PUBLIC MATTER -- NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **JACLYN SHANDLER,** A Member of the State Bar.	**00-O-15606** **OPINION ON REVIEW**

Respondent Jaclyn Shandler was found culpable in two separate client matters of failing to perform legal services competently, failing to respond to the clients' inquiries, failing to inform the clients of significant developments in their cases, improper withdrawal from employment, failing to obey court orders, and committing acts of moral turpitude. Finding serious factors in aggravation, including perjury in her State Bar Court testimony, the hearing judge recommended that respondent be suspended from the practice of law for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on conditions, including an actual suspension of 90 days.

Respondent requested review, arguing that many of the hearing judge's factual findings are not supported by the record and that the discipline should be reduced to "at most" a stayed suspension. The State Bar asserts that the record supports all of the hearing judge's findings and that the recommended discipline is appropriate. Based on our independent review of the record, we modify the hearing judge's findings and conclusions, including the serious factual findings regarding the aggravating circumstances. Finding less culpability and fewer aggravating circumstances than did the hearing judge, we reduce the recommended discipline to two years' stayed suspension, two years' probation, and 60 days' actual suspension.

FINDINGS OF FACT AND LEGAL CONCLUSIONS

The hearing judge's decision contains few factual findings. For the most part, the decision recites conflicting witness testimony without resolving the conflicts. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968-969, fn. 2.) We therefore make our own factual findings based on our independent review of the record. We note, however, that the hearing judge clearly indicated his conclusions regarding the credibility of the witnesses, and our findings give those conclusions great weight. (Rule 305(a), Rules Proc. of State Bar; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.) We also modify the hearing judge's culpability conclusions and discuss our reasons for doing so below.

SALVATIERRA MATTER

In late October 1998, Karen Salvatierra[1] employed respondent on a contingency fee basis to represent her in a personal injury case resulting from an automobile accident that occurred in that same month. Karen asked her father, Rojelio Salvatierra, to look for a lawyer for her. Rojelio's friend referred him to Irene Lanuza, who worked for respondent. Lanuza went to the Salvatierra home and had Karen sign a contingency fee agreement employing respondent. All communications between respondent and her client were made through Rojelio. Karen never met or spoke to respondent during the entire time respondent represented her. However, Karen called respondent several times to speak to her about the case, but respondent did not return Karen's calls. Rojelio told respondent not to call Karen at Karen's work, but no restriction was placed on calling Karen at her home.

Robert B. Ehrenworth is an attorney whose office was located for a time in the same suite as occupied by respondent. Respondent referred a number of personal injury cases to him. Respondent asked Ehrenworth to draft Karen's complaint for her signature, which he did. The complaint was filed in superior court in October 1999. In November 1999, the court set an order

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[1] We refer to the Salvatierras by their first names for ease of reference, intending no disrespect.

to show cause hearing for February 17, 2000, regarding service of the summons and complaint. The court's notice indicated that no appearance was required if the proof of service of the summons and complaint had been filed.

Sometime in late January 2000, respondent asked Ehrenworth to try and settle Karen's case. She also told Ehrenworth that there was a hearing scheduled for February 17, 2000. Ehrenworth told respondent he could not attend that hearing. Ehrenworth made some efforts to settle the case but returned Karen's file to respondent after he discovered that the client had not signed a consent for a fee split and that a notice of association of counsel had not been filed in the court case.[2]

Respondent did not appear for Karen at the February 17 hearing, and the court set an order to show cause hearing regarding dismissal of the case for March 16, 2000. On February 23, 2000, respondent told Ehrenworth that she had lost the summons and complaint, and he provided her with another copy. He also sent a fax to respondent on the same day reminding her of the March order to show cause hearing date. On March 8, 2000, Ehrenworth sent respondent another fax reminding her of the March 16 hearing and giving her advice on what to do if she lost the summons. Respondent did not appear at the March 16 hearing, and Karen's case was dismissed.

On June 24, 2000, Ehrenworth received a telephone call from respondent. She asked him how to get the dismissal set aside and the deadline for doing so. Ehrenworth told respondent of the deadline and gave her advice on how to file a motion to set aside the dismissal. In July 2000, Ehrenworth faxed to respondent two examples of these motions. At some point, respondent asked Ehrenworth what could be done if the deadline was missed. He informed her there was nothing to his knowledge that could be done.

