

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**WILLIAM H. TEMKIN, JR.**

A Member of the State Bar

[No. 86-O-15265]

Filed January 25, 1991

**SUMMARY**

Respondent was a partner in a limited partnership. The creditors of another partner in the partnership contended that their debtor had fraudulently transferred his partnership interest to respondent. In the ensuing civil litigation, respondent filed a declaration asserting the validity of the transfer. Ultimately, the civil courts found that the purported transfer had been a fraud intended to deceive the transferor's creditors.

In the State Bar disciplinary proceeding, respondent was charged with filing a false declaration in the civil litigation, and with participating in the preparation of documents used to fraudulently conceal the purported transferor's interest in the partnership. After a hearing, the State Bar Court referee found that respondent had failed to exercise due diligence in preparing and signing the declaration he filed in superior court. The referee concluded that such conduct violated rule 7-105(1) of the Rules of Professional Conduct and sections 6103, 6068 and 6068(b) of the Business and Professions Code, in that respondent employed conduct and methods that tended to mislead the trial judge in the case. However, the referee did not find respondent's conduct to have constituted an act involving moral turpitude, dishonesty or corruption. (Kevin G. Lynch, Hearing Referee.)

On review, the review department found that the referee's findings and conclusions of law were incomplete and in some instances irreconcilable, and remanded the matter to the hearing department of the full-time State Bar Court for retrial of the charges. The review department noted that, in almost every case, a violation of rule 7-105(1) would also constitute an act of dishonesty proscribed by section 6106, and that on the facts of the instant case the referee's finding of culpability under rule 7-105(1) could not be reconciled with his finding of non-culpability on the section 6106 charge.

**COUNSEL FOR PARTIES**

For Office of Trials: Loren J. McQueen

For Respondent: Gert K. Hirschberg

HEADNOTES

- [1 a-d]    **165      Adequacy of Hearing Decision**  
               **166      Independent Review of Record**  
 Where hearing referee's findings and conclusions were incomplete and in some instances irreconcilable with each other, and referee failed to make critical determinations regarding credibility of respondent's testimony asserting his innocence, which testimony conflicted with determinations of civil courts in related litigation, review department could not make its own findings and conclusions based on documentary evidence, but found it necessary to remand for new trial, including reassessment of witness credibility and weight of documentary evidence in light of such assessment.
- [2 a, b]    **106.20   Procedure—Pleadings—Notice of Charges**  
               **106.40   Procedure—Pleadings—Amendment**  
               **213.20   State Bar Act—Section 6068(b)**  
 Where notice to show cause did not charge violation of statute requiring attorneys to maintain respect for courts and their officers, and no motion to amend was made at hearing, referee's conclusion that respondent violated the statute was inappropriate.
- [3 a-c]    **106.30   Procedure—Pleadings—Duplicative Charges**  
               **213.10   State Bar Act—Section 6068(a)**  
               **220.10   State Bar Act—Section 6103, clause 2**  
 In matter charging attorney with filing false declaration and assisting in preparation of fraudulent documents, hearing referee's conclusions that respondent violated statutory duty to uphold the law (Bus. & Prof. Code, § 6068(a)) and statute regarding attorneys' violations of their oath and duties (*id.*, § 6103) were inappropriate. Section 6068(a) charge was duplicative since same misconduct was charged as violation of specific Rule of Professional Conduct. Section 6103 does not define a duty or obligation, but rather provides grounds for discipline for violation of an oath or duty defined elsewhere.
- [4]        **166      Independent Review of Record**  
 On its independent review of the record, the review department may reweigh all evidence and adopt findings and a recommendation of discipline at odds with the referee on all issues.
- [5]        **146      Evidence—Judicial Notice**  
               **147      Evidence—Presumptions**  
               **191      Effect/Relationship of Other Proceedings**  
 Although prior civil court actions are not binding in disciplinary matters, they are admissible when they address issues substantially identical to those raised in the disciplinary hearing. Civil court decisions that are supported by substantial evidence are accorded a strong presumption of validity, and individual facts established by such civil court decisions may serve as a conclusive legal determination as to particular facts determined by the civil courts.
- [6]        **135      Procedure—Rules of Procedure**  
               **148      Evidence—Witnesses**  
               **166      Independent Review of Record**  
 The Rules of Procedure of the State Bar require that the review department give great weight to the hearing department's findings of fact resolving issues pertaining to testimony. This rule rests on the sound policy that when evidence turns on the assessment of credibility, the evaluation of such

evidence should be made by a judicial officer who sees and hears the witnesses and can translate the credibility accorded witnesses into the weight to be given their testimony as it relates to other evidence in the case. Before disregarding any such credibility assessments, the review department must have a very good reason for doing so. (Trans. Rules Proc. of State Bar, rule 453.)

