

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

ROMUALDO BENITO NAVARRO

A Member of the State Bar

[No. 87-O-14338]

Filed October 11, 1990

SUMMARY

Respondent failed to file a timely answer to the notice to show cause, but did attempt to file an answer five days before the expiration of the time to answer set forth in the examiner's notice of application to enter default. The clerk's office rejected the answer for filing, and sent respondent a form letter which indicated that the answer had been rejected for noncompliance with technical rules, and invited resubmission of a corrected version. The letter did not fix a time by which respondent's cured answer was to be returned to the clerk's office. Less than a week later, respondent resubmitted his corrected answer by mail to the clerk's office. However, the clerk's office had in the interim entered respondent's default. The resubmitted response was therefore rejected, and the matter was set for default hearing. The hearing referee found respondent culpable as charged, and recommended discipline including actual suspension for one year. (Linus J. Dewald, Jr., Hearing Referee.)

Respondent filed a motion to set aside the default well within the time allowed under the rules, but the motion was denied. (Steven H. Hough, Assistant Presiding Referee.)

On ex parte review, the review department held that it was an abuse of discretion to deny respondent's motion for relief from default. The review department vacated the hearing department decision, vacated the order denying relief from default, vacated the default, ordered the filing of respondent's corrected answer and remanded the matter for a de novo hearing on the merits.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance (default)

HEADNOTES

- [1] **107 Procedure—Default/Relief from Default**
 130 Procedure—Procedure on Review
 166 Independent Review of Record

In order to reach merits on review of decision recommending discipline following default hearing, review department first had to be satisfied with the propriety of the entry of the respondent's default and the order denying respondent's motion for relief from default.

- [2 a, b] **106.50 Procedure—Pleadings—Answer**
 107 Procedure—Default/Relief from Default
 119 Procedure—Other Pretrial Matters
 135 Procedure—Rules of Procedure
 139 Procedure—Miscellaneous

Time to file answer to notice to show cause is extended twenty days by service of notice of application to enter default, and is extended an additional five days when the application is served by mail.

- [3 a, b] **106.50 Procedure—Pleadings—Answer**
 107 Procedure—Default/Relief from Default
 119 Procedure—Other Pretrial Matters
 135 Procedure—Rules of Procedure
 139 Procedure—Miscellaneous

Where respondent who filed motion for relief from default had previously submitted proposed answer to notice to show cause to State Bar Court and served it on examiner, and declaration accompanying motion to set aside default verified essential allegations of proposed answer, this constituted substantial compliance with rule requiring motion to set aside default to be accompanied by verified proposed answer.

- [4] **107 Procedure—Default/Relief from Default**
 130 Procedure—Procedure on Review
 165 Adequacy of Hearing Decision
 166 Independent Review of Record

General rule is that where record is silent, all intendments and presumptions are indulged to support a lower court order; moreover, inadvertent misuse of terms in an order does not require reversal. Review department therefore presumed that referee considered and denied alternate ground for relief from default which was addressed in moving papers of both parties but not listed in referee's order denying motion.

- [5 a, b] **107 Procedure—Default/Relief from Default**
 139 Procedure—Miscellaneous

There is a strong public policy in favor of hearing cases on the merits and against depriving a party of the right of appeal because of technical noncompliance in matters of form. The policy against deprivation of a hearing due to noncompliance with filing requirements appears just as strong in the situation of noncompliance resulting in default prior to trial. In both cases parties are deprived of a significant legal remedy if the noncomplying pleading is ultimately disregarded despite its reasonably timely correction.

- [6] **101 Procedure—Jurisdiction**
 106.50 Procedure—Pleadings—Answer
 107 Procedure—Default/Relief from Default
 135 Procedure—Rules of Procedure

The time limit for filing an answer to the notice to show cause is not jurisdictional, and an answer will be accepted for filing at any time prior to the actual entry of default, no matter how belatedly it is submitted.