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[2] The retainer agreement signed by Karen allowed respondent to associate other counsel, but Ehrenworth was not aware of this.

Respondent did not inform Karen or Rojelio that the case had been dismissed. Rojelio found out about the dismissal from talking to his insurance company. He confronted respondent with this knowledge when he met with her in June 2000. Respondent's explanation to Rojelio was that the case had been "closed." Respondent informed Rojelio that she would need to be paid $250 to "open the case." Rojelio refused to pay her. During the meeting, respondent called Karen's doctor's office and requested that it fax her a copy of the doctor's report of Karen's treatment, which it did. No motion to set aside the dismissal was filed. Rojelio subsequently informed Karen that her case had been "closed."

The hearing judge found respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct[3] by intentionally, recklessly or repeatedly failing to perform legal services competently in that respondent failed to appear at the February 17 and March 16 hearings, failed to take steps to set aside the dismissal, and did no work to advance Karen's case beyond filing the complaint. We agree.

The hearing judge found that respondent violated Business and Professions Code section 6068, subdivision (m)[4] in that respondent failed to return Karen's calls and failed to adequately inform Karen of significant developments in her case, including that her case had been dismissed. We agree.

The hearing judge found that respondent willfully violated rule 3-700(A)(2) by withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of the client in that respondent never did any meaningful work on Karen's case beyond filing the complaint, and, after allowing her client's case to be dismissed, respondent not only failed to notify her client of the dismissal, she failed to try to have the dismissal set aside. We disagree with this conclusion. Respondent did not withdraw from representing Karen. She

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[3]Unless otherwise noted, all further references to rules are to the Rules of Professional Conduct.

[4]Unless otherwise noted, all references to sections are to the Business and Professions Code.

continued to represent her client and made some effort, albeit wholly inadequate, to get the dismissal set aside and to obtain a doctor's report detailing Karen's treatment. As in *Guzzetta v. State Bar*, *supra,* 43 Cal.3d at p. 979, respondent's conduct involved her intentional, reckless and repeated failure to perform legal services competently rather than improper withdrawal from employment.

The hearing judge found that respondent violated section 6103 by disobeying the court orders to appear at the February 17 and March 16 order to show cause hearings. We agree.

The hearing judge found that respondent violated section 6106 by committing acts of moral turpitude and dishonesty by wilfully allowing her client's case to be dismissed and then charging her client a fee to have the dismissal set aside, and by testifying falsely regarding Ehrenworth's involvement in the case.[5] Respondent testified that she requested the money because she became concerned about whether Karen's injuries were legitimate, and requiring Karen to pay the money would have demonstrated her good faith. We, like the hearing judge, find this after-the-fact explanation spurious at best. A more credible explanation for respondent's request for the money is contained in a letter respondent wrote to Karen in February 2001. Respondent told Karen in the letter that she "had too much money in the case and could not justify expending more money on a case when [she] did not believe [they] would recover any money." We agree that respondent's attempt to collect a fee to provide the necessary services to have the dismissal set aside was overreaching and involved moral turpitude. We, also find, respondent's misrepresentations in failing to disclose that Karen's case had been dismissed, and instead characterizing the matter as "closed" constituted moral turpitude.

The hearing judge did not clarify what part of respondent's testimony was false regarding Ehrenworth's involvement in Karen's case. We note that the evidence regarding Ehrenworth's involvement consisted primarily of the testimony of respondent and Ehrenworth. The two

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[5] As the notice to show cause in this case did not charge that respondent testified falsely, this finding can be considered only in aggravation as uncharged misconduct. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28.)

witnesses had conflicting accounts of what occurred. The hearing judge believed Ehrenworth's account and not respondent's. "There is a clear distinction between credibility and candor. [Citation.] The determination of a witness's credibility (i.e., believability) is primarily within the province of the hearing judge because he or she saw and heard the witness testify. [Citation.] On the other hand, the determination that a witness's testimony lacks candor (i.e., the witness is lying) must ordinarily be found by clear and convincing evidence. [Citations.]" (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) While we give the hearing judge's decision to believe Ehrenworth great weight, we find no clear and convincing evidence proving that respondent lied. Disbelieving respondent's testimony does not itself create evidence to the contrary. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 240.)

