

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROGER S. HANSON

A Member of the State Bar

Nos. 90-O-12046, 90-O-17011

Filed February 23, 1994

SUMMARY

In a single matter, respondent failed to return an unearned legal fee promptly to his clients and, upon discharge by the clients, failed to take steps to avoid foreseeable prejudice to them. Based on this misconduct and on respondent's record of prior misconduct, the hearing judge recommended that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be placed on probation for a period of two years on conditions. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing, among other things, that the discipline should be a public reproof along with the requirement that he take and pass the California Professional Responsibility Examination. The review department concluded that respondent was culpable of the misconduct found by the hearing judge. However, because the review department gave less weight to respondent's prior discipline than the hearing judge did, and in view of comparable case law, it concluded that the discipline should be a public reproof with the added requirement that respondent complete the State Bar Ethics School.

COUNSEL FOR PARTIES

For Office of Trials: Rachelle M. Bin, Lawrence J. Dal Cerro

For Respondent: Keith C. Monroe

HEADNOTES

[1] **130 Procedure—Procedure on Review**
 166 Independent Review of Record

Even though primary focus of respondent's arguments on review was degree of discipline, review department's review of the record was independent and therefore, review department was required to determine whether hearing judge's findings of fact and conclusions of law were supported by record.

- [2] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Respondent's failure to return the unearned portion of an advanced legal fee for over a year violated the rule of professional conduct requiring that unearned fees be promptly returned to the client.
- [3] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Respondent's failure to notify counsel for the opposing side that respondent was no longer representing a client violated the rule of professional conduct requiring attorneys to take steps to avoid foreseeable prejudice to their clients prior to withdrawal from employment.
- [4] **270.30 Rule 3-700(B) [former 2-111(B)]**
Given relatively short duration of respondent's representation of two clients and work respondent performed for them, there was insufficient evidence to support charge that respondent intentionally, or with reckless disregard, or repeatedly failed to perform legal services competently.
- [5] **214.30 State Bar Act—Section 6068(m)**
275.00 Rule 3-500 (no former rule)
Where respondent spoke with clients approximately eight or nine times during short period of representation, there was insufficient evidence to support charge that respondent failed to communicate with clients.
- [6] **162.11 Proof—State Bar's Burden—Clear and Convincing**
165 Adequacy of Hearing Decision
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
Where there was clear conflict in testimony with regard to whether respondent provided clients with an accounting, and hearing judge was unable to resolve such conflict, there was insufficient evidence to support charge that respondent did not provide accounting.
- [7 a, b] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
An attorney's failure to turn over client's file to successor counsel is not excused by fact that client has copies of documents in file. However, where respondent's employment was of limited duration, work respondent performed was of minimal nature, and there was no evidence that file contained any documents that had not been previously released to client, there was insufficient evidence to support charge that respondent failed to return file.
- [8] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where respondent filed a late response to a motion to dismiss, the response was considered by the court, and the late filing was an isolated and at most negligent act, it did not amount to a violation of the rule of professional conduct prohibiting intentional, reckless or repeated failures to perform legal services competently.
- [9 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Where there was no clear and convincing evidence establishing services that were to be performed for fee paid, or establishing respondent's agreement to perform those services, evidence did not support charge of failing to perform services competently. Where, in addition, review department could not determine whether respondent's employment was ever terminated, as opposed to simply being completed, or whether respondent did not earn entire fee paid, review department did not find that respondent violated rule requiring attorneys to take reasonable steps to avoid foreseeable

prejudice to clients prior to withdrawal from representation, or rule requiring prompt refund of any unearned fee.

- [10] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
 130 Procedure—Procedure on Review
 135 Procedure—Rules of Procedure
 139 Procedure—Miscellaneous
 178.10 Costs—Imposed
 178.90 Costs—Miscellaneous

Where review department imposed public reproof, it was statutorily required to order that respondent pay costs of disciplinary proceeding. Respondent's request to be relieved of such order to pay costs, on ground that State Bar abused its discretion in filing one of the charges, was rejected as premature in light of statute and rules permitting respondent to seek relief from order assessing costs after its effective date. (Trans. Rules Proc. of State Bar, rules 460-464.)

- [11] **130 Procedure—Procedure on Review**
 141 Evidence—Relevance
 159 Evidence—Miscellaneous
 765.51 Mitigation—Pro Bono Work—Declined to Find
 795 Mitigation—Other—Declined to Find

List of representative cases respondent had handled, including pro bono matters, which was attached to respondent's brief on review, and expanded from similar list introduced at trial, was of minimal value in terms of mitigation, especially without explanation. Review department therefore declined to augment record to include list and did not consider it.