- [7]      **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
         **162.90 Quantum of Proof—Miscellaneous**  
         **165 Adequacy of Hearing Decision**  
         **191 Effect/Relationship of Other Proceedings**

Where court in civil action related to disciplinary proceeding had concluded (applying preponderance of evidence standard) that there was substantial evidence that purported transfer of partnership interest to respondent was fraudulent, and it was undisputed that respondent had prepared partnership transfer document, referee’s conclusion in disciplinary proceeding that there was no evidence that respondent actively participated in fraud in preparation of document could only be consistent with civil court finding if referee’s conclusion was based on difference in applicable standard of proof, in that culpability in disciplinary cases must be proven by clear and convincing evidence.

- [8]      **148 Evidence—Witnesses**  
         **165 Adequacy of Hearing Decision**

Where the record includes extensive documentary as well as testimonial evidence, it is incumbent on the hearing department to weigh all of the evidence and identify for the litigants and further reviewing bodies the way in which credibility assessments led to the court’s ultimate conclusions regarding respondent’s culpability or innocence.

- [9 a, b] **165 Adequacy of Hearing Decision**  
         **221.00 State Bar Act—Section 6106**  
         **320.00 Rule 5-200 [former 7-105(1)]**

Where hearing referee concluded that respondent did not act dishonestly, but failed to exercise due diligence in learning the true facts before filing a declaration in a civil court, this conclusion was inconsistent with the conclusion that respondent’s declaration violated the rule against seeking to mislead a judge by a false statement of fact.

- [10]     **165 Adequacy of Hearing Decision**  
         **204.90 Culpability—General Substantive Issues**  
         **320.00 Rule 5-200 [former 7-105(1)]**

If respondent’s only breach, in relation to a charge of filing a false declaration, was a lack of care in ascertaining the truth of the facts presented in the declaration, then it was incumbent on the hearing referee to determine whether that lack of care or diligence was culpable within the charges and fell below the level of conduct required of members of the State Bar.

- [11 a, b] **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
         **221.00 State Bar Act—Section 6106**  
         **320.00 Rule 5-200 [former 7-105(1)]**

In order to find a violation of the rule against misleading courts and judicial officers, the State Bar must show clearly and convincingly that the attorney knowingly presented a false statement intending to mislead the court, and such deceit would, in almost every case, be an act of dishonesty in violation of the statute authorizing discipline for acts of moral turpitude, corruption and dishonesty. When an attorney makes a false or misleading statement to a court, that act involves moral turpitude.

- [12]     **204.90 Culpability—General Substantive Issues**  
          **320.00 Rule 5-200 [former 7-105(1)]**  
          When an attorney presents statements to a judicial tribunal while appearing in pro per as a party to litigation, the rule against misleading courts and judicial officers applies to him as an attorney.
- [13]     **320.00 Rule 5-200 [former 7-105(1)]**  
          Culpability of violating the rule against misleading courts and judicial officers may be established even where there is no direct evidence of malice, intent to deceive, or hope of personal gain. Actual deception is not necessary to sustain a violation; wilful deception is established where the attorney knowingly presents a false statement which may tend to mislead the court. Even where the fabrications are the work of another, and the attorney is unaware of the truth, the attorney remains culpable if the attorney learns of their bogus nature and continues to assert their authenticity.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Not Found

- 213.15 Section 6068(a)
- 213.25 Section 6068(b)
- 220.15 Section 6103, clause 2

## OPINION

## FACTS

STOVITZ, J.:

A hearing referee of the former, volunteer State Bar Court has recommended that respondent William H. Temkin, Jr., be suspended from the practice of law in California for one year, stayed on conditions, including a 45-day actual suspension. The referee found respondent failed to exercise due diligence in preparing and signing a declaration he filed in 1981 in superior court in support of his objection to the entry of a partnership charging order, in which he claimed that the interest sought to be secured had been transferred to him for consideration in February 1981. The referee concluded that respondent's declaration violated rule 7-105(1) of the Rules of Professional Conduct of the State Bar<sup>1</sup> and Business and Professions Code sections 6103, 6068 and 6068 (b)<sup>2</sup> in that respondent employed conduct and methods that tended to mislead the trial judge in the case. The referee also concluded that the State Bar examiner representing the Office of Trial Counsel had failed to demonstrate by clear and convincing evidence that respondent's conduct involved moral turpitude pursuant to section 6106.

[1a] For the reasons we shall detail below, based upon our independent review of the record, which consisted of many documents, prior court rulings and extensive testimony before the referee, we have concluded that the referee's findings and conclusions of law are incomplete and in some instances irreconcilable with each other. Particularly in light of the extensive testimony which required a credibility assessment to determine whether the particular charged rule or statute was violated, coupled with the referee's failure to make needed findings resolving credibility issues, we have determined that we cannot properly resolve the factual and legal inconsistencies in the referee's decision. Accordingly, we have determined that we have no choice but to remand this matter to the Hearing Department of the State Bar Court for retrial of the charges.

We summarize the facts which appear from the record to be undisputed. Respondent was admitted to practice in California on June 5, 1963, and has no prior record of discipline. Prior to February 2, 1981, respondent was a general partner in a limited partnership entitled Normandie Towers, Limited ("Normandie Towers"). His parents, Mr. and Mrs. William Temkin, Sr., his brother, Sheldon, and William Nemour, all were limited partners. Normandie Towers was intended to construct senior citizen housing financed in part by federal housing grants.

On May 20, 1981, judgment was entered in San Diego Superior Court in favor of Richard Eddy for \$303,741 against William Nemour and other defendants (none connected to this case), in a civil action unrelated to Normandie Towers. After recording the judgment in Los Angeles County, Eddy filed a petition in Los Angeles County Superior Court on June 16, 1981, seeking a charging order against Normandie Towers and its partners, to reach the partnership interest held by Nemour to satisfy the judgment. (Exh. 2, attach. A.) At the superior court order to show cause hearing, respondent appeared in propria persona to oppose the charging order, alleging in his petition and supporting declaration that Nemour no longer held an interest in the limited partnership. Respondent stated in his declaration dated July 27, 1981, that "ultimately by February 15, 1981," over five months earlier, he had paid Nemour over \$300,000 and had been assigned Nemour's partnership interest. (Exh. 2, attach. B.) An amended certificate of limited partnership evidencing the transfer, signed "as of" February 2, 1981, was recorded on June 16, 1981, and was attached to respondent's declaration.

In light of respondent's submission, the trial court judge continued the proceedings to permit discovery. Eddy's attorneys deposed respondent, his brother, Sheldon, his attorney, Robert Leff

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1. References to the Rules of Professional Conduct herein are to the rules effective from January 1, 1975, through May 26, 1989.

2. Unless otherwise stated, references to sections are to the sections of the Business and Professions Code.

(respondent's long-time law partner, who signed the agreement on behalf of respondent's parents) and Norman Cohen (respondent's boyhood friend and sometime business partner who notarized the amended partnership agreement and accompanying jurat,<sup>3</sup> and recorded the agreement). Documents were also exchanged by respondent and Eddy's attorneys, including the original partnership agreement, the partnership ledgers and summaries of payments made to Nemour and Nemour's payments to the partnership, and letters; one an unsigned letter from respondent to his parents and brother Sheldon dated December 12, 1980, which sought their consent to the transfer of Nemour's interest in exchange for the "advances" made to Nemour (exh. 22, attach. 20); and another letter, signed by Nemour and dated February 2, 1981, purporting to acknowledge \$307,577.53 in advances made by Normandie Towers to Nemour from a partnership account<sup>4</sup> on which Nemour was an authorized signatory. (Exh. 31.) The notarial journal was not produced in discovery and Cohen claimed it had been lost.