PACHECO MATTER

In February 2001, Ruben Pacheco employed respondent to represent him with respect to a workers' compensation claim. Respondent knew by October 2001 that Pacheco had retained another attorney. In late October 2001, Pacheco called respondent and requested that his file be provided to him. Respondent told Pacheco that the file would be ready for him on November 5, 2001. Pacheco never picked up the file, and his new attorney never asked respondent for the file. In August 2002, respondent met with a State Bar investigator regarding the Pacheco case. The investigator told respondent that she had not sent Pacheco his file. Respondent faxed the file to Pacheco's new attorney the next day.

The notice of disciplinary charges in this matter alleged that respondent violated rule 3-700(D)(1) by failing to release promptly Pacheco's file to him, and violated section 6106 by misrepresenting to the State Bar that she had told Pacheco that his file would be available on November 5, 2001.

The hearing judge found that respondent was not culpable of violating rule 3-700(D)(1) in that Pacheco's file was made available to him within a week of his request, and that respondent

was not culpable of violating section 6106 as there was no evidence presented showing that respondent's statement to the State Bar was false. The State Bar does not contest the hearing judge's conclusions, and after independently reviewing the record, we agree with the hearing judge. Respondent was the only witness to testify regarding this matter. The State Bar failed to present any evidence contradicting her version of the events. Even if respondent's testimony is disbelieved, there is no evidence proving the charges. We therefore dismiss this matter with prejudice without further discussion.

DE LA CRUZ MATTER

Jose De La Cruz hired respondent in July 2000 to represent him in a personal injury case arising from an automobile accident that occurred sometime between May and June of 2000.[6] In July 2000, De La Cruz met with respondent and Jaime Gutierrez, a Spanish speaking paralegal in respondent's office. De La Cruz did not speak to, or meet with, respondent again after this meeting. Respondent told De La Cruz that she was willing to take the case, that she was going to have his car repaired, and that she was going to send him to a clinic for treatment. She advised him to make copies of the damage estimates and to start going to the clinic. De La Cruz believed he signed about seven or eight documents at this meeting. De La Cruz went to the medical clinic about nineteen times for treatment. Respondent filed a complaint in municipal court in June 2001 on behalf of De La Cruz as his attorney.

In September 2001, De La Cruz received a letter from his insurance company in which, he believed, the insurance company "blamed" him for the accident. De La Cruz called respondent's office several times after receiving the letter. He did not receive a response from respondent. De La Cruz also went to respondent's office several times and was not able to speak to respondent. De La Cruz was finally able to schedule an appointment and upon arrival at respondent's office in September 2001, he met with respondent's husband, who is an attorney

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[6]As we noted *post*, there is conflicting evidence in the record as to the actual date of the accident.

and who assisted respondent in the office. Respondent's husband told De La Cruz that respondent no longer handled personal injury cases and that De La Cruz would be given his file. De La Cruz went to respondent's office several times to get his file and finally received it in October 2001. Respondent did not have De La Cruz sign a substitution of attorney form at that time and demanded that he return to the office to sign the form. De La Cruz refused. Respondent did not mail or take the form to De La Cruz.

From the filing of the lawsuit in June 2001 to October 2001 when respondent returned De La Cruz's file, there was nothing done on De La Cruz's case by respondent. However, after October 2001, respondent continued to represent De La Cruz to "keep the case alive." She made several court appearances on his behalf, served the summons and complaint, requested entry of default, filed an at-issue memorandum and requested additional time to respond to discovery. Respondent filed a motion to withdraw as De La Cruz's attorney in October 2002. The motion was granted in December 2002.

