

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HENRY L. GLASSER

A Member of the State Bar

[No. 86-O-18495]

Filed September 11, 1990

SUMMARY

In this matter, the hearing judge dismissed the notice to show cause without prejudice on motion of the respondent, on the ground that the notice was so vague that it did not provide respondent with sufficient notice of his alleged misconduct. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar examiner sought review, and the review department affirmed. The review department held that the notice to show cause did not give the respondent adequate notice of any specific alleged misconduct. The notice broadly referred to a series of loans made by respondent over an unspecified period of time commencing in 1982, by respondent as trustee for twelve unidentified client family trusts, to one or more of three limited partnerships of which respondent was general partner. None of the loans were identified by lender, borrower, amount or date. The notice to show cause did not specify which loans were challenged as improper, nor did it tie the misconduct charged in any paragraph of the notice to the elements of an offense proscribed by any particular statute or rule. Instead, it concluded with a catch-all paragraph charging that respondent had "committed the above-described acts in wilful violation of your oath and duties as an attorney and in particular," specified sections of the Business and Professions Code and Rules of Professional Conduct.

In affirming the order granting respondent's motion to dismiss, the review department emphasized that in order to defend against disciplinary charges, a respondent needs to be adequately apprised of the precise nature of the charges. It is thus incumbent upon the Office of Trial Counsel not only to determine which specific conduct of the respondent is at issue, but also to articulate the nature of the challenged conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby.

COUNSEL FOR PARTIES

For Office of Trials: Starr Babcock, Mara Mamet

For Respondent: Ephraim Margolin, Bradford L. Battson

HEADNOTES

- [1] **106.20 Procedure—Pleadings—Notice of Charges**
 139 Procedure—Miscellaneous
 192 Due Process/Procedural Rights
 A motion to dismiss a notice to show cause for failure to provide the respondent with sufficient notice of the alleged misconduct is available where appropriate to assure adequate notice of charges in compliance with statutory mandate and due process.
- [2] **106.20 Procedure—Pleadings—Notice of Charges**
 192 Due Process/Procedural Rights
 In order to defend against charges, a respondent needs to be adequately apprised of the precise nature of the charges.
- [3] **192 Due Process/Procedural Rights**
 194 Statutes Outside State Bar Act
 Neither civil nor criminal rules of procedure govern State Bar disciplinary proceedings. However, the right to practice one's profession is sufficiently precious to be surrounded by a panoply of legal protection, including invocation of civil and criminal procedural rules when necessary to insure administrative due process.
- [4 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
 192 Due Process/Procedural Rights
 Adequacy of notice is an essential element of due process, in order that the accused may have a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered at trial. The respondent in a disciplinary proceeding is entitled to reasonable notice of the specific charges, which is the purpose of the notice to show cause.
- [5 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
 192 Due Process/Procedural Rights
 The principle that due process requires notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, applies with equal force in State Bar proceedings. The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded. Thus, the charges in the notice to show cause should relate individual facts to specific statutory and rule violations.
- [6 a, b] **106.10 Procedure—Pleadings—Sufficiency**
 106.20 Procedure—Pleadings—Notice of Charges
 165 Adequacy of Hearing Decision
 192 Due Process/Procedural Rights
 It is important for decisions of the State Bar Court to identify with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. This specificity is essential to the respondent's due process right to adequate notice, as well as to meaningful Supreme Court review of the recommendation of the State Bar Court. The notice to show cause must be sufficient to support the charges relied upon in the decision, because the findings of the State Bar Court must rest on the charges filed.

