

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

RESPONDENT B

A Member of the State Bar

[No. 88-TT-xxxxx (confidential matter)]

Filed April 22, 1991

SUMMARY

In an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007(b)(3), a hearing judge ordered a mental examination of the respondent pursuant to Business and Professions Code section 6053. After respondent refused to undergo the mental examination, the judge applied rule 644 of the Transitional Rules of Procedure of the State Bar of California to presume the existence of facts warranting respondent's involuntary transfer to inactive status. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent's appointed counsel requested review. The review department held that the standard of proof for involuntary inactive enrollment is clear and convincing evidence, and that the test for the constitutional validity of a mental examination order is whether the mental examination serves a compelling government interest and constitutes the least intrusive means of accomplishing that interest. The review department concluded that section 6053 does not violate the California constitutional right of privacy because it serves a compelling government interest in protecting the public, courts, and profession from mentally incompetent attorneys and because its grant of discretion to order a mental examination is consistent with the requirement that the least intrusive means be used to satisfy the compelling government interest. The review department also held that the rules governing an involuntary inactive enrollment proceeding incorporate by reference the requirement in the civil discovery statutes that a mental examination order must rest on a finding of good cause. Because the examiner and the hearing judge did not comply with the good cause requirement in this case, and because it had not been shown that a compulsory mental examination constituted the least intrusive means of ascertaining the respondent's mental condition, the review department reversed the hearing judge's decision and remanded the case for further proceedings.

The review department also held that the probable cause determination necessary for the initiation of an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007(b)(3) does not suffice as good cause to order a mental examination, and that a determination of mental incompetency does not necessarily require a mental examination. Further, the review department held that rule 644 of the Transitional Rules of Procedure of the State Bar of California must be interpreted as merely allowing a permissive inference of mental infirmity, rather than shifting the burden of proof, if an attorney fails without good cause to undergo a mental examination as ordered.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Francis J. McTernan, Jr.

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protecting the public, courts, and profession from mentally incompetent attorneys and because section 6053's grant of discretion to order a mental examination may be construed so as to allow such examinations to be ordered only when they are the least intrusive means to satisfy the compelling government interest. In addition, the limited distribution of the mental examination report and the confidentiality of the proceeding serve as further protections of the attorney's privacy and thereby bolster the constitutionality of section 6053.

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Although rule 644 of the Transitional Rules of Procedure purports to allow a presumption affecting the burden of proof if an attorney fails without good cause to undergo an ordered mental examination, rule 644 must be interpreted as merely allowing a permissive inference of mental infirmity, in order to ensure due process. Rule 644 would not be valid if it operated to relieve the examiner of the burden of proving mental incompetence by clear and convincing evidence. The presumption authorized by rule 644, if applied, would conflict with the appropriate presumption that an attorney remains mentally competent to practice law in the absence of proof to the contrary, and would be tantamount to the imposition of a default judgment for failure to obey a discovery order, in violation of rule 321 of the Transitional Rules of Procedure.

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The facts of each case will determine whether a particular rule of civil or criminal law should be applied in State Bar proceedings to ensure due process. This principle applies in involuntary inactive enrollment proceedings as well as disciplinary proceedings.

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An attorney's license to practice law creates a continuing presumption, in the absence of proof to the contrary, that the attorney is not only morally fit but also mentally competent to practice law. This presumption underlies the rule in disciplinary proceedings that all reasonable doubts are to be resolved in favor of respondents and that, if equally reasonable inferences may be drawn from a fact, the inference to be accepted is the one leading to a conclusion of innocence.

ADDITIONAL ANALYSIS

Other

- 2125 Section 6007(b)(3) Proceedings—Inactive Enrollment Not Ordered

OPINION

PEARLMAN, P. J.:

We review the decision of a hearing judge of the State Bar Court to enroll respondent¹ as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007, subdivision (b), paragraph (3).² Pursuant to section 6053, the hearing judge ordered a mental examination of respondent.³ Respondent refused to undergo the mental examination, and the hearing judge applied rule 644 of the Transitional Rules of Procedure of the State Bar of California⁴ to presume the existence of facts warranting transfer of the member to inactive status.⁵ Because the mental examination order by the hearing judge did not rest on a finding of good cause for its issuance in accordance with Code of Civil Procedure section 2032, subdivision (d) and a finding that the order was the least intrusive means of determining respondent's mental condition, we reverse the decision

below and remand the case for further proceedings in accordance with this opinion.

I. FACTS AND PROCEEDINGS BEFORE THE STATE BAR COURT

Respondent was admitted to the practice of law in this state more than 15 years ago and has no record of discipline.

In October 1988, the State Bar filed a verified application informing respondent that the Office of Trial Counsel would move the State Bar Court to issue an order for respondent to undergo a mental examination pursuant to Business and Professions Code section 6053 and to issue a notice to show cause for respondent's inactive enrollment pursuant to section 6007 (b).