Without holding a plenary hearing and based solely on the evidence adduced in discovery, the superior court found that Nemour was still a partner in Normandie Towers. It concluded that respondent had never paid any consideration for Nemour's interest in the partnership, did not sign the amended certificate on February 2, 1981, and did not sign a notary public journal as part of the execution of the amended certificate. Further, the court found that the amended certificate of partnership (drafted by respondent) had been prepared to "fraudulently conceal" Nemour's interest in the partnership. The

court issued an order dated February 9, 1982, charging the partnership interest of Nemour in Normandie Towers with the unsatisfied judgment of Eddy. (Exh. 2, attachs. G and H.)

Respondent and the partnership appealed from the charging order, alleging error by the trial court in failing to hold a plenary hearing on the order to show cause and contending that the charging order was not supported by substantial evidence in the record. On April 23, 1985, the Court of Appeal affirmed the superior court's order and rejected both of the arguments raised. (*Eddy v. Temkin* (1985) 167 Cal.App.3d 1115 (Arguelles, J.)) The appellate court identified specifically the substantial evidence supporting the finding of fraudulent intent in the form of depositions, declarations and bank records showing: Nemour had received less than \$300,000 for the interest and continued as an authorized signatory on the bank account *after* his "withdrawal," formalities were not followed in the purported transfer, and the notarial records could not be produced, making the February 1981 agreement date highly suspect. (*Id.* at p. 1122.)<sup>5</sup>

In the meantime, this dispute spawned other litigation. In February 1982, after the charging order had been entered by the trial court and finding Normandie Towers to be all but insolvent, Eddy brought suit in Los Angeles County Superior Court against respondent, Nemour, Sheldon Temkin, Cohen and Leff, in a fraudulent conveyance action alleging that they had conspired to hide and conceal Nemour's interest in Normandie Towers from his creditors, including Eddy. (Exh. 29.) Eventually,

3. The State Bar Court hearing referee found that the separate jurat was altered by using "white-out" to cover the date "June 9" and typing "Feb. 2" over it. This alteration was not discovered until June 1986, when attorneys for Eddy were able to examine the original document. (R.T. pp. 37-38.)

4. The account was shared with another limited partnership, Sunset-Normandie Towers, Ltd.

5. The Court of Appeal's discussion preceding its description of the specific substantial evidence supporting the charging order is as follows: "II. Substantial Evidence [¶] (3) Appellants contend that there was not substantial evidence that the transfer of Nemour's partnership interest to [respondent] was a fraud upon creditors. In support of this contention, appel-

lants recite only the evidence favorable to their position. For this reason alone, their contention could be rejected. (See *Estate of D'India* (1976) 63 Cal.App.3d 942, 950 [134 Cal.Rptr. 165].) However, we also reject this contention on its merits. [¶] Under the Uniform Fraudulent Conveyance Act (Civ. Code, §§ 3439-3439.12), '[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud . . . creditors, is fraudulent as to . . . creditors.' (Civ. Code, § 3439.07.) [¶] Proof of fraudulent intent often consists of 'inferences from the circumstances surrounding the transaction, such as secrecy or concealment of the debtor, the relationship of the parties . . . ' (5 Witkin, Cal. Procedure (2d ed. 1971) Enforcement of Judgment, § 147, p. 3510, and cases cited therein.)" (*Eddy v. Temkin, supra*, 167 Cal.App.3d at pp. 1121-1122, emphasis and omissions in original.)

after Nemour's death, Eddy entered into separate settlements with the surviving parties, including respondent.<sup>6</sup>

Also, in September 1983, respondent and his co-defendants in the fraudulent conveyancing suit sued Eddy and his counsel for malicious prosecution, slander of title, abuse of process and conspiracy to interfere with economic advantage, arising from the prosecution of the charging order proceeding. (Los Angeles Superior Court Case No. C 469 948; exh. 32, attach. L, p. 17.) The complaint was dismissed by the trial court as defective, without leave to amend, and affirmed on appeal. (*Normandie Towers, Ltd. v. Eddy* (1987) (Cal.App.) [opinion deleted upon direction of Supreme Court by order dated April 23, 1987].)