De La Cruz settled his case in October 2003 with the help of his daughter-in-law, Guadalupe De La Cruz. The total amount of the settlement was approximately $8,000. Before the matter settled, Guadalupe made trips to the court for hearings with De La Cruz, since no attorney would take the case. It was through Guadalupe's efforts that De La Cruz salvaged anything from his case. According to Guadalupe, the case took a long time to settle because respondent asserted a lien for costs and attorney's fees. Respondent made a claim for $206 in costs and 25 percent of any recovery in attorney's fees. Eventually, respondent relinquished her claim, and the matter settled.

The hearing judge found that respondent violated rule 3-110(A) by intentionally, recklessly, or repeatedly failing to perform legal services competently in that respondent failed to advance De La Cruz's claim both before and after the De La Cruz's complaint was filed. We agree.

The hearing judge found that respondent violated rule 3-700(A)(2) by failing to take reasonable steps upon termination of employment to avoid foreseeable prejudice to her client in that respondent failed to do any substantive work on De La Cruz's case, returned De La Cruz's file to him without obtaining a substitution of attorney, failed to file timely a motion to withdraw, and continued to make appearances in the case after the file was returned. We disagree with this conclusion. Respondent did not withdraw from representing De La Cruz prior to the court order relieving her. Even though she returned De La Cruz's file to him in October 2001, she continued to represent him by making court appearances and performing other legal work on his behalf. As in the Salvatierra matter respondent's conduct involved her intentional, reckless and repeated failure to perform legal services competently rather than improper withdrawal from employment. (*Guzzetta v. State Bar, supra,* 43 Cal.3d at p. 979.)

The hearing judge found that respondent violated section 6068, subdivision (m) by failing to notify De La Cruz that she filed his lawsuit outside the period of the statute of limitations and of the significance of her omission, by failing to timely inform De La Cruz that she was not handling auto accident cases anymore, by continuing to make appearances for De La Cruz after returning his file without informing him of the result of each appearance, by failing to inform De La Cruz that she had done nothing to advance his case and that his case would eventually be dismissed as a result, and by failing to respond to De La Cruz's calls for information on his case. We do not find clear and convincing evidence proving that the De La Cruz case was filed beyond the statute of limitations, but otherwise agree with the hearing judge. De La Cruz testified that the accident occurred on May 29, 2000, but notes taken by respondent's assistant of De La Cruz's initial office visit as well as a doctor's lien signed by De La Cruz indicated that the date of the accident was June 29, 2000. Further, the statute of limitations was not raised as a defense in the lawsuit, which eventually settled for $8,000.

The hearing judge found that respondent violated section 6106 by committing acts of moral turpitude in that she forged or permitted the forgery of De La Cruz's signature on a

December 13, 2000, declaration that contained false statements; created or permitted the December 13, 2000, declaration to be created and placed in De La Cruz's file; created a July 9, 2001, letter that purported to have been mailed to De La Cruz, and which contained false statements; submitted last minute evidence to further bolster her false testimony; knowingly gave false testimony in this matter; and delayed the settlement by insisting on fees which she had not earned. We do not find clear and convincing evidence supporting any of these findings.

The December 13 declaration states that De La Cruz discussed the merits of his lawsuit with respondent and that she told him she would no longer represent him in the matter. Respondent testified that she met with De La Cruz in December 2000 and informed him that she wouldn't be able to handle his case and that he would need to get another attorney. She believed that her office assistant gave De La Cruz the declaration to sign and she didn't remember if she was in the room when he did so. De La Cruz testified that he did not meet with respondent in December 2000 and first saw the declaration when he picked up his file from respondent in October 2001. When asked if the signature on the declaration was his, he stated that "[i]t does look like it." There are other hand written notations on the declaration, including the date, and De La Cruz testified that only his signature was his handwriting.

The hearing judge believed De La Cruz's testimony, and we give that credibility determination great weight. Nevertheless, in view of De La Cruz's testimony regarding his signature, the hearing judge's conclusion that respondent forged or permitted the forgery of the declaration is not supported by clear and convincing evidence. (*In the Matter of Dahlz, supra,* 4 Cal. State Bar Ct. Rptr. at p. 282.)