Attached to the application was a memorandum of points and authorities in which the examiner stated

1. Proceedings pursuant to Business and Professions Code section 6007 (b) are required to be confidential. (Trans. Rules Proc. of State Bar, rule 225(a)(i).) Because this case raises important issues of first impression, the examiner and respondent's appointed counsel have consented to the publication of this opinion omitting the identification of respondent by name. All statutory references herein refer to the Business and Professions Code, unless otherwise noted.

2. At the time this proceeding began in the fall of 1988, section 6007, subdivision (b), paragraph (3) provided that the Board of Governors of the State Bar shall involuntarily transfer a member of the State Bar to inactive status if "[a]fter notice and opportunity to be heard before the board or a committee, the board finds that the member, because of mental infirmity or illness, or because of the habitual use of intoxicants or drugs, is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public. No proceeding pursuant to this paragraph shall be instituted unless the board or a committee finds, after preliminary investigation, or during the course of a disciplinary proceeding, that probable cause exists therefor." Since January 1, 1989, section 6007, subdivision (b), paragraph (3) has also provided that "[t]he determination of probable cause is administrative in character and no notice or hearing is required." Section 6086.5 authorizes the State Bar Court to act in place of the Board of Governors in "disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007," as provided by the Transitional Rules of Procedure of the State Bar of California.

3. Section 6053 provides that if "the mental or physical condition of [a] member of the State Bar is a material issue [in an investigation or proceeding], the board or the committee having jurisdiction may order the member to be examined by one or more physicians or psychiatrists designated by it. The reports of such persons shall be made available to the member and the State Bar and may be received in evidence in such investigation or proceeding."

4. All references to rules herein refer to the Transitional Rules of Procedure of the State Bar of California, effective September 1, 1989, unless otherwise noted.

5. Rules 640 through 645 govern the involuntary transfer of a member to inactive status under section 6007 (b). Rule 644 states that "[u]pon failure without good cause of the member to obey an order of the hearing panel for physical or mental examination of the member, the existence of facts warranting transfer of the member to inactive status may be presumed. Such presumption shall be a 'presumption affecting the burden of proof' as defined in Evidence Code sections 605 and 606."

Evidence Code section 605 defines a presumption affecting the burden of proof as "a presumption established to implement some public policy." Evidence Code section 606 states that "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

that three investigation matters were pending against respondent. The examiner alleged that respondent was suffering from a mental infirmity which might affect respondent's ability to defend against charges or assist counsel in the defense of any disciplinary proceedings. The examiner asserted that the pending investigation matters could not proceed to a determination until the State Bar Court determined whether respondent should be transferred to inactive status. Also attached to the application was the examiner's declaration, which set forth information about the matters which were later to constitute the counts in the notice to show cause for the current State Bar proceeding.

In November 1988, the State Bar Court held a hearing concerning the Office of Trial Counsel's application for the issuance of a mental examination order and notice to show cause. Respondent participated in this hearing, but did not appear at the portion of the hearing continued to the following month.

In December 1988, the examiner filed an ex parte application for an independent mental examination in the current State Bar Court proceeding. The State Bar Court referee issued a notice to show cause setting forth the counts against respondent and ordered respondent to submit to psychiatric evaluation within ten weeks.

In June 1989, the State Bar Court appointed counsel for respondent pursuant to rule 641 and, on its own motion, extended the date for respondent to undergo a psychiatric evaluation to August 31, 1989. The chief deputy clerk of the State Bar Court independently engaged a psychiatrist to conduct the ordered examination of respondent, informed respondent's appointed counsel of the actions taken regarding the psychiatric examination, and urged respondent's counsel to make every effort to ensure that respondent kept his appointment with the psychiatrist. In a declaration dated September 22, 1989, the psychiatrist stated that neither respondent nor his appointed counsel had contacted the psychiatrist to arrange for respondent's psychiatric evaluation.

In August 1989, following the appointment of full-time hearing judges to replace volunteer referees in the State Bar Court, this proceeding was

assigned to a hearing judge, who presided from then onwards over the matter. In December 1989, the hearing judge held a hearing at which the examiner and respondent's appointed counsel appeared, but at which respondent did not appear. At this hearing, the examiner moved that, pursuant to rule 644, the existence of facts warranting respondent's transfer to inactive status be presumed. Concluding that the examiner had failed to show by clear and convincing evidence that respondent's failure to comply with the psychiatric examination order was without good cause, the hearing judge denied the examiner's motion.

At the December hearing, respondent's appointed counsel raised various objections to the order requiring respondent to undergo a psychiatric examination. Among these objections was the argument that the order violated respondent's fundamental right of privacy. The hearing judge acknowledged that a psychiatric examination would invade respondent's privacy, but determined that such an invasion was reasonable because of a compelling interest in inquiring into respondent's mental fitness to practice law. Also, the judge indicated that probable cause for requiring a psychiatric examination had been established pursuant to section 6007 (b)(3). The judge did not consider any less intrusive means of determining whether respondent was mentally competent to practice law.