- [12 a, b] **513.20 Aggravation—Prior Record—Found but Discounted**
 513.90 Aggravation—Prior Record—Found but Discounted
 805.51 Standards—Effect of Prior Discipline

Where last acts of misconduct in prior discipline matter occurred approximately 17 years before first acts of misconduct in second matter, and prior misconduct itself was minimal in nature and involved misconduct for which respondent was found not culpable in second matter, prior misconduct did not merit significant weight in aggravation, and it would be manifestly unjust to impose greater discipline in second matter than in prior proceeding solely because of prior discipline.

- [13 a, b] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
 277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
 1091 Substantive Issues re Discipline—Proportionality
 1092 Substantive Issues re Discipline—Excessiveness

In light of comparable case law and absence of mitigating circumstances, public reproof was appropriate discipline for respondent who failed to refund promptly an unearned legal fee and failed to take reasonable steps to avoid prejudice to clients prior to withdrawal from representation. Hearing judge's recommended discipline of stayed suspension was therefore modified.

- [14 a-c] **173 Discipline—Ethics Exam/Ethics School**
 242.00 State Bar Act—Section 6148
 277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
 1099 Substantive Issues re Discipline—Miscellaneous

Where respondent's failure to adhere to statutory requirement of written attorney-client fee agreements was at heart of both matters in which he had been charged with misconduct, and

respondent's attention needed to be directed to written fee agreements and also to his obligations upon withdrawal from employment, public reproof was properly conditioned on completion of State Bar Ethics School. Its format of classroom instruction, followed by a test, would better remedy these problems than the more passive experience of the California Professional Responsibility Examination.

[15] 242.00 State Bar Act—Section 6148

Keeping proper records prepares attorneys to prove honesty and fair dealing when their actions are called into question, and is part of their duty in the attorney-client relationship. Written fee agreements not only protect clients and help to ensure that a fair and understandable fee agreement is reached for specified services, but can also aid the attorney as well in proving the terms of engagement.

**[16] 173 Discipline—Ethics Exam/Ethics School
1099 Substantive Issues re Discipline—Miscellaneous**

Where State Bar Court did not recommend respondent's suspension from law practice, it was not required to include, as condition of public reproof, requirement that respondent pass a professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability

Found

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

Not Found

- 214.35 Section 6068(m)
- 242.05 Section 6148
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 275.05 Rule 3-500 (no former rule)
- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]

Aggravation

Declined to Find

- 582.50 Harm to Client
- 615 Lack of Candor—Bar

Mitigation

Declined to Find

- 720.50 Lack of Harm
- 735.50 Candor—Bar

Discipline

- 1041 Public Reproof—With Conditions

Probation Conditions

- 1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of the hearing judge that respondent, Roger S. Hanson, be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for a period of two years on conditions. The recommendation is based on respondent's misconduct in a single client matter that involved failing to return promptly to the clients an unearned legal fee and, upon discharge by the clients, failing to take steps to avoid foreseeable prejudice to the clients. Respondent was admitted to practice in this state in 1966 and was privately reproved in 1975.

Respondent requested review, arguing, among other things, that the discipline should be a public reproof along with the requirement that he take and pass the California Professional Responsibility Examination (CPRE). The Office of the Chief Trial Counsel argues in reply that we should reject respondent's contentions and adopt the hearing judge's decision, including the discipline recommendation.

Based on our independent review of the record, we conclude that respondent is culpable of the misconduct found by the hearing judge. However, because we give less weight to respondent's prior discipline than the hearing judge did, and in view of comparable case law, we conclude that the discipline should be a public reproof with the added requirement that respondent complete the State Bar Ethics School.

FACTS AND FINDINGS

We adopt the following findings of fact from the hearing judge's findings and the record:

Shea Matter (Case No. 90-O-12046)

In the early 1980's, James Shea was fired from a job as a deputy sheriff in a county in Idaho. He sued the county. Shea's claims against the county were settled and a condition of that settlement was that the

county would not disclose adverse information about Shea to any law enforcement agency that contacted the county seeking pre-employment information. In 1988, Shea applied to the police department of the City of Seal Beach for a position as a police officer, but was not offered the job.

In June 1989, Shea and his wife, Leslie, hired respondent to assist them in determining whether the Idaho county had improperly disclosed negative information to Seal Beach's police department during its pre-employment background check of Mr. Shea. The Sheas paid respondent \$3,000 as advanced attorney's fees.