The notice to show cause which started this disciplinary proceeding against respondent was filed on March 13, 1989. It charged respondent with violations of sections 6068 (a), 6103 and 6106 and former rule 7-105(1). It alleged that at the July 28, 1981 superior court hearing, respondent filed his declaration stating that Nemour no longer had any interest in Normandie Towers because respondent had previously purchased his interest and that respondent participated in the preparation of documents that were used to fraudulently conceal Nemour's interest in Normandie Towers. On November 27, 1989, after five days of hearing, the referee issued his decision, finding culpability under rule 7-105(1), and sections 6103, 6068(b)<sup>7</sup> [2a, 3a - see fn. 7] and 6068. The referee found no clear and convincing evidence of violation of section 6106 (act of moral turpitude, dishonesty or corruption). The referee recommended that respondent be suspended, as we have noted, *ante*.

In his decision, the referee made factual findings distilling the essence of the undisputed facts we have recited above. He found that respondent prepared in 1981 the amended partnership certificate but did not find when in 1981 he prepared it. The referee also found that respondent prepared the July 1981 superior court declaration stating that Nemour had no interest in Normandie Towers but did not find whether or not that statement was falsely made. The referee concluded both that respondent failed to use "due diligence" in learning the true facts before filing his superior court declaration and that respondent misled the court in filing that declaration. However, the referee did not specify how or in what manner respondent misled the court. The referee did conclude that there was "no evidence" that respondent actively participated in fraud on the court in preparing the amended certificate "of February 1981 or [sic] June 1981". The referee also concluded that respondent employed conduct which tended to mislead the superior court by a false statement of fact by filing his July 1981 declaration and violated rule 7-105(1) but the referee did not conclude whether or not respondent's violation was wilful<sup>8</sup> and did not specify in what manner respondent's conduct tended to mislead. Although the referee concluded that respondent violated his oath and duties under sections 6068, 6103 and 6068 (b) by employing methods that tended to mislead the superior court, the referee did not specify any misleading methods; and, as noted, respondent was not charged with a violation of section 6068 (b). Finally, the referee concluded that the State Bar did not establish by clear and convincing evidence that respondent's submission of the declaration to the superior court based on the amended certificate of limited partnership was an act of dishonesty, corruption or moral turpitude defined by section 6106.

6. Respondent's settlement was entered *after* he (1) had a default judgment entered against him for \$200,000 (\$100,000 in punitive damages), (2) moved to set aside the default, which was denied, (3) appealed the denial of the default to the Court of Appeal, which remanded the matter to the trial court with orders to vacate the default, (4) declared bankruptcy, which stayed the trial court proceedings and resulted in his severance from the case, and (5) fought Eddy's complaint in bankruptcy court seeking to prevent discharge of any claim arising from the fraudulent discharge proceeding. Respondent was granted partial summary judgment in the latter proceeding, the bank-

ruptcy judge finding that the loss of value of Normandie Towers was not a result of fraud on the part of respondent and dismissing Eddy's complaint on that issue.

7. [2a] Section 6068 (b) was not alleged in the notice to show cause and no motion to amend was made at the hearing. [3a] Sections 6068 (a) and 6103 would not be appropriate bases for culpability on this record. (See discussion, *post*.)

8. Section 6077; rule 1-100.

Neither the examiner nor respondent requested review of the decision. Nevertheless, the procedural rules governing review of State Bar Court decisions rendered by the former hearing department pursuant to former section 6079 require that we review the referee's decision *ex parte*. Upon independent review of the record, we issued a notice of intent to adopt with modifications, filed on May 3, 1990, providing for no change in the proposed discipline, but modifying the findings to (1) strike the culpability findings under sections 6068 (a), 6103 and 6068 (b), (2) add two factual findings that establish respondent's knowledge of a misrepresentation in his declaration when it was submitted to the trial judge, and (3) conclude that the respondent's misrepresentation constituted an act involving moral turpitude or dishonesty under section 6106. In the notice, we deferred submission for 30 days to permit the parties to submit any objections to the proposed modifications by means of a request for review. (Rule 450(a), Trans. Rules Proc. of State Bar.) Respondent timely objected to our proposed action and requested our review.