At the conclusion of the December hearing, the hearing judge arranged to continue the case to April 1990. The judge also indicated that, pursuant to section 6053, respondent would be ordered to undergo a psychiatric examination before the April hearing.

In an order filed in January 1990, the hearing judge announced the intention to appoint one of three named psychiatrists to examine respondent, enclosed curricula vitae for the psychiatrists, and allowed each of the parties 14 days to reject one of the psychiatrists. This order was served on respondent, his appointed counsel, and the examiner. Having received no opposition to any of the three psychiatrists, the hearing judge filed another order in February 1990. This order, which was served on respondent, his appointed counsel, and the examiner, designated

a new psychiatrist to examine respondent and required respondent to be examined by the new psychiatrist not later than March 9, 1990. The record does not indicate that, before issuing the February order, the hearing judge made any determination as to whether a psychiatric examination was the least intrusive means of determining respondent's mental condition.

Acting on his own behalf in April 1990, respondent filed with the State Bar Court a statement addressing the California Supreme Court. The hearing judge construed the statement as a pleading in the current case to challenge the February 1990 order directing respondent to undergo a mental examination by the new psychiatrist. Respondent alleged denial of due process, lack of jurisdiction, invalidity of section 6053, and impropriety of the appointment of the new psychiatrist. In the statement, respondent explained that he had once retained the new psychiatrist to examine a former client. Fearing some sort of conspiracy, respondent indicated that he intentionally had not notified the court earlier of this relationship and had not exercised his option to reject the new psychiatrist.

Later in April 1990, the continued hearing was held pursuant to section 6007 (b)(3). Respondent's appointed counsel and the examiner appeared, but respondent did not appear. The examiner relied solely on rule 644 as creating a presumption shifting the burden of proof to respondent because of failure to undergo a mental examination. Respondent's appointed counsel had been unable to communicate with respondent and offered no evidence in rebuttal.

In May 1990, the hearing judge filed a decision in the matter. The hearing judge found that in the late 1970's respondent had retained the new psychiatrist

to evaluate a former client, but that the new psychiatrist had never met respondent, had been advised after filing a written report that respondent was no longer working on the case, and did not initially remember respondent. Further, the hearing judge found that respondent intentionally had failed to notify the court of his prior contact with the new psychiatrist and had not made an appointment for a psychiatric examination with the new psychiatrist. The hearing judge concluded that respondent had not shown good cause for failing to comply with the section 6053 order of February 1990 and that the appointment of the new psychiatrist was valid pursuant to section 6053. Based on this conclusion, the hearing judge applied rule 644 to presume the existence of facts warranting respondent's involuntary transfer to inactive status.

Respondent's appointed counsel requested review of the decision on several grounds.⁶ [1 - see fn. 6] Counsel argued that section 6053 and the mental examination order issued pursuant to section 6053 violated respondent's right of privacy, as set forth in article 1, section 1 of the California Constitution.⁷ Further, counsel claimed that rule 644 is invalid and that the hearing judge improperly applied rule 644 to create a presumption shifting the burden of proof.

II. DISCUSSION

A. Standard of Proof

[2a] We agree with the conclusion of the hearing judge, respondent's appointed counsel, and the examiner that "clear and convincing evidence" is the standard of proof for a proceeding pursuant to section 6007 (b)(3). In disciplinary proceedings, the examiner must prove the respondent's culpability by "convincing proof and to a reasonable certainty."

6. [1] Both parties have treated the decision of the hearing judge below as reviewable by the review department pursuant to rule 450. We agree. All inactive enrollment decisions of referees pursuant to section 6007 (b) were automatically subject to review by the prior volunteer review department under rules 450 to 453 although no express provision so stated. Under section 6086.65 (d) of the State Bar Act, "Any decision or order reviewable by the Review Department and issued by a judge of the State Bar Court . . . may be reviewed . . . upon timely request of a party to the proceeding." A timely request

for review having been made, the review department duly set the matter for oral argument and issuance of this opinion on review in accordance with rules 450 to 453.

7. Article 1, section 1 of the California Constitution currently provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

(*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226; *Furman v. State Bar* (1938) 12 Cal.2d 212, 229-230.) This burden of proof may be referred to as “clear and convincing evidence.”

[3] A proceeding for involuntary inactive enrollment is not disciplinary in nature. Section 6007 (b)(3) specifically contrasts a “proceeding pursuant to this paragraph” with a disciplinary proceeding, as does section 6086.5, which authorizes the State Bar Court to handle “disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007”

No case, statute, or rule specifies the standard of proof for a proceeding under section 6007 (b)(3). Nonetheless, the standard of clear and convincing evidence is so basic to State Bar proceedings that any deviation from this standard is ordinarily spelled out in the State Bar Act or the Transitional Rules of Procedure. For example, section 6093 (c) and rule 613 provide that the standard of proof in a probation revocation proceeding shall be “the preponderance of the evidence.” Because the rules governing the transfer of an attorney to inactive status contain no such provision, the absence of such a provision indicates that the usual standard of clear and convincing evidence applies.