- [7] **106.20 Procedure—Pleadings—Notice of Charges**
Shortcomings of notice to show cause were manifest, where such notice did not give respondent notice of any specific alleged misconduct, but broadly referred to a series of loans made over an unspecified period of time from twelve unidentified family trusts to one or more of three limited partnerships; none of the loans was identified by lender, borrower, amount or date; and the notice did not specify which of the loans were challenged as improper.
- [8] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
Examiner's offer to amend notice to show cause to name twelve trusts from which respondent (as trustee) was alleged to have made loans was inadequate to remedy deficiencies of notice to show cause which did not identify loans by borrower, date or amount and did not specify which of series of many loans were alleged to have been improper.
- [9] **106.10 Procedure—Pleadings—Sufficiency**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
In pleading a violation of the ethical rule requiring payment of client trust funds on demand, there must be an allegation that the respondent was in possession of identified funds, securities or other property of a client; that the client was entitled to receive the funds, securities or property, and that there was a request by the client that the respondent pay or deliver the funds, securities or other property.
- [10] **106.10 Procedure—Pleadings—Sufficiency**
280.20 Rule 4-100(B)(1) [Former 8-101(B)(1)]
280.50 Rule 4-100(B)(4) [Former 8-101(B)(4)]
Reference in notice to show cause to undisclosed loans made from client trust funds would appear to charge violation of rule requiring disclosure of receipt of client funds, but not of rule requiring payment of funds to client on demand, since clients would not be in a position to demand funds which they were unaware were transferred out of trust.
- [11] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
135 Procedure—Rules of Procedure
Inadequacies in pleading not only made notice to show cause insufficient under rule 550, Trans. Rules Proc. of State Bar, but also caused questions as to whether notice met requirements of rule 554.1, providing that a notice to show cause may be dismissed on ground that it fails to state a disciplinable offense as a matter of law.
- [12] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
If State Bar intends to charge violation of rule of professional conduct regarding duty of competence, there must be an allegation that respondent intentionally or with reckless disregard or repeatedly failed to perform legal services competently, and notice should state what particular conduct is characterize as violating this standard.

- [13] **106.20 Procedure—Pleadings—Notice of Charges**
273.00 Rule 3-300 [former 5-101]
 Where the first sentence of a paragraph in a notice to show cause referred to a single transaction and the rest of the same paragraph referred to multiple transactions, and where it was unclear whether some or all of the loans described earlier in the notice were alleged not to have been fair or reasonable, there was unnecessary ambiguity in the alleged misconduct with respect to the charge of improper business transactions with clients.
- [14] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
 In every disciplinary proceeding it is the State Bar’s burden to prove specific charged misconduct by clear and convincing evidence.
- [15 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
113 Procedure—Discovery
192 Due Process/Procedural Rights
 The opportunity for permissive amendment of the notice to show cause at a later stage in the proceedings on adequate notice of new factual allegations does not negate the State Bar’s obligation in the first instance to provide adequate notice of the original charges. While developments during discovery may lead to augmentation or modification of the charges by amendment, the ability to amend does not affect the requirement of particularity in the original charges. Informal sharing of source material on which charges are based, while highly desirable, is no substitute for formal charges.
- [16] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
1099 Substantive Issues re Discipline—Miscellaneous
 The State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. If the evidence produced before the hearing department shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing.
- [17 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
162.20 Proof—Respondent’s Burden
192 Due Process/Procedural Rights
 Unless the respondent demonstrates that the respondent’s defense was actually compromised, a slight variance in the evidence that relates to the noticed charge does not, in itself, deprive the respondent of adequate notice. This situation, however, is patently different from one in which ambiguity and lack of specificity in the notice to show cause make it unclear which aspect of the respondent’s conduct over a number of years allegedly violated the rules and statutes cited in the notice.
- [18] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
106.90 Procedure—Pleadings—Other Issues
135 Procedure—Rules of Procedure
 Charges should only be filed when the Office of Trial Counsel ascertains that reasonable cause exists to charge that particular conduct occurred which violated a particular regulatory provision. (Rule 510, Rules Proc. of State Bar.)

- [19] **106.20 Procedure—Pleadings—Notice of Charges**
 135 Procedure—Rules of Procedure
 The State Bar has the duty to distill from sources available to it whether reasonable cause exists for charging a member with statutory or rule violations. It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby. (Rules 510, 550, Rules Proc. of State Bar.)
- [20] **106.90 Procedure—Pleadings—Other Issues**
 162.20 Proof—Respondent's Burden
 192 Due Process/Procedural Rights
 The scope of the respondent's defense is determined by the scope of the notice to show cause.
- [21] **106.10 Procedure—Pleadings—Sufficiency**
 106.20 Procedure—Pleadings—Notice of Charges
 106.40 Procedure—Pleadings—Amendment
 192 Due Process/Procedural Rights
 The degree of specificity required in a notice to show cause does not necessitate lengthy detailed pleading. A notice to show cause does not have to include explicit details of a respondent's alleged misconduct, nor does it have to match the subsequent proof at the hearing as long as the difference is immaterial or the pleading is amended and the respondent is given an opportunity to respond to the additional allegations.
- [22] **106.20 Procedure—Pleadings—Notice of Charges**
 165 Adequacy of Hearing Decision
 192 Due Process/Procedural Rights
 Increased specificity in articulating the charged misconduct in the notice to show cause will enable the respondent to prepare to meet the charges; provide the hearing judge with a proper framework for findings and conclusions; and make it easier for the review department and the Supreme Court to conduct meaningful de novo review of the hearing judge's decision.