#### DISCUSSION

On our *ex parte* review, we noted inadequacies and inconsistencies in the findings and conclusions. We also noted that neither side had initially requested review, including of the recommendation of suspension. Upon respondent's later objection to our proposed modifications on *ex parte* review and request for review however, as we shall detail below, we have determined that it is necessary to remand this matter for a new hearing.

[4] Our review of the record is independent. (Rule 453, Trans. Rules Proc. of State Bar; see *Sands v. State Bar* (1989) 49 Cal.3d 919, 928.) We may reweigh all evidence and adopt findings and a recommendation of discipline at odds with the referee on all issues. (See *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916.)

[5] Although prior civil court actions are not binding in disciplinary matters (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 444), they are admissible when they address issues substantially identical to those raised in the disciplinary hearing. (*Rosenthal v.*

*State Bar* (1987) 43 Cal.3d 612, 634; *Caldwell v. State Bar* (1975) 13 Cal.3d 488, 496-497.) Civil court decisions that are supported by substantial evidence are accorded a strong presumption of validity. (*In re Wright* (1973) 10 Cal.3d 374, 377.) Indeed, individual facts established by such civil court decisions may serve as a "conclusive legal determination" as to particular facts determined by the civil courts. (*Lee v. State Bar* (1970) 2 Cal.3d 927, 941.) [1b] Were this case one solely resting on documents and argument of counsel, we would appear to be in an appropriate position to exercise our independent review by correcting the problems in the referee's decision and assessing the appropriate discipline. But at the State Bar Court hearing, the referee also heard five days of testimony. As respondent has argued to us, a significant portion of his testimony consisted of his assertion of his position of good faith and acts, which if believed, show his innocence of wrongdoing.

[6] Our rules of procedure require we give great weight to the findings of fact of the hearing referee resolving issues pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453; see *Aronin v. State Bar* (1990) 52 Cal.3d 276, 283; *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.) That rule rests on a sound policy reason, for when evidence turns on assessment of credibility we should insist that an evaluation be made by a judicial officer who sees and hears the witnesses and can translate the credibility accorded witnesses into the weight to be given their testimony as it relates to other evidence in the case. (See, e.g., *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) Before disregarding any such credibility assessments of the referee, we should have very good reason to do so. (See *Connor v. State Bar*, *supra*, 50 Cal.3d at p. 1056.)

With the foregoing preface, we identify in greater detail many problems with the hearing referee's decision, which are, in the aggregate, insurmountable. First, the referee simply failed to make necessary findings. The record of State Bar proceedings should have been ample to permit the referee to find whether or not the amended partnership certificate prepared by respondent showing the transfer of Nemour's interest was signed in February of 1981 or June of 1981. This was the single, crucial predicate issue to

the ultimate finding, which should have been made by the referee, as to whether there was clear and convincing evidence that respondent's declaration was the making by him of a false statement. Instead, the referee limited his findings to background facts which were either undisputed since the earliest litigation, or which are not crucial to resolving the issues raised by the notice to show cause.

Second, the referee's conclusion that respondent misled the court in filing the 1981 declaration fails to follow from the referee's findings of fact. As noted, the referee failed to make the essential findings necessary to conclude that respondent did or did not mislead the court. Therefore, we cannot deem this conclusion properly supported by the findings.

[7] Third, the referee adopted a conclusion of law which seems clearly contrary to evidence presented at the hearing. Although the referee concluded that there was no evidence presented that respondent actively participated in fraud in preparation of the amended certificate of partnership, that conclusion could only be consistent with the determination by the Court of Appeal in *Eddy v. Temkin*, *supra*, 167 Cal.App.3d at p. 1122, that there was substantial evidence that the transfer of Nemour's partnership interest to respondent was a fraud upon creditors if it was based on the difference in the applicable standard of proof. The referee had a substantial issue to resolve: did the determination by the Court of Appeal that Nemour's partnership interest transfer was fraudulent, coupled with undisputed evidence that respondent prepared the partnership transfer document, constitute clear and convincing evidence that respondent violated the charged disciplinary statutes and rule? At the time that the appellate court made its determination, proof of fraud in a civil case required only a preponderance of the evidence. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291-293.) In contrast, it is well settled that the State Bar must prove the respondent culpable of professional misconduct in a disciplinary case by clear and convincing evidence. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 725, and cases cited.) The referee failed to resolve this issue.