[2b] This conclusion appears mandated by the California Supreme Court’s application of the clear and convincing evidence standard of proof in reviewing an order of involuntary inactive enrollment under section 6007 (c) in the same manner it applies such standard in reviewing orders recommending suspension or disbarment of an attorney. (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1123, 1126.) Although serving different purposes, the remedy arising from both 6007 (c) and 6007 (b) proceedings is the same. In a proceeding under section 6007 (b)(3), an examiner may seek involuntary inactive enrollment of the respondent because the respondent, regardless of whether he or she even has any clients, is mentally

unable to perform his or her duties or undertakings competently or to practice law without substantial threat of harm to the interests of the public. Since the right to practice law of an attorney accused of mental incapacity is as important as the right to practice law of an attorney accused of actual wrongdoing, we interpret the clear and convincing evidence standard applied in *Conway* to 6007 (c) proceedings to be equally applicable to 6007 (b) proceedings.

B. Right of Privacy and Mental Examination

In November 1972, California voters amended article 1, section 1 of the state Constitution to include privacy among the inalienable rights of the people. The California Supreme Court has asserted that the concept of privacy relates “to an enormously broad and diverse field” of personal actions and beliefs. (*White v. Davis* (1975) 13 Cal.3d 757, 774.)⁸ The Court has also explained that the 1972 constitutional amendment did not purport to prohibit all invasions of individual privacy, but did require a “compelling interest” to justify any such invasion. (*Id.* at p. 775; see also *Doyle v. State Bar* (1982) 32 Cal.3d 12, 19; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131-133; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856.) Some cases, however, have indicated that unless an intrusion substantially burdens or affects an individual’s privacy, the test for validity is not whether a compelling interest justifies the intrusion, but whether the intrusion is reasonable. (See *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389-390; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1047, 1051; *Miller v. Murphy* (1983) 143 Cal.App.3d 337, 343-348.)

In *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, the California Supreme Court stated that an individual’s right of privacy encompasses mental privacy, including thoughts, emotions, expressions, and personality, and that “[i]f there is a quintessential zone of human privacy it is the mind.” (*Id.* at pp. 943-944; see also

8. See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479, 485-486 (privacy of marital relationship); *Stanley v. Georgia* (1969) 394 U.S. 557, 564-565 (privacy of liberty to read and observe what one pleases in one’s own home); *City of Carmel-*

By-The-Sea v. Young (1970) 2 Cal.3d 259, 266-268 (privacy of personal financial affairs); *In re Lifschutz* (1970) 2 Cal.3d 415, 431-432 (privacy of psychotherapist-patient relationship).

White v. Davis, *supra*, 13 Cal.3d at pp. 774-775.) The Court found “that polygraph examinations inherently intrude upon the constitutionally protected zone of individual privacy.” (*Long Beach City Employees Assn. v. City of Long Beach*, *supra*, 41 Cal.3d at p. 948.)⁹ Because the Court focused on the equal protection issue raised by the plaintiff, it did not determine whether these examinations violated the right of privacy. To make such a determination, the Court said that it would inquire whether the defendant “had demonstrated a compelling government interest in administering the polygraph examinations . . . and whether this interest could be accomplished by less intrusive means.” (*Long Beach City Employees*, *supra*, 41 Cal.3d at p. 948, fn. 12.)

A mental examination constitutes a far greater intrusion on individual privacy than a polygraph examination. As the California Supreme Court has observed, an analyst conducting a mental examination undertakes “by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee’s mental condition.” (*Edwards v. Superior Court* (1976) 16 Cal.3d 905, 911.)¹⁰ [4a] Thus, the test for validity of a mental examination order must be whether the mental examination serves a compelling government interest *and* constitutes the least intrusive means of accomplishing that interest.

The requirement for the use of the least intrusive means is “a logical corollary” of the requirement for a compelling government interest. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1148; see also *City of Carmel-By-The-Sea v. Young*, *supra*, 2 Cal.3d at pp. 263, 268.) The conflict between the government’s compelling interest and the individual’s right of privacy must be unavoidable, because if it can be avoided, “the real conflict is not between the compelling interest and the constitutional interest but between the *means* chosen to achieve the compelling interest and the constitutional interest.” (*Wood v. Superior Court*, *supra*, 166 Cal.App.3d at p. 1148, original emphasis.) This is why the California Supreme Court requires that the least intrusive means be used to protect the compelling government interest. (*Ibid.*; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 680; see also *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213; *Doyle v. State Bar*, *supra*, 32 Cal.3d at p. 20; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 270; *Britt v. Superior Court*, *supra*, 20 Cal.3d at pp. 855-856.) [4b] Mere convenience or avoidance of administrative costs does not make a means the least intrusive; otherwise, the overriding value would be expediency, not the compelling government interest. (See *Castro v. State of California* (1970) 2 Cal.3d 223, 241-245; *Wood v. Superior Court*, *supra*, 166 Cal.App.3d at p. 1148; *Fults v. Superior Court* (1979) 88 Cal.App.3d 899, 904.)