- [7 a-d] **107 Procedure—Default/Relief from Default**
 139 Procedure—Miscellaneous
 167 Abuse of Discretion

Review department declined to decide whether clerk's entry of default prior to expiration of reasonable time to respond to clerk's notice, which rejected answer due to technical defects, was void, or erroneous and voidable. Instead, review department determined that the denial of respondent's motion to set aside default was an abuse of discretion. An attorney's neglect in untimely filing papers must be evaluated in light of the reasonableness of the attorney's conduct; respondent acted reasonably in timely submitting answer to notice to show cause, and promptly resubmitting corrected answer after receiving clerk's rejection notice.

- [8] **107 Procedure—Default/Relief from Default**
 135 Procedure—Rules of Procedure
 194 Statutes Outside State Bar Act

In proceedings to set aside default under Rule of Procedure 555.1(a), the terms "mistake, inadvertence, surprise or excusable neglect" are interpreted and applied in the same manner as in motions in civil cases pursuant to section 473 of the Code of Civil Procedure.

- [9] **107 Procedure—Default/Relief from Default**
 135 Procedure—Rules of Procedure

Effective September 1, 1989, the former Rules of Procedure of the State Bar were replaced by the Transitional Rules of Procedure of the State Bar. A motion to set aside default filed and served prior to September 1, 1989, was governed by former Rules of Procedure. (Rule 109, Trans. Rules Proc. of State Bar.)

- [10] **107 Procedure—Default/Relief from Default**
 167 Abuse of Discretion
 194 Statutes Outside State Bar Act

Appellate review under section 473 of the Code of Civil Procedure is for abuse of discretion, the test being whether the trial court exceeded the bounds of reason. The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings.

- [11 a, b] **107 Procedure—Default/Relief from Default**
 162.20 Proof—Respondent's Burden
 169 Standard of Proof or Review—Miscellaneous
 194 Statutes Outside State Bar Act

It is the policy of the law under section 473 of the Code of Civil Procedure to favor a hearing on the merits; any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. A trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. Nonetheless, it is the moving party's responsibility to recite facts that meet the burden of proving mistake, inadvertence, surprise or excusable neglect.

- [12] **106.50 Procedure—Pleadings—Answer**
 107 Procedure—Default/Relief from Default
 139 Procedure—Miscellaneous
 162.20 Proof—Respondent’s Burden
 166 Independent Review of Record

Where record showed that respondent cured defects in otherwise timely answer within six days of mailing of notice to do so by clerk’s office, review department’s duty of independent record review precluded it from ignoring those facts in determining just disposition of motion for relief from default, despite weakness of respondent’s moving papers.

- [13] **107 Procedure—Default/Relief from Default**
 139 Procedure—Miscellaneous
 194 Statutes Outside State Bar Act

An attorney is ordinarily justified in relying on communications from the clerk as a basis for relief under section 473 of the Code of Civil Procedure.

- [14] **106.50 Procedure—Pleadings—Answer**
 107 Procedure—Default/Relief from Default
 135 Procedure—Rules of Procedure

Pursuant to Rule of Procedure 552(a), an answer submitted for filing prior to the entry of default is not required to be verified.

- [15] **106.50 Procedure—Pleadings—Answer**
 107 Procedure—Default/Relief from Default
 135 Procedure—Rules of Procedure
 167 Abuse of Discretion

It would be an abuse of discretion to deny relief from default solely on the basis of the lack of a verification of respondent’s proposed answer, without giving respondent a chance to cure the defect.

- [16] **107 Procedure—Default/Relief from Default**
 139 Procedure—Miscellaneous

Examiner’s argument against setting aside default on review, based on resulting delay, necessity for new trial, and resulting prejudice and inconvenience, was unpersuasive. Reversal of denial of motion to set aside default will always require new hearing. Moreover, record revealed that examiner had notice prior to hearing of respondent’s intention to move to set aside default.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1975 and has no prior disciplinary record. The notice to show cause served on respondent charged two separate types of misconduct, both involving the same client, Clarence Walker.¹ The notice also contained separate counts of making a misrepresentation to the State Bar during its investigation of the Walker matter and of practicing law while suspended for nonpayment of dues. Respondent attempted to file a response to the charges which was rejected and his default was entered. His timely motion to set aside the default was denied and the hearing and ensuing recommendation of one year actual suspension occurred without his participation.