Respondent met with Ms. Shea and reviewed the documents she gave him. Respondent then telephoned the police chief of Seal Beach in an attempt to obtain the information the Sheas wanted. The police chief would not disclose anything to respondent and referred respondent to the city attorney of Seal Beach. After discussions with the city attorney, respondent prepared a hold harmless agreement for the Sheas to execute and give to Seal Beach so that it would release the requested information. Respondent met with the Sheas in August 1989 to discuss this hold harmless agreement, which they signed. Ultimately, Seal Beach declined to accept the hold harmless agreement and refused to release the requested information.

Respondent believed that the most effective way to obtain the desired information from Seal Beach was to file a lawsuit and obtain it through discovery. Ms. Shea did not want to file a lawsuit, but was to discuss the matter with her husband. Ms. Shea delayed responding to respondent regarding his recommendation of filing suit until November 1989 because Mr. Shea was out of town. Mr. Shea worked as a bodyguard and was regularly out of town on business. When she did respond, Ms. Shea suggested, as an alternative to filing suit, a meeting between the Sheas, respondent, and the city attorney. However, Mr. Shea was again out of town.

In late November 1989, Ms. Shea advised respondent of Mr. Shea's return date. In December 1989, respondent tried to set up a meeting with the city attorney, but the city attorney was unavailable

because he was out of the country. In late January 1990, Ms. Shea terminated respondent's employment and demanded that respondent provide an accounting of the advanced attorney's fees, refund any unused portion of the fees, return their file, and send a letter to the city attorney of Seal Beach informing him that respondent was no longer representing the Sheas.

Respondent testified that he sent the Sheas a letter in late February 1990, which the hearing judge characterized as a billing/accounting. In the letter, respondent indicated that he had earned fees of approximately \$2,231 and he offered to refund \$1,000. Ms. Shea testified that she did not receive this letter.¹ In April 1991, after the intervention of the State Bar, respondent paid the Sheas \$1,100, which represented the original \$1,000 he had previously offered plus \$100 interest.

In June 1990, the city attorney sent respondent a letter telling respondent that Ms. Shea was attempting to contact him and that he would not talk with her unless and until he received written verification from respondent that respondent no longer represented the Sheas. Respondent never sent such a letter to the city attorney.

The notice to show cause in this matter charged that respondent failed to perform the services for which he was hired; failed to communicate; failed to refund unearned fees promptly; failed to provide an accounting promptly; failed to return the Sheas' papers to them; and failed to notify the city attorney that he was no longer representing the Sheas. These acts were alleged to be in wilful violation of sections 6068 (m) and 6148 (b) of the Business and Professions Code,² and rules 3-110(A), 3-500, 3-700(D)(1), 3-700(D)(2), 4-100(B)(3), and 3-700(A)(2) of the former Rules of Professional Conduct of the State Bar of California.³

The hearing judge found respondent culpable of failing to refund promptly unearned fees (rule 3-700(D)(2)), and of failing to take steps to avoid foreseeable prejudice to the client in that respondent failed to notify the city attorney that he was no longer representing the Sheas (rule 3-700(A)(2)). The hearing judge did not find clear and convincing evidence to support the remaining charges.

Flesher Matter (Case No. 90-O-17011)

In 1989, Alan Flesher was in state prison serving a sentence for grand theft. Flesher contacted respondent in mid-1989 regarding hiring respondent to represent him in connection with a petition for writ of habeas corpus which Flesher, acting as his own attorney, had previously filed in the United States District Court. Flesher hired respondent in November 1989 to perform legal services in connection with the writ. Flesher sent respondent a letter dated November 6, 1989, in which he indicated their agreement was that for an attorney fee of \$2,500, respondent was to handle "all the necessary legal filings, motions, answers, rebuttals, court appearances, etc. To appeal this matter through the highest court available in this state." (*Sic.*) In this letter, Flesher also authorized respondent to communicate with Nancy Khaliel and Flesher's mother regarding the matter. Flesher paid respondent \$2,500.

In December 1989, the attorney general's office filed a motion to dismiss the writ because Flesher had not exhausted his state court remedies. Respondent did not prepare a response and instead advised Flesher to request an extension of time. Flesher did so and the court granted an extension until March 5, 1990.

In early January 1990, Flesher sent respondent another letter in which he stated that respondent had told Flesher in a telephone conversation that respondent believed that the federal writ would be dismissed,

1. The hearing judge determined that he could not resolve this conflicting testimony, and as a result, there was insufficient evidence to support the charge that respondent failed to provide an accounting to the Sheas.