9. In *Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at p. 1051, the appellate court held that Matthew Bender & Company, Inc., did not violate the state constitutional right of privacy by requiring job applicants to consent to urinalysis tests for alcohol and drugs as a condition of employment because of the notice provided to prospective employees of the testing program, the limited intrusiveness of the collection process, and the procedural safeguards restricting access to the test results. Contrasting the urinalysis tests demanded by Matthew Bender with the compulsory polygraph examinations demanded by the City of Long Beach, the *Wilkinson* court observed that “the challenged conduct in *Long Beach* not only substantially burdened the employees’ rights of

mental privacy; it effectively annulled those rights.” (*Id.* at p. 1048, fn. 8.)

10. Also, in *In re Bushman* (1970) 1 Cal.3d 767, 776-777, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 418, 485, fn. 1, the California Supreme Court stated that the imposition of psychiatric treatment as a probation condition in a criminal matter exceeded the trial court’s jurisdiction where no evidence supported the trial court’s conclusion that psychiatric care was necessary. Decided nearly three years before the amendment adding privacy to the inalienable rights set forth in the California constitution, *Bushman* nonetheless narrowly construed the trial court’s authority to impose psychiatric treatment.

We therefore turn to the question of the interpretation of section 6053 in light of respondent's constitutional right of privacy.¹¹ [5 - see fn. 11]

C. Section 6053

[6] Section 6053 allows, but does not require, the ordering of a mental examination when an attorney's mental condition is a material issue in a State Bar proceeding. Respondent's appointed counsel argued that because the legislature enacted section 6053 three years before the constitutional amendment which added privacy to the inalienable rights set forth in article 1, section 1 of the California Constitution, section 6053 must yield to the newer constitutional provision. This argument would be correct only if section 6053 violated the right of privacy. No such violation, however, appears on the face of the statute. Moreover, the applicable standard is that "When faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids any doubt about its validity." (*Association for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394.) Moreover, section 6053 clearly serves a compelling government interest in protecting the public, courts, and profession from mentally incompetent attorneys. (See *Conway v. State Bar*, *supra*, 47 Cal.3d 1107, 1117.)

The sole remaining question in interpreting section 6053 in light of the constitutional right of privacy is to determine whether section 6053's grant of discretion to order a mental examination is consistent with the requirement that the least intrusive means be used to satisfy the compelling government interest. Section 6053 does not require a mental

examination in every proceeding where the attorney's mental condition is a material issue. Instead, it merely provides that the body having jurisdiction *may* order a mental examination of an attorney. We interpret this provision as allowing a mental examination only if such an examination is the least intrusive means of determining an attorney's mental condition. In adopting this interpretation, we comply with our duty to construe a statute which may raise constitutional questions "in a manner that avoids *any* doubt about its validity." (*Association for Retarded Citizens v. Dept. of Developmental Services*, *supra*, 38 Cal.3d at p. 394, original emphasis; cf. *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594.)

Section 6053 provides that the psychiatrist's report concerning a mental examination must be made available only to the attorney involved and the State Bar. It also allows the body having jurisdiction in a proceeding where an attorney's mental condition is a material issue to receive the report in evidence. Except in rare circumstances, the files and records of such proceeding shall not be public. (Trans. Rules Proc. of State Bar, rule 225(a)(i).) The limited distribution of the report and the confidentiality of the proceeding serve as further protections of the attorney's privacy and thereby bolster the constitutionality of section 6053.

We turn next to the validity of the motion made below for mental examination of respondent and the ensuing order pursuant to section 6053.

D. Mental Examination Motion and Orders

[7] Section 6053 permits an application for an order of mental examination whenever in an investi-

11. [5] A court of record may declare a statute unconstitutional. An administrative agency is prohibited from doing so by article III, section 3.5 of the California Constitution, but "remains free to *interpret* the existing law in the course of discharging its statutory duties." (*Regents of Univ. of Cal. v. Public Employees Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042, original emphasis). This court is neither a court of record, nor an executive branch administrative agency, but a *sui generis* arm of the Supreme Court. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-301.) In cases involving suspension or disbarment our decisions take the form of a

recommendation to the Supreme Court, and no constitutional impediment appears to prevent us from recommending that a rule or statute be declared unconstitutional by the Supreme Court should such a declaration appear to be called for according to applicable legal principles and precedents. However, with respect to decisions of this court which may be implemented without Supreme Court action, such as the decision in this proceeding, we deem the judges of the State Bar Court limited to interpreting the existing law; and that is what we undertake to do here.

gation or proceeding, the mental condition of the member is a material issue, but does not specify the procedure for obtaining a mental examination order. The rules governing the formal proceedings for transfer of a member of the State Bar to inactive status incorporate by reference the applicable portions of the Civil Discovery Act (Code Civ. Proc., §§ 2016 et seq.) with specified limitations, including limitations on the sanctions available for failure to comply with a mental examination order. (See Trans. Rules Proc. of State Bar, rules 315, 321, 643.) The rules do not alter Code of Civil Procedure section 2032, subdivision (d), which sets forth requirements concerning the physical or mental examination of a person other than a plaintiff seeking recovery for personal injuries.¹²