Similarly, there is no clear and convincing evidence showing that respondent created the declaration or permitted the declaration to be created and placed it in De La Cruz's file. The only witness to testify regarding how the document was created and placed in the file was respondent. The hearing judge did not find her testimony credible. However, disbelieving respondent's testimony does not itself create evidence to the contrary. (*In the Matter of Johnson, supra,* 3 Cal.

State Bar Ct. Rptr. at p. 240.) Absent respondent's testimony, there was no evidence showing how the document came to be. We therefore conclude that these findings are also not supported by the record.[7]

The July 9, 2001, letter was purportedly written by respondent and sent to De La Cruz advising him that, since he didn't pick up his file, respondent filed the complaint for him. The letter also requested that De La Cruz go to respondent's office and sign a substitution of attorney. Respondent testified that she wrote the letter and it was sent to De La Cruz, and he testified that he could not remember if he received it "in the mail." The hearing judge apparently concluded that respondent created this letter in an effort to cover her misconduct in the case. We do not find any evidence, let alone clear and convincing evidence, supporting the conclusion that respondent fabricated the letter. Disbelieving respondent's testimony that she sent the letter does not prove that she placed it in the file after the fact to cover herself. (*In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 240.)

The same defect taints all of the hearing judge's remaining findings that respondent testified falsely. For example, the hearing judge found that respondent "testified falsely" that she did not meet with De La Cruz on his initial visit to her office in June 2000. De La Cruz testified that she did. The hearing judge believed De La Cruz, but that alone does not prove by clear and convincing evidence that respondent perjured herself. Similarly, the hearing judge found that respondent testified falsely that she could not remember if De La Cruz had an appointment for the December 2000 office visit or if he came in on his own. The hearing judge disbelieved this testimony, but there simply was no evidence proving that respondent lied.

The "last minute" evidence that the hearing judge concluded was forged and presented at the State Bar Court trial was an "SR-1 Form" showing that date of the accident as June 29, 2000,

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[7] Respondent asserts that the State Bar dismissed the forgery allegations regarding the declaration in a pretrial statement filed in October 2003. We note that the State Bar did indeed request that the notice to show cause be amended to delete the forgery allegations. However, we find no record showing that hearing judge granted that request.

and the notes taken by respondent's office assistant of De La Cruz's initial office visit which also show the date of the accident as June 29. The SR-1 form is a Department of Motor Vehicles traffic accident report form. It shows the date of the accident as June 29, 2000, and is signed by De La Cruz. Respondent testified that the form was in De La Cruz's file. She believed De La Cruz completed the form and submitted it "to the state," and that he provided a copy of it to her office. De La Cruz was not questioned about the form at trial. The SR-1 form was not admitted into evidence at the trial on lack of foundation grounds and therefore neither the form nor secondary evidence of its contents may be considered. (Evid. Code, §§ 403, 1401.)

Respondent testified that the intake notes were in her assistant's handwriting and that it was her understanding that the notes were a memorialization of De La Cruz's description of the accident. No contrary evidence regarding the notes was presented. Disbelieving respondent does not prove that the notes were forged. We find no clear and convincing evidence supporting the hearing judge's conclusion regarding the form and notes.

Lastly, the hearing judge found that respondent violated section 6106 by delaying De La Cruz's settlement by insisting on fees which she had not earned. This matter was not charged in the notice of disciplinary charges. In April 2003, after being relieved as attorney of record, respondent asserted a lien claim for $206 in costs and 25 percent of any recovery in attorney's fees.[8] Guadalupe De La Cruz testified that the case settled in October 2003 and when asked why the case took so long to settle she said because respondent "started a lien." She was not asked for any further explanation. Respondent testified that she asserted the lien and then ultimately waived it. No evidence was presented showing when the lien claim was waived, and as such, we

[8] Respondent's assertion of the lien may very well have been an attempt to collect an illegal fee in violation of rule 4-200(A) as an attorney who withdraws voluntarily from employment without cause in a contingent fee case forfeits recovery for services performed. (*Hensel v. Cohen* (1984) 155 Cal.App.3d 563, 567-568.) As this charge was not made in the notice of disciplinary charges, we decline to determine the issue.

do not find clear and convincing proof that the settlement was delayed as a result of the lien claim.