[1] In order to reach the merits we must first be satisfied with the propriety of the entry of respondent's default and the referee's order denying respondent's motion for relief from default. We have considered the matter after requesting briefing and oral argument by the examiner—the only party before us—and have determined that respondent's motion to set aside his default should have been granted and that the matter should be remanded for a new hearing before a judge of the State Bar Court.

PROCEDURAL HISTORY BELOW

The notice to show cause was served on respondent on April 7, 1989, and the return receipt (exh. 4) indicates that respondent received it on April 10, 1989. Respondent failed to file an answer within 20 days as directed in the notice to show cause. That notice also bore a prominent notice, in capital letters, of the State Bar's default procedure for failure to timely file a written answer. [2a] On May 10, 1989, a notice of application to enter default was served which gave respondent an additional 20 days to file

an answer (exh. 5); respondent appears to have received it on May 12 (exh. 6). On May 31, five days before expiration of respondent's time to answer,² [2b - see fn. 2] the clerk's office received a response to the notice to show cause. As of that date, respondent still had the right to file an answer to avoid having his default entered. On June 1, 1989, the clerk's office rejected the filing, and sent respondent a form notice that it had done so on the grounds that (1) there was no proof of service on the examiner, and (2) respondent had not submitted the required number of copies. (Exh. 9.) The cover letter sent to respondent by the clerk's office stated that the document "has not been FILED with the court as it does not meet filing requirements. . . . [¶] This document will remain endorsed only RECEIVED unless you correct the matter(s) checked below." The boxes checked were "Proof of service on opposing party" and "Four duplicates required." The letter concluded "PLEASE RETURN THIS FORM WITH YOUR CORRECTED DOCUMENT TO ENSURE PROPER HANDLING." The letter did not fix a time by which respondent's cured answer was to be returned to the clerk's office.

On June 7, 1989, respondent served the corrected response by mail and mailed it to the clerk's office for filing. On June 12, 1989, the clerk's office received respondent's resubmitted response complete with proof of service and the requisite copies. (Exh. 10.) However, unbeknownst to respondent, on June 6, 1989 the clerk's office had already entered respondent's default. (Exh. 7.) For this reason, the resubmitted response was rejected. (Exh. 10.) Notice that the hearing in this matter would take place on August 1, 1989 was filed and served on the examiner by the clerk's office on June 9. Because respondent was then in default, he was not served with the notice.

On Friday, July 28, 1989, respondent served on the examiner a motion to set aside default, along with

1. One count charged misappropriation, allegedly occurring in 1985, and one count charged abandonment involving two separate matters which respondent allegedly stopped working on in mid-1986.

2. [2b] Respondent's time to answer was extended an additional five days because service on him of the notice of application to enter default was by United States mail.

a declaration in support thereof.³ [3 - see fn. 3] Coincidentally, this motion reached the examiner the afternoon before the August 1 hearing, and reached the court on the same day as the hearing. The examiner filed an opposition to the motion on August 9. The respondent's motion was denied by the Assistant Presiding Referee on August 29, 1989, on the ground that: "The respondent failed to establish inadvertence, surprise or excusable neglect pursuant to rule 555.1(a) of the Rules of Procedure of the State Bar."⁴ [4 - see fn. 4]

The referee assigned for trial proceeded to hear the matter without respondent's participation while the motion to set aside his default was taken under submission. Based on the State Bar's submission of declarations of witnesses and exhibits entered in evidence, the referee found respondent culpable on all four counts and also made findings in aggravation and mitigation, including respondent's lack of a prior record of discipline over many years of practice. The State Bar requested disbarment, but the referee recommended a three year probation, with actual suspension for one year and until proof of restitution. The examiner did not request review and the matter originally came before us on an ex parte basis. Pursuant to rule 452(b) of the Transitional Rules of Procedure of the State Bar (hereafter "Rules Proc. of State Bar"), we then set the matter for briefing and argument by the examiner.