ADDITIONAL ANALYSIS

Culpability

Not Found

213.15 Section 6068(a)

220.15 Section 6103, clause 2

OPINION

PEARLMAN, P.J.:

The issue before us is the sufficiency of the notice to show cause in this proceeding against respondent Glasser. The notice to show cause was dismissed without prejudice by Judge Jennifer Gee of the hearing department at the request of the respondent, whose counsel contended that the notice violated rules 550 and 554.1 of the Transitional Rules of Procedure of the State Bar, Business and Professions Code section 6085, the due process clause of the Fourteenth Amendment of the United States Constitution, the Sixth Amendment of the United States Constitution and article I, section 7(a) of the California Constitution. The State Bar examiner has sought our review.

[1] A motion to dismiss of the type before us has rarely been made in State Bar proceedings, but it is available where appropriate to assure adequate notice of charges in compliance with statutory mandate and due process. We adopt Judge Gee's October 30, 1989 Order Granting Motion to Dismiss in this case, concluding, as did Judge Gee, that "the Notice as currently drafted is so vague that it does not provide Respondent with sufficient notice of his alleged misconduct." (Order p. 5.)

DISCUSSION

[2] In order to defend against charges, a respondent needs to be adequately apprised of what the precise nature of the charges is. Rule 550 of the Transitional Rules of Procedure of the State Bar¹ so provides: "The notice to show cause shall cite the statutes, rules, or court orders alleged to have been violated . . . and the particular acts or omissions, or other acts, constituting the alleged violation or violations, or the basis for the action proposed. . . ." (Emphasis added.)

[3] While neither civil nor criminal rules of procedure govern State Bar disciplinary proceedings

(*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226), "[t]he right to practice one's profession is sufficiently precious to be surrounded by a panoply of legal protection." (*Id.* at p. 226.) This includes invocation of civil and criminal procedural rules when necessary to insure administrative due process. (*Id.*, citing *Werner v. State Bar* (1944) 24 Cal.2d 611, 615.)

[4a] Adequacy of notice is an essential element of due process. "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*People v. Thomas* (1987) 43 Cal.3d 818, 823.) [5a] "No principle of procedural due process is more clearly established than that the notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Id.* at p. 823, citing *Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

[5b] This principle applies with equal force in State Bar proceedings. (*Woodard v. State Bar* (1940) 16 Cal.2d 755, 757 ["The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded"].) Thus, even when no objection has been raised by the respondent, the Supreme Court has in recent years criticized the failure of the charges in the notice to show cause to relate individual facts to specific statutory and rule violations. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968; *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 931.)

In *Guzzetta* the Supreme Court was critical of State Bar actions where the link between the alleged misconduct and specific charges is not evident from the record, finding that "[n]either the charges, nor the ultimate findings and conclusions in the instant record relates the conduct charged as violations of

1. Hereafter "Rules of Procedure of the State Bar" or "Rules Proc. of State Bar."

petitioner's duties as an attorney to the statutes or Rules of Professional Conduct that the State Bar concludes have been violated." (*Guzzetta v. State Bar, supra*, 43 Cal.3d at p. 968.) The Court went on to note, "Not only does this failure make the work of this court more difficult since we are forced to determine the basis for the recommended discipline by deductive reasoning, but it also brings into question the adequacy of the notice given to an attorney of the basis for the disciplinary charges. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420; *Woodard v. State Bar* (1940) 16 Cal.2d 755, 757.)" (*Guzzetta v. State Bar, supra*, at p. 968, fn. 1.) The same concerns were raised in *Maltaman*, and the same language from *Guzzetta* was quoted by the court to emphasize its point. (*Maltaman v. State Bar, supra*, 43 Cal.3d at p. 931, fn. 1.)