Pursuant to Code of Civil Procedure section 2032, subdivision (d), a State Bar examiner seeking a mental examination of a respondent after formal proceedings have commenced must file a motion specifying the "the time, place, manner, conditions, scope, and nature of the examination, as well as the identity" of the psychiatrist. Accompanying the motion must be "a declaration stating facts showing a reasonable and good faith attempt to arrange for [a mental] examination by [a written] agreement" with the respondent. The State Bar's verified application of October 1988 and its *ex parte* application for a mental examination of December 1988 preceded the institution of formal proceedings and thus were not technically required to comply with the requirements for a motion seeking a mental examination as specified by Code of Civil Procedure section 2032, subdivision (d). As we shall discuss, however, the

applications were nonetheless required to meet "the least intrusive means test." Moreover, the application was not ruled upon until after the commencement of formal proceedings under section 6007 (b) at which point the provisions of Code of Civil Procedure section 2032 came into play, although it appears that the parties and the court below did not focus on the potential applicability of Code of Civil Procedure section 2032, subdivision (d).

Pursuant to Code of Civil Procedure section 2032, subdivision (d), the State Bar Court shall grant a motion seeking a mental examination of a respondent "only for good cause shown." Among other things, the order granting such a motion must specify "the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." The State Bar Court referee's order of December 1988 neither stated a showing of "good cause" nor specified any of the matters set forth by Code of Civil Procedure section 2032, subdivision (d). The hearing judge's order of February 1990 also failed to state a showing of "good cause"; and although it named a psychiatrist and set a deadline for a mental examination, it did not precisely delineate the manner, diagnostic tests and procedures, conditions, and scope of the examination.

At the December 1989 hearing, the judge explained that the February mental examination order would issue on the basis of a "probable cause" determination. Here, respondent did not put his mental condition in controversy. Even if an individual puts his or her present mental condition in contro-

12. Code of Civil Procedure section 2032, subdivision (d) currently provides: "[¶] If any party desires to obtain discovery by a physical examination other than that described in subdivision (c) [which concerns a plaintiff seeking recovery for personal injuries], or by a mental examination, the party shall obtain leave of court. The motion for the examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by an agreement under subdivision (e) [which allows a written agreement between the parties in lieu of following the provisions of subdivisions (c) and (d)]. Notice of the motion shall be served on the person to

be examined and on all parties who have appeared in the action. [¶] The court shall grant a motion for a physical or mental examination only for good cause shown. . . . The order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. If the place of the examination is more than 75 miles from the residence of the person to be examined, the order to submit to it shall be (1) made only on the court's determination that there is good cause for the travel involved, and (2) conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination."

versy, the individual has not totally waived his or her right of privacy; and any compulsory mental examination must be limited by the need to show good cause for inquiring into specific matters and to protect the plaintiff's constitutional right of privacy. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-844.) A leading commentator has observed that the test in such situations should be even greater. "[J]udges should require a *strong* showing of 'good cause' before ordering defendants" who have not put their mental condition in controversy to undergo mental examinations. (1 Hogan, *Modern California Discovery* (4th ed. 1988) § 8.5, p. 463, emphasis added.)

Like Code of Civil Procedure section 2032, subdivision (d), Federal Rule of Civil Procedure 35(a) requires "good cause" for compulsory mental examinations.¹³ In *Schlagenhauf v. Holder* (1964) 379 U.S. 104, the United States Supreme Court vacated an order requiring a bus driver to undergo a mental examination. Having suffered injuries when a bus collided with the rear of a tractor-trailer, certain passengers sought the order pursuant to federal rule 35(a) in order to prove the driver's negligence. As the court observed, federal rule 35 precludes "sweeping examinations of a party who has not affirmatively put his own mental" condition

in controversy. Mental examinations, said the Court, "are only to be ordered upon a discriminating application . . . of the limitations" imposed by the "good cause" requirement of federal rule 35(a). (*Id.* at p. 121.)

After *Schlagenhauf*, a federal district court prohibited the mental examination of a mentally retarded defendant in a negligence action precisely because of federal rule 35(a)'s "good cause" requirement and the right of privacy. (See *Marroni v. Matey* (E.D.Pa. 1979) 82 F.R.D. 371.) The district court explained that the plaintiffs had made no showing that the information which they desired was otherwise unavailable. The defendant's privacy interests, said the district court, required "that less intrusive methods of discovery first be explored." (*Id.* at p. 372.)¹⁴

[8] In the present case, no evidence or finding indicated that a mental examination constituted the least intrusive means of determining respondent's mental condition. Indeed, respondent's appointed counsel vigorously objected to the intrusion of a mental examination and insisted on the protection of respondent's privacy. The mental examination orders thus violated not only section 2032, subdivision (d) of the Code of Civil Procedure, but also article 1, section 1 of the California Constitution.¹⁵

13. Federal Rule of Civil Procedure 35(a) currently provides: "[¶] When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

14. See also *Schottenstein v. Schottenstein* (Fla. Dist. Ct. App. 1980) 384 So.2d 933, 936 (mere showing that the children of a divorced couple were upset after visiting their father was not sufficient grounds for requiring them to undergo mental examinations, which constituted invasions of privacy and were tolerable only upon a showing of good cause).