DISCUSSION

When we set the matter for hearing we asked the examiner to address two questions. The first question was: "Was respondent's default properly entered when he had already submitted to the clerk's office

a response to the notice to show cause which was rejected due to technical defects and a reasonable period for the timely correction of those defects had not yet elapsed?"

The question was followed by a citation to *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912. In the cited case (hereafter "*United Farm Workers*"), a party to an ALRB proceeding submitted a petition for review of the ALRB'S order on the last day for seeking review under Labor Code section 1160.8. The court clerk returned the petition due to lack of verification. The party verified the petition and filed it three days later. The California Supreme Court held that for purposes of compliance with Labor Code section 1160.8 the time of the filing was the original delivery of the document to the appropriate clerk's office during office hours. It is the filer's actions that are scrutinized to assess timely filing and the rejection of the petition by the clerk for a technical defect could not undo a "filing" that had already occurred. The Supreme Court further stated that "This is not to say, however, the reviewing court could not later order dismissal if a party has not undertaken timely correction of defects noted." (*United Farm Workers, supra*, 37 Cal.3d at p. 918.) [5a] The court cited with approval *Litzmann v. Workmen's Comp. App. Bd* (1968) 266 Cal.App.2d 203, 205 ("There is a strong public policy in favor of hearing cases on their merits and against depriving a party of his right of appeal because of technical noncompliance in matters of form.").

[5b] The Supreme Court in *United Farm Workers* was interpreting a Labor Code section governing perfection of an appeal and State Bar proceedings, in

3. [3a] In opposing respondent's motion to set aside his default, the examiner objected to it because it was not accompanied by the proposed response. Respondent had already submitted the proposed response to the court and served it on the examiner. This constituted substantial compliance with the rule requiring submission of a proposed answer, and its absence therefore would not be grounds for denying respondent's motion. (See *Job v. Farrington* (1989) 209 Cal.App.3d 338, 340-341 [proposed answer submitted after motion was filed, but before it was heard; substantial compliance].)

4. Rule 555.1(a), like Code of Civil Procedure section 473 on which it was modeled, lists four grounds for relief: "mistake,

inadvertence, surprise or excusable neglect." Apparently, through inadvertence, the referee did not, in denying the motion, list "mistake" among the grounds he found respondent not to have established. [4] The general rule is that where the record is silent, "all intendments and presumptions are indulged to support a lower court order." (9 Witkin, Cal. Proc. (3d ed. 1985) Appeal § 267 pp. 276-277.) Moreover, inadvertent misuse of terms in an order does not require reversal. (*Id.* at § 334, p. 342.) Both the respondent, in his moving papers, and the examiner, in his opposition, addressed the ground of mistake. We therefore presume that the Assistant Presiding Referee did consider and deny this ground for relief along with the others.

contrast, are *sui generis*. (See, e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301.) Nonetheless, the policy against deprivation of a hearing due to noncompliance with filing requirements appears just as strong in the situation of noncompliance resulting in default prior to trial. In both cases, the parties are deprived of a significant legal remedy if the noncompliant pleading is ultimately disregarded despite its reasonably timely correction.⁵ [6 - see fn. 5]

The examiner argues that respondent waived any contention that the initial entry of default was improper by failing to make that contention when he moved to set the default aside. However, it is generally held in civil cases that a premature entry of default is void. (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 246, pp. 546-547 and cases cited therein.) If so, it would be reversible error *per se* and need not be raised by the respondent. (See, e.g., 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 365, p. 367 and cases cited therein.) The examiner argues that lack of proof of service was not just a technical defect which would automatically require retroactive filing of the answer and void the default. We do not need to reach this issue.