2. All further references to sections are to the Business and Professions Code, unless otherwise noted.

3. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from May 27, 1989, to September 13, 1992.

that the writ would have to be refiled in state court, that the \$2,500 fee Flesher had paid respondent had been "used up," and that respondent would require an additional \$2,500 to proceed at the state level.

Respondent prepared a reply to the motion to dismiss and mailed it to the court on March 2, 1990. Respondent sent Flesher a letter dated March 2, 1990, enclosing a copy of the reply and a substitution of attorney. In this letter respondent stated that if the federal court dismissed the writ, "I will *appeal* that to the 9th Circuit." (Emphasis in original.) However, respondent had orally discussed his request for more money with Flesher. Flesher testified that he signed and returned the substitution of attorney to respondent. The federal court docket does not indicate that the substitution was filed.

The reply to the motion to dismiss was not filed until March 7, 1990. The caption of the reply read "Alan G. Flesher, aided by" with respondent's name and address followed by "Attorney for Alan Flesher." Even though filed late, the federal magistrate judge considered the reply, but recommended in May 1990 that the writ be dismissed because Flesher had not exhausted his state court remedies. Written objections to the magistrate judge's findings and recommendation were to be filed within 30 days. Flesher sent respondent another letter dated May 22, 1990, which indicated that Flesher had received the magistrate judge's recommendation and which inquired about respondent's plan in response. Flesher testified that respondent did not reply to the letter. No objections were filed and the district court dismissed the writ in June 1990. The order of dismissal was served on Flesher and respondent. Flesher sent a final letter to respondent dated July 10, 1990, in which he stated that he had received the dismissal and that he felt he had been abandoned by respondent "because you can not receive any more money from us." Flesher testified that respondent did not reply to this letter.

Flesher and Khalial testified that between them they had made from 60 to 70 telephone calls to respondent that were not answered. According to respondent, Flesher and Khalial called him less than 10 times and he returned every call. The hearing judge found that respondent kept Flesher and Khalial

adequately informed of the status of his work on the writ by telephone. The only letter respondent sent to Flesher or Khalial was the March 2, 1990, letter.

The notice to show cause in this matter charged that respondent failed to perform the services for which he was hired, failed to communicate, and failed to return unearned fees. These acts were alleged to be in wilful violation of section 6068 (m) and rules 3-110(A), 3-500, 3-700(A)(2), and 3-700(D)(2). In its pretrial statement, the Office of the Chief Trial Counsel alleged that respondent violated rule 3-700(A)(2) because he withdrew from employment without taking steps to avoid foreseeable prejudice to Flesher. The hearing judge concluded that there was insufficient evidence to support any of the charges.

Mitigation/Aggravation

The hearing judge found no mitigating circumstances. In aggravation, the hearing judge found that respondent had a record of prior discipline. Respondent was privately reprovved in February 1975. The misconduct involved a single client and occurred between 1968 and 1973. Respondent was hired to represent the client in connection with a writ of habeas corpus. He thereafter failed to perform the legal services for which he was hired, failed to communicate with his client, and failed to release all the client's papers to the client promptly.

DISCUSSION

Except for the assertion that the hearing judge's misinterpretation of a letter adversely affected the discipline recommendation, which conceivably implicates the factual findings, respondent does not contest the hearing judge's findings of fact or conclusions of law. The deputy trial counsel also does not contest the findings or conclusions. [1] As the primary focus of respondent's arguments on review is the degree of discipline, we address his contentions below in our consideration of that issue. However, our review of the record is independent. (Rule 453(a), Trans. Rules Proc. of State Bar; *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 541-542.) Therefore, we must first determine whether the hearing judge's findings of fact and conclusions of law are supported by the record.

Culpability

1. *Shea Matter*

[2] Respondent's failure to return the unearned portion of the legal fee the Sheas paid him, which by his calculation amounted to approximately \$769, for over a year supports the hearing judge's conclusion that respondent failed to return an unearned fee promptly in wilful violation of rule 3-700(D)(2). [3] We also agree with the hearing judge that respondent failed to take steps to avoid foreseeable prejudice to his client in wilful violation of rule 3-700(A)(2) by not notifying the city attorney that he was no longer representing the Sheas. In light of the city attorney's letter to respondent, the simple step of notification would have avoided prejudice to the Sheas. Respondent concedes in his reply brief that he is culpable of these violations.

