities toward proper handling of trust funds. In one matter, he misled a superior court judge as to the reasons for his failure to appear for an earlier hearing. He failed to perform services competently in another matter. In two matters, he threatened criminal or administrative charges in wilful violation of rule 7-104. In four others, he practiced law while suspended in violation of section 6125. He failed to participate in the State Bar's investigation into two of the charges and wilfully breached his earlier probation in two respects. Respondent's misconduct in just the current proceedings spanned four years of his practice.

Looking initially at the standards as guidelines (e.g., *In re Young* (1989) 49 Cal.3d 257, 267-268), any of respondent's violations of sections 6106 or 6125, standing alone, could warrant either disbarment or suspension. (Stds. 2.3 and 2.6.) Similarly, any of respondent's wilful trust account rule violations could warrant a minimum three-month actual suspension. (Std. 2.2(b).)

[17a] Since a recommendation as to the degree of discipline properly results from a balanced consideration of all factors (std. 1.6(b); e.g., *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1114-1115; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931), we must weigh mitigating and aggravating circumstances.

The hearing judge assigned as mitigating circumstances a strong emotional difficulty respondent experienced as he had to face the hardship of his 1990 suspension. Also deemed mitigating were respondent's demonstration of good character and genuine display of remorse and commitment to improved professional practices. The judge described respondent's mitigation as "compelling." As aggravating circumstances, the hearing judge identified respondent's prior record of discipline and that his misconduct involved multiple acts, although found not to be a pattern of misconduct. The judge did not find that most clients suffered significant harm to warrant aggravation of discipline.

The deputy trial counsel contends that the hearing judge refused to allow the introduction of uncharged evidence of misconduct involving respondent's alleged other trust account violations and that the mitigating circumstances relied on by the hearing judge were not supported by the record.

[18] With regard to the deputy trial counsel's claim of the judge's improper refusal to allow proffered aggravating evidence, we note that a balancing of interests was involved. This balancing was between the desire for additional relevant evidence on the one hand against Supreme Court decisions which require fair notice of disciplinary charges as a principle of due process, on the other hand. (Compare, e.g., *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36 with *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.) Here the judge considered this balance, but determined that the proffered evidence was too unrelated to the charged matters to risk due process error if such proffered evidence was admitted, even though it was offered in the degree-of-discipline phase of the proceedings. As our weighing of all existing evidence pertinent to this proceeding will show, *post*, we need not resolve the deputy trial counsel's claim in this proceeding. (Compare *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 400-403.)

[19] Respondent urges error in considering as aggravating his prior suspension for two years and until he proves his eligibility to return to good standing under standard 1.4(c)(ii). He claims that that prior suspension was based on one matter which was time-barred.[9] **[20 - see fn. 9]** Had respondent participated in his prior proceedings or sought relief from

9. **[20]** One of the matters involved in the prior suspension was the subject of an earlier admonition imposed on June 3, 1986. Admonitions are not discipline and may be reopened and proceed anew as a formal disciplinary proceeding, if ". . . within two years, a formal proceeding is brought against the member, based on other alleged misconduct. . . ." (Trans. Rules Proc. of State Bar, rule 415.) The deputy trial counsel contends that the Office of Trial Counsel met the two-year requirement on the ground that it reached a decision to file the notice to show cause within the two-year period. However, the rules of procedure define the start of a formal proceeding as the *issuance* of a notice to show cause. (Trans. Rules Proc. of State Bar, rule 550.) That notice issued on June 30, 1988, nearly a month after the two-year period since the giving of the admonition.

default, he could have raised this issue timely before the State Bar. However, since respondent's prior two-year suspension was imposed over three years ago by order of the Supreme Court, only that Court can grant relief. We express no opinion here whether any such relief is appropriate. However, even if, arguendo, we were to give less weight to respondent's prior discipline on account of its being based partly on a time-barred complaint, this would not cause us to change our recommendation of discipline in the proceedings now before us.

[17b] When balancing mitigating and aggravating factors, we have concluded that the judge gave greater weight to the mitigating ones than warranted by the record. Although we have no doubt as to the sincerity of respondent's expression of remorse or the strong belief his character references placed in him, we cannot weigh those factors heavily in the balance of the serious and wide-ranging misconduct he committed.

[21] Respondent did not present specific evidence of any of the problems of psychological, medical or family pressures which would be entitled to more significant mitigating weight. His bitterness and disaffection over his 1990 suspension may account for some of his culpability with regard to dealings with some of his clients, but we cannot view any resulting misconduct as excused by respondent's problems of coping with his suspension, especially since that suspension and its terms were designed to seek respondent's rehabilitation. Additionally, the evidence which respondent has offered as to his rehabilitation is depreciated by the findings as to his failure to comply with his probationary duties. Although these failures, standing alone, were not the most serious probation offenses we have adjudicated, they were relatively recent and occurred after respondent had ample time to become familiar with his duties. Moreover, with regard to the question of harm, while most of respondent's clients were able to settle or advance their cases with new counsel, one client's case was barred by the limitations period and three clients had to wait two years for respondent's belated refund of cost advances which he had unilaterally taken for fees.