[6a] Last fall, in *Baker*, the Supreme Court again addressed the issue of adequacy of notice: "Once again we are constrained to call to the attention of the State Bar Court the importance of identifying with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. While petitioner here does not complain of any due process violation in lack of notice, this specificity is also essential to meaningful review of the recommendation of the State Bar Court." (*Baker v. State Bar, supra*, 49 Cal.3d at p. 816.)

[6b] The Supreme Court's immediate concern in *Baker* was its ability to conduct meaningful review of the decision of a referee of the prior voluntary State Bar Court. However, the reference to respondent's due process rights to adequate notice clearly refers to the sufficiency of the notice to show cause to support the charges relied upon in the decision. "[T]he findings must rest on the charges filed." (*Irving v. State Bar* (1931) 213 Cal. 81, 85; see also *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1153-1154 [charges held to have given respondent full notice of the specific conduct at issue].)

[7] We turn now to the charges filed against respondent Glasser in the instant proceeding. The charges of the notice to show cause are contained in a single count of less than two pages, a copy of which is attached as an exhibit to this opinion. Its shortcomings are manifest. It does not give the respondent notice of any specific alleged misconduct, but broadly refers to a series of loans made by respondent, over an unspecified period of time commencing in 1982, as trustee for 12 unidentified client family trusts to one or more of three limited partnerships of which respondent was general partner.² [8 - see fn. 2] None of the loans are identified by lender, borrower, amount or date. The notice merely alleges that the gross amount of all of the loans when added together is "in excess of \$2,000,000." The notice also alleges that the loans were "frequently undocumented," "many" were allegedly not disclosed to the clients and some were allegedly made after knowledge that the limited partnerships were likely to fail. The notice to show cause does not specify which loans are challenged as improper: all of the loans, only those that were undocumented, only those that were allegedly not disclosed, or some combination or subset of the above. Nor does it tie the misconduct charged in any paragraph of the notice to the elements of an offense proscribed by any particular statute or rule, instead concluding with a catch-all paragraph charging that: "You committed the above-described acts in wilful violation of your oath and duties as an attorney and in particular, California Business and Professions Code Sections 6068(a), 6103 and 6106; and former Rule 6-101(2) (pre-October 1983) and former Rules 5-101, 6-101(A)(2), 8-101(B)(3) and 8-101(B)(4) (pre-May 27, 1989)."

The Office of Trial Counsel's brief before the review department belatedly seeks to correlate specific paragraphs of the notice to show cause with the alleged violation of rules 8-101(B)(3) and 8-101(B)(4), asserting without explanation that "by implication these same facts would be sufficient to support the factual bases for the additional charges."

2. [8] In the proceedings below, the examiner offered to amend the notice to show cause to name the 12 trusts, but refused to make any further clarifying amendments. The hearing judge

properly rejected this offer as inadequate to remedy the deficiencies of the notice. (Order p. 4.)

Thus, the examiner contends that the notice alleges, in paragraphs two through four, that respondent was under a duty to provide an accounting and failed to do so in violation of rule 8-101(B)(3). Contrary to the examiner's assertion, the duty to account is not expressly pleaded in paragraphs two through four, or anywhere else in the notice, but must be inferred from the allegation that respondent acted as the "trustee" for unnamed client trusts. There are likewise no express allegations of a failure to account, but only allegations that respondent made many loans which were "frequently undocumented" and "many" were not disclosed to his clients.

[9] There is *no* allegation anywhere as required by rule 8-101(B)(4) that respondent was, at *any* time, in possession of "*any* identified funds, securities or other properties" of *any* client; that any client "was entitled to receive" any funds, securities or other properties or "that there was a request" by *any* client "to pay or deliver" *any* funds, securities or other properties.

The examiner's brief does not address the requirement of relating the charges to specific conduct, but states that "[t]o properly allege a violation of 8-101(B)(4), the State Bar must allege sufficient facts to establish that respondent was (1) in possession of client funds, and (2) during the time he had possession of client funds he used them for his own use or benefit." No citation is supplied for this formulation of the required pleading of a rule 8-101(B)(4) violation which omits the identification of particular client funds and lacks the essential element of client demand. Moreover, the only allegation of use of funds for respondent's own benefit is in paragraph five of the notice to show cause, which states: "You were aware of the substantial depreciation of the trusts and of the likelihood of the failure of the limited partnerships, but continued to make loans from the trusts to the limited partnerships. You misappropriated *these* funds to your own use and benefit." (Emphasis added.) The placement of the allegation of misuse in paragraph five and the limiting adjective, "these",

makes it appear that only the loans made after knowledge of the risk of non-repayment were allegedly misappropriated.