15. But see *Board of Trustees v. Superior Court* (1969) 274 Cal.App.2d 377, decided three years before the people added privacy to the inalienable rights specified in article 1, section 1 of the California Constitution. In *Board of Trustees*, an appellate court ordered a teacher to submit to a mental examination where the teacher was resisting a school district's efforts to remove her for alleged mental incapacity. The trial court found the teacher mentally incompetent on the basis of outdated expert testimony and was reversed. (*Id.* at p. 379.) On retrial the school district, acting pursuant to Code of Civil Procedure section 2032, moved the court to appoint a psychiatrist to make a current examination of the teacher. The court denied the motion, and the school district sought a writ of mandate ordering the examination. Granting the writ, the appellate court stated that, while it did not rule out the sufficiency of the record to demonstrate good cause, it was "unnecessary to determine whether 'good cause' as used in [ordinary] civil proceedings" had been met in the Education Code proceedings then before it. (*Id.* at p. 380.) Unlike the Education Code proceedings, involuntary inactive enrollment proceedings require compliance with Code of Civil Procedure section 2032, subdivision (d).

[9] For the future guidance of the State Bar and its membership, we stress that the “probable cause” determination necessary for the initiation of an involuntary inactive enrollment proceeding pursuant to section 6007 (b)(3) does not suffice for the ordering of a mental examination pursuant to section 6053. The latter necessitates the much stronger procedural and constitutional safeguards afforded by showings from the State Bar of “good cause” and “least intrusive means.”

[10a] The California Supreme Court has made it clear that a determination of mental incompetency does not require psychiatric examination. In some older cases, the Court upheld trial court determinations of mental incompetency where no psychiatric testimony whatsoever was mentioned. Other evidence, however, was offered in such cases; and the allegedly incompetent individual appeared in court, took the witness stand, and underwent cross-examination. (See *Estate of Cowper* (1918) 179 Cal. 347, 348-349; *Matter of Coburn* (1913) 165 Cal. 202, 214-217.)

In more recent cases, the California Supreme Court has upheld trial court determinations of mental incompetence where psychiatric testimony was given, but where the psychiatrists who testified had not examined the allegedly incompetent individuals. For example, in *Guardianship of Brown* (1976) 16 Cal.3d 326, a stroke victim, Brown, seemed aware at times, but established no rapport with a court-appointed psychiatrist. Brown’s own physician testified that Brown could not communicate, but did respond to some requests. Because Brown was present in the courtroom, the trial court could observe his demeanor and responsiveness. Although no psychiatric examination of Brown was possible, the California Supreme Court determined that the trial court had been justified in finding Brown mentally incompetent. (*Id.* at p. 337.)

In *Guardianship of Walters* (1951) 37 Cal.2d 239, the California Supreme Court upheld a trial court determination that a woman in her late seventies was mentally incompetent. At trial, Walters took the stand. On direct examination, her testimony was clear, and her memory was excellent. On cross-examination, she was evasive and forgetful. Also, a

psychiatrist testified that at the time of the trial court proceeding Walters suffered from arteriosclerosis and was mentally incompetent. (*Id.* at p. 247.) The psychiatrist based his opinion on his observation of Walters, his study of two transcripts of testimony given by her in other proceedings four years earlier, and a lengthy hypothetical question. The psychiatrist did not examine Walters, but did see her in court three times and noted that she had a marked tremor of the head, which he said was a positive indication of arteriosclerosis. The psychiatrist also described her testimony in the two transcripts as uncertain, confused, and forgetful. The California Supreme Court stated that although the psychiatrist’s conclusion would have carried more weight if he had examined Walters, the conclusion was not unjustified as a matter of law. Although Walters produced two other psychiatrists and her family physician to attest to her mental competency, two of her experts admitted that she had a tremor; and one of her experts conceded that the tremor might indicate arteriosclerosis. In addition, the California Supreme Court noted that the trial judge observed Walters and was entitled to consider her testimony and demeanor. (*Id.* at pp. 248-249.)