[4] Given the relatively short duration of respondent's representation of the Sheas and the work he performed for them, we also agree with the hearing judge that there is insufficient evidence to support the charges that respondent "intentionally, or with reckless disregard, or repeatedly fail[ed] to perform legal services competently." (Rule 3-110(A).)⁴ [5] We also agree that there is insufficient evidence to support the charge that respondent failed to communicate with the Sheas (section 6068 (m); rule 3-500) in light of the hearing judge's finding that respondent spoke with Ms. Shea approximately eight or nine times during the period of time he represented the Sheas.

[6] There was a clear conflict in the testimony with regard to the accounting contained in

respondent's February 1990 letter. The hearing judge's inability to resolve this conflicting evidence indicates that he did not find either Ms. Shea's or respondent's testimony on this issue to be more credible than the other's. Given the great weight to be accorded to the hearing judge's credibility determinations (rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 203-204), we agree with the hearing judge that there is a lack of clear and convincing evidence to support the charge that respondent failed to provide an accounting to the Sheas in violation of rule 4-100(B)(3).⁵

[7a] We also agree that there is insufficient evidence to support the charge that respondent failed to release the clients' file in violation of rule 3-700(D)(1) in light of the short duration of respondent's employment, the minimal nature of the work he performed, and the lack of evidence relating to the contents of the file. The only documents that the Sheas gave respondent were copies of newspaper articles relating to the allegations that led to Mr. Shea's discharge by the Idaho county, and respondent gave the Sheas a copy of the hold harmless agreement. Other than these items, there is no direct evidence of the contents of the file.⁶ [7b - see fn. 6]

2. *Flesher Matter*

The State Bar presented testimony from two witnesses in this case, Flesher and Khalial. The hearing judge expressly found that Khalial's testimony as to all disputed facts, and Flesher's testimony as to respondent's alleged failure to communicate and as to the nature of the legal services respondent

4. The hearing judge also concluded that the notice to show cause did not properly allege the failure-to-act-competently charge and that the deputy trial counsel did not properly brief that charge in the pre-trial statement. We do not reach the merits of these conclusions because we agree that there is insufficient evidence to support the violation.

5. The Office of the Chief Trial Counsel alleged that the failure to provide an accounting was also a violation of section 6148 (b). The hearing judge determined that a violation of that section is not a disciplinable offense. We do not reach the merits of this holding either because we agree that there is insufficient evidence to support the charge.

6. [7b] The hearing judge concluded that respondent was not required to give the Sheas copies of documents they already had. We do not reach this issue. However, we note that the Supreme Court has held, in the context of a charge that the attorney withdrew from employment without taking reasonable steps to avoid prejudice to the client, that an attorney's failure to turn a client's file over to successor counsel was not excused by the fact that the client had a copy of each of the documents in the file. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 244.)

was to provide, lacked credibility. We find no reason on this record to disturb the hearing judge's credibility determinations.

Respondent testified in his defense. However, his testimony was limited to the issue of the alleged failure to communicate and mostly focused on the number of calls he received and the number of calls he returned, not the substance of the conversations. Consequently, the record contains very little credible evidence regarding the charges.

[8] The Office of the Chief Trial Counsel alleged that respondent failed to perform the legal services for which he was hired (rule 3-110(A)) by failing to timely file a response to the motion to dismiss and by not appealing the dismissal of the writ. The hearing judge concluded respondent's late response to the motion to dismiss was isolated and at most negligent and did not amount to an intentional, reckless or repeated failure to perform. We agree, especially since the reply was considered by the magistrate judge.

[9a] We also agree with the hearing judge's conclusion that the evidence failed to establish that respondent had a duty either to object to the magistrate judge's ruling or appeal the dismissal of the writ. Even though Flesher's letters to respondent indicated the services Flesher wanted performed, respondent testified and Flesher acknowledged that the fee for the services was not agreed upon. In addition, the only evidence presented regarding the services to be performed came from Flesher, Khalial, and the various letters they sent respondent. The hearing judge expressly found this evidence not credible.⁷ Thus, there is no clear and convincing evidence establishing the services that were to be performed for the fee paid or establishing respondent's

agreement to perform those services. (See *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 275 [attorney not culpable of failing to perform services competently where there was no clear and convincing evidence attorney had agreed to perform those services].)⁸

With respect to the failure to communicate charge (section 6068 (m); rule 3-500), the hearing judge found that respondent kept Flesher adequately informed about the status of respondent's work relating to the writ. Although respondent testified that he returned all of the telephone calls, the substance of those conversations was not explored at trial. Respondent did inform Flesher regarding the writ in a telephone conversation with Flesher and in the March 1990 letter. As the only contrary evidence on this issue came from Flesher and Khalial, whom the hearing judge specifically found not credible, we agree with the conclusion that there is no clear and convincing evidence to support this charge.