In marking the original timely, but defective, answer "RECEIVED" and issuing a form letter permitting corrections, the clerk's office was following court policy instituted pursuant to the directive of the then Presiding Referee of the State Bar Court. The form notice from the clerk's office implied that the clerk's office would wait for his response to its letter before entering his default in order to permit a resubmitted corrected answer to be filed. [7a] We need not decide whether the clerk's entry of default prior to the expiration of a reasonable time to respond

was void *ab initio* or erroneous and voidable (cf. *Potts v. Whitson* (1942) 52 Cal.App.2d 199, 208) in light of the second question we posed to the examiner: "Was it an abuse of discretion for the Assistant Presiding Referee to deny respondent's motion to set aside his default?"

[8] The rule we must interpret here is rule 555.1(a) of the Rules of Procedure of the State Bar.⁶ [9 - see fn. 6] It provides that in ruling on a motion for relief from default, this court interprets and applies the terms "mistake, inadvertence, surprise or excusable neglect" in the same manner as those terms are interpreted and applied in civil cases in motions brought pursuant to section 473 of the Code of Civil Procedure. [10] Appellate review under section 473 is for abuse of discretion, the test being "whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)⁷ The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings. (See, e.g., *Slaten v. State Bar* (1988) 46 Cal.3d 48, 54-55, 57; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 453; *Frazer v. State Bar* (1987) 43 Cal.3d 564, 567-568.)

[11a] Under section 473, "[i]t is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.]" (*Shamblin v. Brattain, supra*, 44 Cal.3d at p. 478.) The Supreme Court has repeatedly stated the importance of the policy favoring disposition on the merits. "[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of

5. [6] The time limit for filing an answer to the notice to show cause is not jurisdictional, and an answer will be accepted for filing at any time prior to the actual entry of default, no matter how belatedly it is submitted. (See rule 552.1, Rules Proc. of State Bar.) In this respect the situation here presents an easier issue than in *United Farm Workers*, discussed *ante*, because Labor Code section 1160.8 was jurisdictional and relation back was necessary to allow perfection of the appeal.

6. [9] Effective September 1, 1989, the former Rules of Procedure of the State Bar were replaced by the Transitional Rules of Procedure of the State Bar. Respondent's motion to

set aside his default was governed by the former Rules of Procedure. (See rule 109, Trans. Rules Proc. of State Bar.) In any event, the text of rule 555.1(a) is identical in both versions of the rules.

7. In *Shamblin*, the trial court set aside the default of a party who had been dropped by mistake from the court's mailing list for notices in the action, whose attorney had withdrawn, and who apparently had not received actual notice of the new trial at which the party had failed to appear. The Supreme Court held that the court of appeal should not have reversed the trial court's order setting aside the default. (*Id.* at p. 479.)

the party seeking relief from default [citations]. . . . Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]” (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

[11b] Nonetheless, it is the moving party’s responsibility to recite facts that meet his burden of proving mistake, inadvertence, surprise or excusable neglect. (See, e.g., *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 300.) [12] Respondent’s moving papers are weak and would not of themselves justify relief. However, the record itself supplies the missing necessary details, affirmatively disclosing that the respondent cured defects surrounding his otherwise timely answer within six days of mailing of notice to do so by the clerk’s office. Particularly in view of our duty of independent record review, we cannot ignore these facts in determining the just disposition of the motion.

Even where appellate review is narrower, a court of appeal will take appropriate action on its own motion. *Kapitanski v. Von’s Grocery Co.* (1983) 146 Cal.App.3d 29 is a case on point. There, summary judgment had been entered in favor of a defendant because the trial court had refused to consider the plaintiff’s declaration in opposition to the motion, on the ground that the declaration was filed a day late under the trial court’s local rules. The court in *Kapitanski* discussed at length the fact that requiring compliance with local procedural rules is a matter of discretion, which judges frequently exercise in favor of considering untimely-filed documents in order to promote the policy of disposing of cases on their merits. (*Id.* at p. 32.) It proceeded to treat the plaintiff’s request for consideration of his late-filed declaration as a request for relief under section 473, and held that it was an abuse of discretion for the trial court to refuse to consider it. [7b] In so holding, the court stated that “[a]n attorney’s neglect in untimely filing opposing papers must be evaluated in light of the reasonableness of the attorney’s conduct. [Citation.]” (*Id.* at p. 33.) Under Code of Civil Procedure section 473, a short grace period has long been sanctioned. (See *Bank of Haywards v. Kenyon* (1917) 32 Cal.App. 635, 637 [answer filed one day late; abuse of discretion to strike answer and give default judgment].)