The examiner states that in paragraphs one through four he likewise sought to allege that respondent used earlier loaned funds for respondent's own use and benefit. No such allegation is contained in these paragraphs. Thus, if the Office of Trial Counsel intended the section 6106 charge to apply to conduct alleged in paragraphs one through four as well as paragraph five, it has not pleaded a basis for such charge. Also, as noted above, the examiner fails to acknowledge the requirement of an allegation that the client requested such funds as a basis for a rule 8-101(B)(4) violation. No such allegation is contained anywhere in the notice. [10] On the other hand, the notice refers to failure to disclose loans made from the trust account. An allegation of undisclosed receipt of client funds would appear to charge a violation of 8-101(B)(1), but not 8-101(B)(4), since clients would not be in a position to demand funds which they were unaware were transferred out of trust.

[11] The inadequacies in pleading not only make the notice insufficient under rule 550, but also cause questions as to whether the notice meets the requirements of rule 554.1, which provides that a notice to show cause may be dismissed on the ground that it fails to state a disciplinable offense as a matter of law.

The Supreme Court in *Baker* specifically addressed problems with respect to alleged violation of Business and Professions Code sections 6068 (a) and 6103. (See *Baker v. State Bar*, *supra*, 49 Cal.3d at pp. 814-815; *Sands v. State Bar* (1989) 49 Cal.3d 919, 931.) Here, as in *Baker* and the first three counts in *Sands*, there are no charged violations of any specific laws outside the Business and Professions Code. The notice to show cause does not specify in what manner, and by which conduct, respondent failed to support the laws of this state within the meaning of section 6068 (a), or violated section 6103, which the

Supreme Court has held does not define any duties. (*Baker, supra*, 49 Cal.3d at p. 815; *Sands, supra*, 49 Cal.3d at p. 931.)³

[12] A similar problem exists with the alleged violation of former rule 6-101(A)(2). There is no allegation that respondent “intentionally or with reckless disregard or repeatedly failed to perform legal services competently.” If the State Bar intends to characterize particular conduct as violative of former rule 6-101(A)(2), it should so state in its notice. If his entire handling of each of the 12 client trusts is intended to be charged as violative of this rule, then it is no great burden on the examiner to articulate that. However, it is unfair to leave it open for the respondent to conjecture whether seven years of handling twelve trusts is at issue if the State Bar possesses reasonable cause only to challenge specific conduct over a shorter time period.

[13] Again, with respect to former rule 5-101, there is unnecessary ambiguity in the alleged misconduct. Paragraph four states that “you entered into a business transaction and acquired an interest adverse to your clients and beneficiaries, the terms of which were not fair or reasonable.” (Emphasis added.) It then refers to failure to disclose the terms of *all transactions* and manner of acquisition of adverse interests. The first sentence refers to the unfairness of a single transaction and the rest of the paragraph refers to multiple transactions. The reader is left to infer that “transactions” in paragraph four is intended to refer to loans described in earlier paragraphs

and is left to guess whether all of the loans are intended to be characterized as not fair or reasonable, or only some loans or categories of loans.

[14] In every disciplinary proceeding it is the State Bar’s burden to prove specific charged misconduct by clear and convincing evidence. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 725; *Golden v. State Bar* (1931) 213 Cal. 237, 247.) [4b] The respondent is entitled to reasonable notice of the specific charges. (Bus. & Prof. Code, § 6085.) That is the purpose served by the notice to show cause—putting the respondent on notice of the specific misconduct the State Bar intends to prove.

The examiner brushes aside issues of vagueness, contending that the notice meets both civil and criminal pleading requirements—which it clearly does not.⁴ He asserts that the State Bar’s only duty is to put respondent on notice of the particular statutes and rules allegedly violated, but not to specify the particular conduct. The examiner contends that the respondent can ascertain the precise factual allegations during the course of discovery and trial. This argument is misconceived. [15a] The opportunity for permissive amendment at a later stage in the proceedings on adequate notice of new factual allegations does not negate the State Bar’s obligation in the first instance to provide adequate notice of the original charges.