Fourth, with regard to the referee's conclusion that no evidence was presented that respondent actively participated in fraud in preparation of the

partnership certificate, the referee failed even to determine whether it was prepared in February of 1981 or June of that year, and to that extent his conclusion suffers from the first difficulty we noted above. Further, the referee's conclusion fails to show how it was reached. [8] As we noted, the record includes extensive documentary as well as testimonial evidence. It was therefore incumbent upon the referee to weigh all evidence and identify for the litigants and further reviewing bodies the way in which that credibility assessment led to the referee's ultimate conclusions regarding respondent's culpability or innocence.

[9a] There is some language in the referee's conclusions that suggests, but does not expressly state, that the referee found respondent's testimony credible since the referee concluded that the respondent did not commit an act of dishonesty, but perhaps was culpable of something less serious in failing to exercise due diligence in learning of the true facts before filing his 1981 superior court declaration. (Compare *Connor v. State Bar*, *supra*, 50 Cal.3d at p. 1056.) However, we can only speculate as to the referee's credibility determinations. [1c] Yet in a case as this, where such credibility determinations were critical in view of the seemingly adverse determinations of civil courts on similar issues, we are not content to so speculate. We are especially loathe to do so in view of our determination, as we shall next discuss, that the referee's conclusions are hopelessly in conflict with one another and are thus unreliable.

Fifth, the key conclusions of the referee appear irreconcilably in conflict. While concluding that respondent misled the court in filing his July declaration, the referee next concluded that no evidence showed that respondent actively participated in fraud on the court in preparing the amended partnership certificate. These conclusions seem clearly at odds with each other in view of the record showing that the only material aspect of respondent's July 1981 superior court declaration at issue was his statement therein concerning when he received an assignment of Nemour's interest. [9b] Moreover, this latter conclusion appears inconsistent with the referee's fourth conclusion that respondent's declaration violated rule 7-105(1) by employing conduct tending to mislead the trial judge by a false statement of fact.

Furthermore, the referee's fourth conclusion appears to have been substantially undercut if it is not actually at odds with his third conclusion, to the effect that respondent failed to exercise due diligence in learning of the true facts before filing his declaration. This "due diligence" conclusion suggests that respondent is not culpable of a violation of rule 7-105(1), but may be responsible only for some lack of care. [10] If indeed respondent's only breach is lack of care as suggested by the referee's third conclusion of law, it was incumbent upon the referee to conclude whether or not that lack of care or diligence was culpable within the charges and fell below the level of conduct required for members of the State Bar in a disciplinary proceeding. (Compare, e.g., *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 with *Call v. State Bar* (1955) 45 Cal.2d 104, 110-111.)

We simply cannot square the referee's third and fourth conclusions with each other, particularly when we note that his fourth conclusion fails to identify wherein respondent employed conduct which tended to mislead the judge by a false statement of fact.

Assuming that we were to credit, arguendo, the referee's fourth conclusion that respondent did violate rule 7-105, we see another inconsistency, in light of the referee's sixth conclusion that the State Bar failed to prove that respondent committed dishonesty or moral turpitude within the meaning of section 6106. Our analysis of the Supreme Court's decisional law involving cases where attorney misconduct could violate rule 7-105(1) and section 6106 show that the referee's unexplained different conclusions as to whether respondent violated those respective authorities appear not to be warranted. As we shall discuss, we note that in all but one decision in which a respondent was charged with both a rule 7-105(1) violation and a section 6106 offense, the Supreme Court found that the respondent had violated both provisions. [11a] In order to find a rule 7-105(1) violation, the State Bar must show clearly and convincingly that the attorney knowingly presented a false statement intending to mislead the court, and such deceit would, in almost every case, be an act of dishonesty proscribed by section 6106.