MITIGATING AND AGGRAVATING CIRCUMSTANCES

In mitigation, the hearing judge found that respondent practiced law for 22 years without prior discipline. (Rule Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(i).) We agree. Respondent testified that she made several case management improvements in her office procedures such as networking her office computers, setting up a calendaring system and developing standardized forms. The hearing judge recited this testimony in his decision but made no findings in mitigation based on it. As respondent's testimony was the only evidence offered regarding this matter, we will give this some weight in mitigation.

In aggravation, the hearing judge found that respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).) We agree. We make the additional finding in aggravation that respondent harmed her client in that Karen Salvatierra lost her cause of action. (Std. 1.2(b)(iv).) The hearing judge found that respondent committed uncharged acts of misconduct by wilfully allowing Karen's case to be dismissed and then charging her client money to have the matter set aside. This "uncharged misconduct" was charged in the notice of disciplinary charges and formed the basis for the conclusion that respondent was culpable of violating section 6106. It is therefore not an appropriate aggravating circumstance as it is duplicative. The hearing judge also found in aggravation that respondent committed perjury on the witness stand. We find no support for this finding as discussed above.

DISCUSSION

Respondent's arguments on review are essentially two-fold: she asserts that many of the hearing judge's factual findings are not supported by the evidence and that the discipline should be reduced. Our above conclusions regarding culpability and our discussion address all of respondent's arguments concerning the hearing judge's factual findings, except one.

Respondent asserts that the hearing judge made "repeated unsupportable findings" that respondent was not a credible witness. In support of this argument, she points to one matter regarding her testimony in the Salvatierra matter concerning her receipt of a two-page medical report and a billing statement, which was included with the report. Respondent testified that she did not see the two-page report until it was produced by the State Bar during the course of the disciplinary proceeding. However, respondent made reference to the amount of the billing statement included with the two-page report in a letter she wrote to the State Bar before she received the two-page report from the State Bar.

The hearing judge indicated that he found differences between respondent's testimony and the statements she made in the letter she wrote, and indicated that he considered those matters "with respect to [r]espondent's credibility." Beyond this vague observation, the hearing judge did not specify the impact the conflicting statements had on his overall determination that respondent was not a credible witness.

As shown in our above discussion regarding culpability, the testimony of respondent and the other witnesses was diametrically opposed in many areas. There were discrepancies and inconsistencies between the witness's testimony and that of the other witnesses as well within each witness's testimony. In addition, each witness had memory lapses. These circumstances are common. (See BAJI No. 2.21 (Oct. 2005 ed.).) This case is a classic example of the need for the trier of fact to resolve the conflicts by evaluating the witnesses' statements after observing their demeanor and the character of their testimony. The hearing judge who saw and heard all the witnesses was in a far better position to perform this function. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 121.) Accordingly, we decline to reverse the hearing judge's ultimate conclusion that respondent was not a credible witness.

Turning to the appropriate degree of discipline, we agree with respondent that the discipline in this case should be reduced. In summary, we have concluded that, in the Salvatierra matter, respondent willfully failed to perform legal services competently (rule 3-110(A)), failed

to communicate with her clients (§ 6068, subd .(m)), disobeyed court orders (§ 6103) and engaged in an act of moral turpitude (§ 6106) and that in the De La Cruz matter respondent willfully failed to perform services competently (rule 3-110(A)) and failed to communicate with her client (§ 6068, subd. (m)). This misconduct is mitigated by respondent's 22 years of practice without discipline and is aggravated by the multiple acts of misconduct and the harm to Karen Salvatierra.

In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) The standards applicable to this proceeding are standards 2.3, pertaining to offenses involving moral turpitude, 2.4(b), pertaining to offenses involving the failure to perform services competently and the failure to communicate, and 2.6, pertaining to offenses involving the violation of section 6103. When two or more different standards apply, the sanction imposed shall be the most severe of the applicable standards. Standard 2.3 is the most severe of the applicable standards and it provides for actual suspension or disbarment depending on the extent of the misconduct and the harm to the clients.