[9b] Lastly, the hearing judge concluded that the evidence did not establish that respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to his client (rule 3-700(A)(2)), and did not establish that he did not earn the entire \$2,500 Flesher paid him. (Rule 3-700(D)(2).) We agree. As indicated above, no clear and convincing evidence was presented regarding the exact services respondent was to perform for Flesher or the exact fee that was agreed upon. Thus, like the hearing judge, we are not able to determine whether respondent's employment by Flesher was ever terminated, as opposed to simply being completed. Furthermore, no clear and convincing evidence was presented establishing that respondent did not earn the entire fee paid him as a result of the services he did perform for Flesher.⁹

7. It is clear that the hearing judge did not find the hearsay statements contained in the letters written by the same witnesses any more credible than he found their live testimony.

8. The hearing judge also found that respondent testified that Flesher's November 6, 1989, letter did not reflect the agreement of the parties; that respondent explained to Flesher that he would become the attorney of record in the district court for a fee of \$10,000; and that Flesher knew when he wrote the November 6 letter that respondent would not perform the

described legal services for only \$2,500. We do not find clear and convincing evidence to support these findings.

9. The hearing judge also concluded that the rule 3-110(A), rule 3-700(A)(2), and rule 3-700(D)(2) violations were not properly charged in the notice to show cause. As in the Shea matter, we do not reach the merits of these conclusions because we agree that there is insufficient evidence to support the allegations even if they were properly charged.

Discipline

1. Respondent's Contentions

Respondent argues that the hearing judge's misinterpretation of his February 1990 letter to the Sheas adversely influenced the discipline recommendation; that the hearing judge's recommendation that respondent both complete ethics school and pass the CPRE is duplicative; that the State Bar abused its discretion in filing the charge that he failed to timely file the response to the motion to dismiss in the Flesher matter and that as a remedy, we should award him costs for the Flesher matter; and that the recommended discipline is excessive and should be a public reproof along with the requirement that respondent take and pass the CPRE.

We reject respondent's assertions with regard to the February 1990 letter. First, we note that the statement in the hearing judge's decision that respondent finds objectionable was that the more plausible inference to be drawn from the letter was that respondent returned the \$1,100 to the Sheas in order to avoid having the amount he claimed to have earned scrutinized in a fee arbitration proceeding *and/or* that respondent finally realized that returning the money was the proper thing to do. Next, the record simply does not support the conclusion that the above statement adversely influenced the discipline recommendation. In fact, the statement is contained in the part of the decision dealing with and properly rejecting respondent's estoppel defense, and the hearing judge viewed favorably respondent's return of the money in the part of the decision discussing the appropriate degree of discipline. Finally, our *de novo* review renders the issue moot as the hearing judge's statement, which we have not adopted, has not adversely influenced our conclusion as to the appropriate degree of discipline.

[10] We also reject as premature respondent's request with regard to costs. The argument is in essence a request to be relieved of an order to pay

costs. Because we impose a public reproof in this matter, we must order that respondent pay the costs of the disciplinary proceeding. (See Bus. & Prof. Code, § 6086.10.) Respondent may seek relief from the order assessing costs on the grounds of hardship, special circumstances, or other good cause, by filing a verified petition, accompanied by appropriate declarations or affidavits, no later than 30 days from the date of the order assessing costs. (*Id.*; Trans. Rules Proc. of State Bar, rules 460-464.) The petition is assigned for decision to a hearing judge and an evidentiary hearing may be held to resolve questions of fact. (Rule 462(c), Trans. Rules Proc. of State Bar.) The parties may seek review of the hearing judge's decision by petition to the Presiding Judge. (*Id.*; see, e.g., *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273.) Thus, under this statutory and procedural framework, respondent will have a formal opportunity to seek relief from the costs ordered before the hearing judge where an appropriate factual record can be made.¹⁰

Respondent asserts that the discipline is excessive because there are mitigating circumstances despite the hearing judge's contrary finding, the misconduct found by the hearing judge is minimal, and his prior private reproof is so remote that it merits little weight. While we do not find the mitigating circumstances suggested by respondent, we agree that the prior discipline is remote and the prior misconduct was minimal.