Rule 7-105(1) reads in pertinent part as follows: "In presenting a matter to a tribunal, a member of the

State Bar shall: [¶] (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge . . . by an artifice or false statement of fact or law." [12] At the time respondent opposed the charging order and offered his declaration, he was appearing in pro per. Accordingly, the rule applies to him as an attorney. (*Davis v. State Bar* (1983) 33 Cal.3d 231, 240.) [13] Culpability may be established even where there is "no direct evidence of malice, intent to deceive or hope of personal gain. [Citation.]" (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 473.) Actual deception is not necessary; wilful deception is established where the attorney knowingly presents a false statement which may tend to mislead the court. (*Davis v. State Bar, supra*, 33 Cal.3d at pp. 239-240.) Even when the fabrications are the work of another and the attorney is unaware of the truth at the time he presents the statement or document, he remains culpable once he learns of their bogus nature and continues to assert their authenticity. (*Olguin v. State Bar* (1980) 28 Cal.3d 195, 198-200.)

[11b] The Supreme Court has held in a number of cases that when an attorney makes a false or misleading statement to a court, that act involves moral turpitude proscribed by section 6106. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124; *Giovanazzi v. State Bar, supra*, 28 Cal.3d at p. 473.) There are cases where the State Bar chose to charge only a violation of rule 7-105 but not section 6106. (See *Davis v. State Bar, supra*, 33 Cal.3d at p. 240 [section 6106 not alleged against attorney, rule 7-105 violation found]; *Garlow v. State Bar* (1982) 30 Cal.3d 912 [section 6106 not charged, rule 7-105 violation found; however, case often cited for proposition that rule 7-105 violation involves moral turpitude (e.g., *Chefsky v. State Bar, supra*, 36 Cal.3d at p. 124)].)

Neither the examiner nor respondent's counsel offered any basis for reconciling the referee's finding of a rule 7-105 violation but no section 6106 violation on these facts. Our own research has revealed only one case in recent years where violations of section 6106 and rule 7-105 were charged and the Court did not find the misrepresentations at issue to violate both. (*Arm v. State Bar* (1990) 50 Cal.3d

763.) In *Arm*, the State Bar Court had found that by failing to disclose his then upcoming suspension to a trial court judge during a scheduling conference with opposing counsel, the attorney violated rule 7-105(1) and sections 6068 (d) (duty to employ the truth and not mislead judge or judicial officer) and 6106. The Supreme Court adopted the finding that the attorney had misled the trial court, but without any discussion as to whether or not he thereby violated section 6106, affirmatively found violations only of rule 7-105(1) and section 6068 (d). (*Id.* at p. 776.) The three-justice dissent on the degree of discipline noted the majority's omission of a violation of section 6106 in passing. (*Arm v. State Bar, supra*, 50 Cal.3d at p. 782 (dis. opn.).)

Yet a further inconsistency in the hearing referee's decision is his conclusion five, that respondent violated sections 6068 (b) and 6103 by employing methods that tended to mislead the court. We do not find this conclusion appropriate.

[3b] Section 6103 does not define a duty or obligation, but rather provides grounds for discipline for violation of an oath or duty defined elsewhere. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617-618; *Baker v. State Bar* (1989) 49 Cal.3d 804, 815.) [2b] Respondent was not charged in the notice to show cause with failure to maintain respect for the courts and their officers, nor was the notice amended at trial, so the conclusion of a section 6068 (b) violation is inappropriate. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1151-1152; *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.) [3c] Section 6068 (a), which was charged in the notice, appears duplicative since the same misconduct was charged as a violation of a specific Rule of Professional Conduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059-1060.)

[1d] Considering the many problems we have identified with the hearing referee's findings and conclusions and considering especially that their resolution in this case will require reassessment of credibility of witnesses and the weighing of documentary evidence in light of that credibility assessment, we are not in the appropriate position, regrettably, to make the appropriate findings of fact and conclusions of law and assess any appropriate disposition in light of those findings and conclu-

sions. That responsibility must be left to a hearing judge on remand for new trial on the issues raised in the notice to show cause.

We are cognizant of the burden this remand places on respondent and the examiner. If we could have avoided the additional expenditure of resources entailed in another hearing, we certainly would have done so. However, there are pretrial mechanisms available to the parties, such as factual stipulations and other agreements, that could streamline the process and reduce the costs involved. We encourage their use especially in this case.

#### DISPOSITION

For the reasons stated, we remand this proceeding to the Hearing Department of the State Bar Court, composed of judges and judges pro tempore under section 6079.1, for retrial of the charges in a manner consistent with this opinion.

We concur:

PEARLMAN, P.J.  
NORIAN, J.