The examiner mistakenly relies on *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929, as authority in

3. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of section 6068 (a) and/or 6103 of the Business and Professions Code. (E.g., *Layton v. State Bar* (1990) 50 Cal.3d 889, 893, 898, reh. den. July 18, 1990; *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision. Moreover, prior to *Layton* and *Hartford*, the court reaffirmed in other cases the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245; *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 903.) We are reluctant to assume that the Court intended, in *Layton* or *Hartford*, to overrule sub silentio decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as

applied in the text *ante*, pending further clarification from the Supreme Court.

4. In civil cases a demurrer will be sustained for uncertainty of the complaint. (Code Civ. Proc., § 430.10, subd. (f); see generally 5 Witkin, *California Procedure* (3d ed. 1985) Pleading, § 926, pp. 363-364.) Examples include failure to specify the date of occurrence of material events (*Corum v. Hartford Acc. & Indem. Co.* (1945) 67 Cal.App.2d 891, 894) and the date of indebtedness. (*Miller v. Brown* (1951) 107 Cal.App.2d 304, 307.) As pointed out by the examiner in his brief, the bare essentials in a criminal accusatory pleading include the approximate date, identification of the victim and a statement of the act or omission constituting the offense. (See also 4 Witkin, *California Criminal Law* (2d ed. 1989) Proceedings Before Trial, § 2059.)

support of his position. To the contrary, the Supreme Court in *Van Sloten* stated that [16] “the State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. [Citation.] If the evidence produced before the hearing panel shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing.” The examiner relies on the next sentence in the opinion, “Yet adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before the proceedings commence. [Citation.]” (*Id.*, emphasis in original.) The Court then explained that, [17a] “Unless the petitioner demonstrates that his defense was actually compromised, *a slight variance in the evidence that relates to the noticed charge does not, in itself, deprive him of adequate notice.* (See Rules Proc. of State Bar, rule 556.)” (*Van Sloten*, *supra*, 48 Cal.3d at p. 929, emphasis added.)

In *Van Sloten*, the sole charge was abandonment of a single, named client in a divorce proceeding. There was simply no colorable argument asserted by *Van Sloten* that he could not prepare an adequate defense to abandonment of an identified client in an identified proceeding because the dates charged in the notice differed by a few months from the dates found by the referee. The Supreme Court therefore held that *Van Sloten* made no showing that the four-month variance in the dates specified in the notice to show cause and the referee’s findings prejudiced his defense or prevented him from adequately responding to the charge.

[17b] The situation here is patently different from that in *Van Sloten*. Here, we are not faced with a potentially slight variation in proof from specific allegations of a single incident of misconduct in the notice. Rather, the examiner has put at issue a large but unspecified number of transactions, has failed to allege *any* particular transactions or *any* particular dates, and has included in the charges ambiguous and confusing references, making it unclear which aspect of respondent’s conduct, over a number of years violates the rules and statutes cited in the notice.

[15b] While developments during discovery may lead to augmentation or modification of the

charges by amendment, the ability to amend does not affect the requirement of particularity in the original charges. [18] Charges should only be filed when the Office of Trial Counsel ascertains that reasonable cause exists to charge that particular conduct occurred which violated a particular regulatory provision. (Rule 510, Rules Proc. of State Bar.) In the instant case, the Office of Trial Counsel does not claim it did not have more specific information which it could have drawn upon in drafting the notice. Indeed, according to the declaration filed by the examiner in the proceedings below, the State Bar had in its possession, prior to preparing the notice to show cause, an independently prepared, 200-page report concerning the respondent’s activities as trustee. This report allegedly sets out a chronology of the trust accounts with great specificity.

The examiner points out in his declaration that respondent and his counsel have been shown a copy of that report. [15c] Such informal sharing of source material, while highly desirable, is no substitute for formal charges, nor does it clarify which transactions are the subject of the charges. At oral argument, the examiner acknowledged that the report was done for a different purpose than a disciplinary proceeding and that not all of the report relates to potentially disciplinable conduct. Thus, the examiner argues, it would not have been appropriate to incorporate the report into the notice to show cause. We agree. [19] The State Bar has the duty to distill from sources available to it whether reasonable cause exists for charging a member with statutory or rule violations. (Rule 510, Rules Proc. of State Bar.) It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby. (Rule 550, Rules Proc. of State Bar; *Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 968; *Maltaman v. State Bar*, *supra*, 43 Cal.3d at p. 931; *Baker v. State Bar*, *supra*, 49 Cal.3d at p. 816.) This was not done here.