The only evidence respondent presented on the issue of mitigation was a list of representative cases he has handled over the years. The list was submitted as an exhibit and no evidence was adduced regarding the nature of the cases or respondent's representation. [11] Respondent has attached to his brief on review what appears to be an expanded version of the list of cases he submitted at trial. He has highlighted cases on that list and indicates he handled those cases *pro bono*. The deputy trial counsel objects to our consideration of the list because it was not introduced at trial. We agree with the deputy trial counsel

10. We express no opinion at this juncture regarding what may or may not constitute good cause for relief from an award of costs in this matter.

and see no reason to augment the record, especially since the list, without explanation, is of minimal value in terms of mitigation.

Without citing to any evidence in the record, respondent claims he was candid and cooperated with the State Bar. We do not find clear and convincing evidence establishing that he either was, or was not, candid and cooperative.

Respondent also claims that there was no harm to the Sheas because he paid them more than he owed them for the unearned fee. We reject this argument. The Sheas were harmed in that there was a delay in refunding the money and in that they were not able to discuss their matter with the city attorney because of respondent's misconduct. However, we also do not find that significant harm to the Sheas was established by clear and convincing evidence. (See standard 1.2(b)(iv), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s]).) The money was ultimately returned to them and the record is not clear as to whether they were able to speak with the city attorney and if not, the consequences that resulted. Thus, while we do not find lack of harm as a mitigating factor, we also do not find harm as an aggravating factor.

[12a] The last acts of misconduct in respondent's prior discipline occurred in 1973, approximately 17 years before the first acts of misconduct in the present case. He was disciplined for that misconduct in 1975, approximately 19 years ago. In addition, the prior misconduct itself was minimal in nature as indicated by the fact that respondent was privately reprovved, the minimum discipline available for professional misconduct. Furthermore, the prior misconduct (failure to perform services competently, failure to communicate and failure to release a client's file) involved acts for which respondent was found not culpable in the present matter. In light of the above, we do not believe the prior misconduct merits significant weight in aggravation. (See std. 1.7(a); *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105.)

[12b] In determining the appropriate discipline, the hearing judge considered respondent's present

misconduct, the prior misconduct, standard 1.7(a), and the underlying purposes of disciplinary proceedings. Standard 1.7(a) provides that "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust." Our view of the prior discipline, as indicated above, persuades us that imposing greater discipline in the current matter based solely on standard 1.7(a) would be manifestly unjust.

2. Comparable Case Law

[13a] In the present proceeding, respondent failed to refund promptly an unearned fee of approximately \$769 and failed to take reasonable steps to avoid prejudice to his clients by failing to notify the city attorney that he was no longer representing the Sheas. The parties do not cite, and our research has not revealed, other cases involving the same circumstances as the present case. Nevertheless, viewing this case against cases that have resulted in a range of discipline from reprovval to one year of stayed suspension with two years probation indicates to us that the recommended discipline should be modified.

In *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, the attorney was privately reprovved for failing to perform services competently in a probate case. The misconduct resulted in the client suffering interest and penalties on unpaid taxes. No aggravating circumstances were found, but several mitigating circumstances existed. As a condition of the reprovval, the attorney was required to make restitution to the client. However, we declined to order the attorney to take and pass the CPRE because he had voluntarily taken steps to insure that his misdeeds would not recur. (See *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 181 [denying reconsideration of decision not to require CPRE].)

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, the attorney was privately reprovved for commingling and failing to

retain disputed funds in trust in a single client matter. The misconduct was caused by an isolated mistake in an otherwise careful bookkeeping system. Extensive mitigating factors were present and no aggravating circumstances were found. As a condition of the reproof, we ordered the attorney to take and pass the CPRE.

In *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, the Supreme Court adopted our recommendation and the attorney was given six months stayed suspension and one year probation for failing to render a proper accounting and failing to communicate in a single matter. Although significant mitigating circumstances existed, the attorney had a record of prior discipline, which consisted of a public reproof. We noted that a reproof would ordinarily have been in order but that the prior discipline indicated greater discipline was appropriate under standard 1.7(a). (*Id.* at p. 150.)

In *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, the Supreme Court adopted our recommendation and the attorney was given one year stayed suspension and two years probation for failing to perform competently and abandonment of the clients' case without notifying them, returning their file, or shielding their rights from foreseeable prejudice in a single matter. The attorney denied to his clients that he had withdrawn as their counsel and refused to give the clients their file until they paid him additional fees. Both mitigating and aggravating circumstances were found, but the attorney had no prior discipline.