[7c] In the present case, we cannot characterize respondent’s conduct as unreasonable. He submitted a timely response to the notice to show cause, which was marked received, but not filed, due to lack of proof of service and insufficient copies. Only five days after the rejection notice was mailed out—the same day respondent presumably received the rejection notice—the clerk’s office entered respondent’s default, even though he had just been invited to resubmit a corrected response which the clerk’s office indicated would be filed. Less than a week after that—apparently by return mail—respondent resubmitted his response, with the defects corrected, only to have it rejected again due to his default having been entered in the interim. Admittedly, respondent then waited six weeks before filing his motion to set aside the default; however, it was filed well within the time allowed him under the rules. (Rule 555.1(b), Rules Proc. of State Bar.) [13] An attorney is ordinarily justified in relying on communications from the clerk as a basis for relief under Code of Civil Procedure section 473. (See 8 Witkin, *Cal. Procedure* (3d ed. 1985) Attack on Judgment in Trial Court, § 159, pp. 561-562 and cases cited therein.)

The examiner argues that the lack of a verification of the answer was a separate ground for denying the motion for relief from default. [14] First, an answer submitted for filing *prior* to the entry of default (as respondent’s was) is not required to be verified. (Compare rule 552(a), Rules Proc. of State Bar with *id.*, rule 555.1(b).) [15] Second, it would have been an abuse of discretion to deny relief from default solely on the basis of the lack of a verification, without giving respondent a chance to cure the defect. (See *United Farm Workers, supra*, 37 Cal.3d at p. 915 [lack of verification is curable by amendment, even after statute of limitations has run]; *Brochtrup v. INTEP* (1987) 190 Cal.App.3d 323, 332-333 [denial of relief under Code Civ. Proc. § 473 was abuse of discretion, where defect in verification of proposed discovery responses submitted with motion for relief was due to honest mistake of law].) [3b] In any event, the declaration submitted with respondent’s motion did verify the essential allegations made in the response that he had attempted to file, thus constituting substantial compliance with the verification rule. (*Job v. Farrington, supra*, 209 Cal.App.3d at pp. 340-341.)

[16] The examiner also argues that the review department should not set aside the default at this point because the resulting delay and necessity for a new trial would prejudice and inconvenience the State Bar and the witnesses whose declarations were used at the original default hearing. This is unpersuasive. It is always the case that reversal of a denial of a motion to set aside a default will require a new hearing. Moreover, the record reveals that the examiner had received notice of respondent's intention to file a response on June 6, 1989, a copy of the response sought to be filed on June 14 and a copy of the motion to set aside respondent's default the day before the hearing, although it had not yet been filed by the clerk's office. (R.T. p. 5.)⁸ The examiner does not explain how it would have prejudiced the State Bar or the examiner if the clerk's office, having permitted respondent to supply the proof of service belatedly, had refrained from entering his default in the meantime.

DISPOSITION

[7d] In light of our conclusion that it was an abuse of discretion to deny respondent's motion for relief from default, we therefore vacate the decision below, vacate the order denying relief from default, vacate the default, order the filing of respondent's corrected response received by the clerk's office on June 12, 1989, and remand the matter for a de novo hearing on the merits before a judge of the State Bar Court.

We concur:

NORIAN, J.
STOVITZ, J.

8. The examiner admitted below in his declaration in opposition to respondent's motion to set aside default, filed on August 9, 1989, that (1) the examiner was notified informally on June 6, 1989—before the examiner learned that respondent's

default had been entered—that respondent intended to file an answer (see declaration, ¶¶ 6 and 7), and (2) the examiner received a copy of respondent's answer on June 14, 1989 (see declaration, ¶ 9).