[20] The scope of the respondent’s defense is determined by the scope of the notice to show cause. It is improper to require the respondent to justify every loan transaction for every one of 12 clients

over a seven-year period if the Office of Trial Counsel did not consider itself to have reasonable cause to charge each and every such transaction as violative of a statute or rule of professional conduct. If less than all such loan transactions for all client trusts are at issue, then the notice to show cause should specify which are challenged, and in what manner the charged statutes and rules were violated. If, on the other hand, the Office of Trial Counsel did consider reasonable cause to exist for all loan transactions between every client trust and the three limited partnerships to constitute charged misconduct, the Office of Trial Counsel should so articulate and also specify whether all of such conduct violated each of the statutes and rules cited, or which alleged misconduct was violative of which statute or rule.

[21] The degree of specificity required does not necessitate lengthy detailed pleading. As noted by Judge Gee, a notice to show cause does not have to include explicit details of a respondent's alleged misconduct, nor does it have to match the subsequent proof at the hearing as long as the difference is immaterial or the pleading is amended (*Van Sloten v. State Bar*, *supra*, 48 Cal.3d at pp. 928-929) and the respondent is given an opportunity to respond to the additional allegations (*Marquette v. State Bar* (1988) 44 Cal.3d 253, 264-265).

The examiner contends that dismissing for lack of sufficient specificity would invite an extensive motion practice equivalent to a criminal bill of particulars hitherto foreign to disciplinary proceedings. Given the cost of a motion to dismiss, and the fact that if granted it is without prejudice to the Office of Trial Counsel refile a more specific notice, there is little incentive for respondents to make such motions where they are not legitimately confused by the notice. Nor is there any reason to suppose such motions would be granted unless the Office of Trial Counsel has, in fact, failed to satisfy the requirements of rule 550 and due process.

[22] More specificity in articulating the charged misconduct should enable the respondent to prepare to meet the charges and also provide the hearing judge with a proper framework for findings and conclusions in compliance with *Maltaman*, *Guzzetta* and *Baker*. It additionally will make it easier for the

review department and the Supreme Court to conduct meaningful de novo review of the hearing judge's decision.

The order of dismissal is therefore adopted.

We concur:

NORIAN, J.
STOVITZ, J.

EXHIBIT

PUBLIC MATTER

FILED

JUL 12 1989

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

1 OFFICE OF TRIAL COUNSEL
STATE BAR OF CALIFORNIA
2 STARR BABCOCK, No. 63473
Attorney at Law
3 555 Franklin Street
San Francisco, California 94102
4
415/561-8200
5
6
7

8 THE STATE BAR COURT

9 THE STATE BAR OF CALIFORNIA

10 HEARING DEPARTMENT - SAN FRANCISCO

11 In the Matter of)
)
12 HENRY L. GLASSER, No. 29836) 86-0-18495
)
13 A Member of the State Bar) NOTICE TO SHOW CAUSE

14
15 TO: HENRY L. GLASSER, Respondent herein:

16 IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN
17 THE TIME ALLOWED BY STATE BAR RULES, INCLUDING
18 EXTENSIONS, YOU MAY BE ENROLLED AS AN INVOLUNTARY
INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE
PERMITTED TO PRACTICE LAW UNTIL AN ANSWER IS FILED.

19 You were admitted to the practice of law in the State of
20 California on January 12, 1960. Pursuant to Rule 510, Rules of
21 Procedure of the State Bar of California, reasonable cause has
22 been found to conduct a formal disciplinary hearing, commencing
23 at a time and place to be fixed by the State Bar Court (NOTICE
24 OF THE TIME AND PLACE OF HEARING WILL BE MAILED TO YOU BY THE
25 STATE BAR COURT CLERK'S OFFICE), by reason of the following:

26 //
27 //
28 //

COUNT ONE

1
2 1. On or about 1981 you were a partner in the
3 law firm of Bancroft, Avery & McAllister, Attorneys
4 at Law, 601 Montgomery Street, San Francisco,
5 California.

6 2. While acting in your duties as an attorney,
7 fiduciary and member of your law firm, you occupied
8 the position of trustee for client trusts, which were
9 grouped into twelve family groups.