The misconduct in the present case is similar, in terms of its severity, to the misconduct in *Respondent G*, *Respondent E*, and *Cacioppo*. However, both *Respondent G* and *Respondent E* had mitigating circumstances not found here and the discipline in *Cacioppo* was greater because of the prior discipline. On the other hand, the misconduct in *Aguiluz* was more serious than present here. [13b] In light of these cases and the absence of mitigating evidence in the present record, we conclude that a public reproof is appropriate.

3. Ethics School

Respondent argues without citing to any authority that the CPRE is comparable to a final examination given after a prescribed course of study and ethics school is that course of study. Respondent asserts that he is amply prepared to pass the CPRE and therefore should not be required to attend ethics school. The Office of the Chief Trial Counsel asserts in its brief on review that the ethics school "is a one day, eight hour remedial course offered by the State Bar in a classroom setting which focusses on specific disciplinary problems. Through the use of hypotheticals and specific examples, the instructor reviews with attorneys practical methods of handling a law practice and attempts to provide them with the tools for recognizing and dealing with potential ethical problems in the future. Ethics School also provides attorneys with a forum to not only discuss the Rules of Professional Conduct but also to discuss the application of the Rules to their practice."

[14a] Respondent's failure to adhere to the provisions of the State Bar Act regarding written fee agreements (Bus. & Prof. Code, § 6148) appears at the heart of both the Shea and Flesher matters. We believe that that failure would be better remedied by requiring respondent's satisfactory completion of the State Bar's Ethics School instead of passage of the CPRE.

The Sheas hired respondent in June 1989 and paid him \$3,000 as advanced attorney fees. Business and Professions Code section 6148, in effect for over two years at the time, required this engagement to be the subject of a written retainer agreement which sets forth the basis of the fee and charges in the case, the general nature of the legal services respondent was to provide the Sheas and the "respective responsibilities" of respondent and the Sheas in performing the contract. The record shows no evidence that respondent entered into the required written agreement. Had respondent complied with these provisions, some or all of the triable issues below would likely have been obviated.

Although respondent committed no charged professional misconduct in the Flesher matter, as in the Shea matter, he apparently entered into no bilateral written agreement in exchange for \$2,500 in advance attorney fees in an engagement which also required such an agreement. The parties and the hearing judge expended considerable effort below in attempting to ascertain what services respondent was obligated to perform for Flesher. One of the very purposes of an attorney-client written retainer agreement is to eliminate such a basic issue from this proceeding.

[15] Decades before the State Bar Act required written attorney-client fee agreements, the Supreme Court observed that “‘The purpose of keeping proper books of account, vouchers, receipts and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called into question, whether in litigation with their clients or in disciplinary proceedings and *it is a part of their duty which accompanies the relation of attorney and client.*’” (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 713, emphasis in original, quoting *Clark v. State Bar* (1951) 39 Cal.2d 161, 174.) The written fee agreement not only protects clients and helps to ensure that a fair and understandable fee agreement is reached for specified services (see *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572-1573), it can also aid the attorney as well in proving the terms of engagement. Unfortunately, the foregoing principles appear to have been missed on respondent.

Our conclusion that respondent is not culpable of charged misconduct in the Flesher matter should not be read as a conclusion that he complied with his

duties under section 6148, violation of which was not charged. [14b] Because of our concern that respondent’s attention needs to be directed to his duties as to attorney-client fee agreements, as well as his duties upon withdrawal from employment, we conclude that his public reproof should be accompanied by a duty to address these concerns. [16] Because we do not recommend suspension, we are not required to include the duty that respondent pass a professional responsibility examination. (See *In the Matter of Respondent G, supra*, 2 Cal. State Bar Ct. Rptr. at p. 180.) [14c] We believe that the State Bar Ethics School with its format of classroom instruction, followed by a test, is a better learning alternative to meet respondent’s needs than the more passive experience of CPRE passage. For these reasons, we will require respondent’s completion of the State Bar Ethics School rather than passage of the CPRE.

DISPOSITION

For the foregoing reasons, it is hereby ORDERED that respondent be publicly reproofed. As a condition of the reproof, respondent is ORDERED to attend the State Bar Ethics School, and to pass the test given at the end of such session, within one year of the effective date of this reproof. Costs incurred by the State Bar in this matter are awarded to the State Bar pursuant to section 6086.10.

We concur:

PEARLMAN, P.J.
STOVITZ, J.