The hearing judge noted a lack of guiding decisions based on facts comparable to the range and breadth of respondent's misconduct and the surrounding circumstances. Neither party has cited us to decisions deemed guiding to support their respective positions. We have identified several decisions of general similarity to the present case, in addition to the rule 955 cases discussed *ante*.

In *Cannon* v. *State Bar*, *supra*, 51 Cal.3d 1103, the attorney had no prior record of discipline, but was admitted only six years before his first act of misconduct. He was found culpable of five matters of misconduct involving failure to perform services coupled with refusal to refund unearned fees and failure to communicate with his clients. Although considering these multiple acts as not involving a pattern of misconduct, the Supreme Court disbarred the attorney noting that the volunteer State Bar Court had not deemed mitigating respondent's evidence of law practice and family problems.

In *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, by a four-to-three decision, the Supreme Court suspended the attorney for five years, stayed the suspension and placed her on probation on conditions including a two-year actual suspension and until she satisfied standard 1.4(c)(ii). Middleton had a prior suspension for misconduct arising in the year of her admission and the Supreme Court's opinion found her culpable in three matters: two of failure to perform services competently and one of communicating directly with an adverse party represented by counsel. In addition, she failed to participate in a State Bar investigation and did not appear at trial. There was no discussion of mitigating circumstances, but there were also fewer matters involved than we review here. The three dissenting justices would have disbarred Middleton based in part on their conclusion that Middleton's suspension was inadequate protection of the public.

In *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218, an attorney with no prior record of discipline was found culpable in eight matters representing a wide range of professional misconduct and arising between five and ten years after his admission to practice law. The misconduct found involved making misrepresentations to judges and clients, harassing a client for his own gain, disregarding a client's confidences, taking an adverse interest against a client, splitting attorney fees with one not allowed to

practice law, collecting an illegal fee, practicing law while suspended and issuing checks without sufficient funds. In mitigation, Ainsworth offered positive character evidence, presented evidence of illness, expressed remorse, and made restitution to clients. In aggravation, it was noted he had not participated in the State Bar investigation. The Court disbarred Ainsworth, concluding that the collective severity of his misconduct outweighed the force of mitigation.

Finally, we believe that the disbarment case of *Marquette* v. *State Bar*, *supra*, 44 Cal.3d 253 is also guiding here. Marquette was admitted in 1971 and was privately reproved in 1975 and publicly reproved three years later. The disbarment case rested on three matters of misconduct involving, collectively, perjury to obtain execution of a lease, the knowing issuance of checks without sufficient funds which were subsequently paid, failure to pay a judgment against him, misappropriation of a $1,350 check and threatening the fiancée of his client with criminal charges to gain a civil advantage. Although fewer matters were involved in *Marquette*, the Court's opinion showed he demonstrated less insight into his offenses than did respondent.

[16b] While respondent showed more remorse than Marquette appeared to demonstrate, he also showed that his prior suspension and probation were ineffective either to stem his misconduct or to allow him to demonstrate that he can comply with court orders. Currently, as a condition of his prior suspension, before resuming practice respondent is required to make a showing based on a preponderance of the evidence of rehabilitation, fitness to practice and present learning and ability in the law. In our view and guided by the Supreme Court opinions we have reviewed, *ante*, the proper protection of the public would be realized by his demonstration of sustained evidence of rehabilitation in a reinstatement proceeding with its attendant greater showing than would be required under standard 1.4(c)(ii).[10] **[22 - see fn. 10]**

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Brian S. Rodriguez, be disbarred from the practice of law in this state. Since he has been suspended continuously since February 5, 1990, we do not recommend that he be again required to comply with the provisions of rule 955, California Rules of Court. We recommend that costs be awarded the State Bar, pursuant to Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

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10. **[22]** Respondent may apply for reinstatement five years after disbarment. (Rule 662(a), Trans. Rules Proc. of State Bar.) Upon good cause shown, rule 662(b) allows respondent to apply three years after disbarment to shorten time to seek reinstatement. Under the rule, the five-year and three-year periods run from the time of any interim suspension and the Supreme Court has given the same effect to inactive enrollment. The issue of whether the five-year period may run from the start of respondent's 1990 non-interim suspension has not been decided and we need not address the question. However, if the Supreme Court adopts our recommendation and if respondent wishes to seek reinstatement at the earliest possible time, he may raise this issue before a hearing judge. (See *In the Matter of Grueneich*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 444, fn. 7.)