10 3. Beginning in 1982, while serving as trustee
11 for the above-referenced trusts and their attendant
12 fiduciary concerns, you made a series of unsecured
13 and frequently undocumented loans from these trusts
14 to three limited partnerships, IDA Associates, Los
15 Banos Shopping Center Association and Rubimar
16 Associates, in which you were the general partner.
17 The gross amount of said loans was in excess of
18 \$2,000,000. Many of the specific individual loans
19 were not disclosed to your clients.

20 4. You entered into a business transaction and
21 acquired an interest adverse to your clients and
22 beneficiaries, the terms of which were not fair or
23 reasonable. You failed to fully disclose and
24 transmit to them in writing the terms of all the
25 transactions, and manner of the acquisition of the
26 adverse interests, in a way which should reasonably
27 have been understood by them. You failed to give
28 your clients a reasonable opportunity to seek the

1 advice of independent counsel and failed to obtain
2 your clients' written consent to the transactions.

3 5. As a result of subsequent limited
4 partnership losses, the above-referenced trusts were
5 either completely or substantially depleted. You
6 were aware of the substantial depreciation of the
7 trusts and of the likelihood of the failure of the
8 limited partnerships, but continued to make loans
9 from the trusts to the limited partnerships. You
10 misappropriated these funds to your own use and
11 benefit.

12 6. In an attempt to prevent exposure of your
13 activities, you transferred funds between various
14 trusts without the consent of the clients.

15
16 You committed the above-described acts in wilful violation
17 of your oath and duties as an attorney and in particular,
18 California Business and Professions Code Sections 6068(a), 6103
19 and 6106; and former Rule 6-101(2) (pre-October 1983) and former
20 Rules 5-101, 6-101(A)(2), 8-101(B)(3) and 8-101(B)(4)
21 (pre-May 27, 1989).

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 WITHIN TWENTY (20) DAYS after service of this Notice, you
2 shall file a written answer as provided by Rule 552, Rules of
3 Procedure of the State Bar of California.

4 **NOTICE - DEFAULT PROCEDURE!**

5 YOUR DEFAULT MAY BE ENTERED FOR FAILURE TO FILE A
6 WRITTEN ANSWER TO THIS NOTICE WITHIN TWENTY (20) DAYS
7 AFTER SERVICE AS PRESCRIBED BY RULE 552, RULES OF
8 PROCEDURE OF THE STATE BAR. SHOULD YOU TIMELY FILE
9 AN ANSWER YOUR DEFAULT MAY ALSO BE ENTERED FOR
10 FAILURE TO APPEAR AT THE FORMAL HEARING. THE ENTRY
11 OF YOUR DEFAULT MAY RESULT IN THE CHARGES SET FORTH
12 IN THIS NOTICE TO SHOW CAUSE BEING ADMITTED AND
13 DISCIPLINE RECOMMENDED OR IMPOSED BASED ON THOSE
14 ADMITTED CHARGES. IF YOUR DEFAULT IS ENTERED, YOU
15 WILL LOSE THE OPPORTUNITY TO PARTICIPATE FURTHER IN

16 THESE PROCEEDINGS UNLESS AND UNTIL YOUR DEFAULT IS
17 SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED
18 GROUNDS. SEE RULES 552.1 ET SEQ., RULES OF PROCEDURE
19 OF THE STATE BAR.

20 **NOTICE-INACTIVE ENROLLMENT**

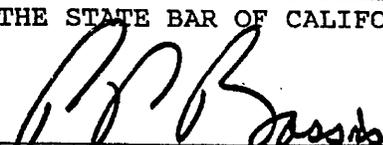
21 YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR
22 COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE
23 SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL
24 THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO
25 THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN
26 INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE
27 ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE
28 RECOMMENDED BY THE COURT. SEE RULES 550 AND 560,
RULES OF PROCEDURE OF THE STATE BAR.

NOTICE - COST ASSESSMENT!

 IN THE EVENT THESE PROCEEDINGS RESULT IN PUBLIC
DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF
COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION,
HEARING AND REVIEW OF THIS MATTER PURSUANT TO
BUSINESS AND PROFESSIONS CODE §6068.10. SEE RULES
460 ET SEQ., RULES OF PROCEDURE OF THE STATE BAR.

OFFICE OF TRIAL COUNSEL
THE STATE BAR OF CALIFORNIA

27 DATED: July 7, 1989


FRANCIS P. BASSIOS,
Deputy Chief Trial Counsel