We recognize that in *Guardianship of Brown* and *Guardianship of Walters* the individuals whose mental conditions were at issue appeared in court. We also acknowledge that respondent has not appeared at any of the proceedings in his case since November 1988 and may continue not to appear. The record, however, does not suggest that such a situation will pose any insuperable problems. The allegations of the notice to show cause presumably were drafted on the assumption that, if proved, they would warrant respondent’s inactive enrollment under section 6007 (b)(3). Yet no psychiatrist examined respondent in order to draft the notice. [10b] The individuals whose complaints formed the basis for the notice to show cause will presumably be available at the remanded proceeding to testify about respondent’s allegedly bizarre behavior. Pleadings which respondent filed and which allegedly reflect mental infirmity will presumably be available at the remanded proceeding for introduction into evidence by the examiner and for analysis by the judge. The hearing judge also has the power to appoint a qualified psychiatrist, who can provide expert opinion at

the remanded proceeding. Based on testimonial and documentary evidence, the psychiatrist will presumably be able to render an opinion about respondent's mental condition. Respondent's appointed counsel will have the opportunity to rebut such evidence and present evidence in favor of respondent. The hearing judge will thus be able to consider all of these facts and circumstances, including any psychiatric opinions offered by either side, in order to determine whether the examiner has established by clear and convincing evidence that respondent is mentally incompetent to practice law.

[10c] If, at that time, the judge is unable to make the necessary determination without ordering a mental examination of respondent, and respondent refuses to consent to such examination, such an order might nevertheless then be justified as the least intrusive means of accomplishing the compelling interest. In such event, an issue could be raised as to the effect of respondent's noncompliance with such an order. Nevertheless, it appears in the present case that crucial witnesses and documents upon which the notice to show cause relied would have to be unavailable at the remanded proceeding before the trial judge would be in a position to determine the necessity of ordering a mental examination of respondent.

E. Rule 644

[11a] If, upon remand, a mental examination order is deemed appropriate in this case and if the respondent refuses without good cause to comply with it, then rule 644 will come into play. Despite the fact that rule 644 purports to allow a presumption affecting the burden of proof if an attorney fails without good cause to undergo an ordered mental examination, in accordance with precedents from criminal law, we interpret rule 644 as merely allowing a permissive inference.

[12] The California Supreme Court has observed that the facts of each case will determine "whether a particular rule of civil or criminal law . . . should be applied in State Bar disciplinary matters" to ensure due process. (*Emslie v. State Bar*, *supra*, 11 Cal.3d at p. 226.) The same approach should apply to involuntary inactive enrollment proceedings.

In *People v. Roder* (1983) 33 Cal.3d 491, 499, the California Supreme Court considered the interpretation of an apparently mandatory statutory presumption which could be rebutted. Because the jury could have interpreted instructions based on the presumption as relieving the prosecution of its burden of proving every element of the criminal offense beyond a reasonable doubt, the Court construed the presumption as a permissive inference, which did not shift the burden of proof. (*Id.* at pp. 505-507; see also *People v. Stevens* (1986) 189 Cal.App.3d 1020, 1025; 1 Witkin, Cal. Evidence (3d ed. 1986) § 182, pp. 155-156.)

The State Bar's adoption of rule 644 reflects its judgment that refusal to undergo a mental examination without good cause may merit consideration in determining the mental competence of an attorney. [11b] Rule 644 would not be valid if it operated to relieve the examiner of the burden to prove by clear and convincing evidence that an attorney is not mentally competent to practice law. Respondent's case highlights this problem because the examiner relied solely on the presumption allowed by rule 644 and produced no other evidence to prove the case against respondent. Nevertheless, to ensure due process for an attorney in a proceeding under section 6007 (b)(3), we interpret rule 644 as allowing a permissive inference of mental infirmity, but not as authorizing a presumption which shifts the burden of proof.

[13a] In making such an interpretation, we note that the California Supreme Court has described an attorney's license to practice law as "a representation by the court, speaking as of the date of the license, that the licensee is a trustworthy person who reasonably may be expected to act fairly and honestly in the practice of his profession." From then onward, "in the absence of proof to the contrary, the original representation exists as a continuing presumption." (*Roark v. State Bar* (1936) 5 Cal.2d 665, 668.) This continuing presumption of moral fitness underlies the rule in disciplinary proceedings that all reasonable doubts are to be resolved in favor of the respondents and that, if equally reasonable inferences may be drawn from a fact, the inference to be accepted is the one leading to a conclusion of innocence. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.)

[13b] We believe that it is appropriate to presume, in the absence of proof to the contrary, that an attorney is not only morally fit, but also mentally competent. [11c] Because the creation of a presumption affecting the burden of proof conflicts with such a continuing presumption of mental competence, this conflict also prompts us to interpret rule 644 as authorizing only a permissive inference.

The need for consistency with other rules governing the transfer of an attorney to involuntary inactive enrollment serves as a further separate argument for our interpretation of rule 644. Rule 643 incorporates the discovery provisions set forth in rules 300 through 324. [11d] Pursuant to rule 321, an attorney who disobeys an order to undergo a mental examination is not to suffer a judgment by default. The presumption set forth in rule 644, however, is tantamount to the imposition of a default judgment because transfer to involuntary inactive enrollment may result solely from refusal to undergo a mental examination. Thus, rule 644 must be interpreted as merely allowing a permissive inference of mental infirmity.

III. DISPOSITION

We reverse the hearing department decision and remand this case, with the directions that the hearing judge should conduct further proceedings in accordance with the guidance expressed in this opinion.

We concur:

NORIAN, J.
STOVITZ, J.