In *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, the attorney failed to complete work for one client and retained unearned fees of $2,000, and failed to communicate and abandoned a second client. In mitigation, the attorney practiced law for 11 years without misconduct, and in aggravation, caused harm to his client in that a default judgment for over $11,000 was entered against the client. Kennon was suspended for two years, stayed, with two years' probation and 30 days' actual suspension.

In *King v. State Bar* (1990) 52 Cal.3d 307, the attorney failed to perform services in two cases, which resulted in loss of one of the client's causes of action. That client sued King and obtained a default judgment for approximately $84,000. King never paid or offered to pay the client any part of the judgment. King also failed to return client files in both cases. In

mitigation, King had practiced 15 years without discipline. He was suspended for four years, stayed, with four years' probation and 90 days' actual suspension.

In *Wren v. State Bar* (1983) 34 Cal.3d 81, the attorney failed to perform services in a single client matter, misrepresented the status of the case to the client and submitted misleading testimony to the State Bar Court in the disciplinary proceeding. The Supreme Court noted Wren's years of practice without prior discipline (approximately 16 years), but nevertheless concluded that the serious nature of the misconduct warranted the imposition of two years' stayed suspension, two years' probation and 45 days' actual suspension.

In *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, the attorney failed to perform services in two cases, which resulted in the loss of both clients' causes of action. Greenwood failed to cooperate with the State Bar, and his default was entered in the discipline case. Greenwood's six years of practice without prior discipline was not found to be a mitigating circumstance. He was suspended for 18 months, stayed, with two years' probation and 90 days' actual suspension.

In *Gold v. State Bar* (1989) 49 Cal.3d 908, the attorney failed to perform services for two clients. In one of the cases, Gold missed the statute of limitations which resulted in the loss of the client's cause of action. Gold misrepresented to that client that he had settled her case, manufactured a settlement distribution authorization, and paid the client out of his own pocket in order to cover-up his misconduct. The Supreme Court found significant mitigating circumstances, including that Gold had practiced for 25 years without prior discipline and that Gold was motivated by a desire to make his client whole. The Court imposed three years' stayed suspension, three years' probation, and 30 days' actual suspension.

We recognize that there are differences between the above cases and respondent's case. For example, *Kennon* and *King* involved more harm to the clients than the present case. We do not diminish the harm caused to Karen Salvatierra by the loss of her legal rights, but note that the unliquidated nature of the loss precludes attaching a specific dollar figure to the harm. *Wren* and

Gold involved more extensive dishonesty than is present here. *Greenwood* had more aggravating and fewer mitigating circumstances. Nevertheless, these cases provide guidance and show that the failure to perform services in similar two-client cases, even when not accompanied by acts of moral turpitude, has resulted in actual suspension.

Respondent's 22 years of practice without prior discipline also distinguishes this case from the above. "The absence of a prior disciplinary record is in itself an important mitigating circumstance. [Citation.]" (*Chefsky v. State Bar, supra,* 36 Cal.3d at p. 132, fn. 10.) It is a particularly strong mitigating factor here, given the length of respondent's years of practice. (*Waysman v. State Bar* (1986) 41 Cal.3d 452, 457.) On balance, we conclude that two years' stayed suspension, two years' probation, and 60 days' actual suspension is warranted. This discipline is consistent with the standards and with the discipline imposed in the above cases and, in our view, will adequately protect the public.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for two years, that execution of that suspension be stayed, and that she be placed on probation for two years on conditions, including that respondent be actually suspended from the practice of law during the first 60 days of her probation. We further recommend that respondent be ordered to comply with probation conditions numbered 2 through 8 recommended by the hearing judge in his decision filed January 29, 2004.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation within one year after the effective date of the Supreme Court order in this matter.

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It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, to be paid in accordance with section 6140.7 of that code.

WATAI, J.

We concur:

STOVITZ, P. J.
EPSTEIN, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on November 30, 2005, I deposited a true copy of the following document(s):

OPINION ON REVIEW, FILED NOVEMBER 30, 2005.

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

Erica Ann Tabachnick
900 Wilshire Blvd., #1000
Los Angeles, CA 90017

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Timothy G. Byer, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 30, 2005**.

Shemainee Carranza

Shemainee Carranza
Case Administrator
State Bar Court