STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT D

A Member of the State Bar

[No. 85-O-15225]

Filed May 29, 1991

SUMMARY

Respondent negotiated a settlement for his clients, who were defendants in a business litigation matter. After the settlement papers were signed, the plaintiff, acting on his own behalf, requested that the judgment and dismissals not be filed with the court until agreement was reached on the timing of the settlement payment. Respondent advised the plaintiff that the papers had already been mailed to the court. The plaintiff then brought in his counsel, who moved to set aside the dismissals. After the motion was granted, respondent filed a notice of appeal. Three days later, he also filed a petition for alternative writ of mandate. The alternative writ was issued, and respondent filed a proof of service indicating that the writ had been served on the plaintiff. Respondent did not serve the writ on the plaintiff's counsel.

After the appeal was dismissed as frivolous, the plaintiff complained to the State Bar. Respondent was charged in the notice to show cause with misrepresenting the nature of the settlement to the plaintiff, and with "pursuing appeals in bad faith." The hearing panel found that the misrepresentation charge had not been proven by clear and convincing evidence, but found respondent culpable of acting in bad faith and with intent to deceive in connection with the service of the writ application. (Theodore L. Johanson, Kenneth D. Gack, Edward Morgan, Hearing Referees.)

Respondent requested review, contending that he had not received adequate notice of the charges of which he had been found culpable. The review department agreed, concluding that the charge of "pursuing appeals in bad faith" did not constitute notice to respondent that he was charged with misconduct in connection with the service of papers in the writ proceeding. The review department also held that the record did not clearly and convincingly establish that the appeal in the litigation matter was pursued in bad faith, and that the misrepresentation charge had been properly dismissed based on the hearing panel's credibility determinations. Accordingly, the review department dismissed the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Mara J. Mamet

For Respondent: Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **204.90 Culpability—General Substantive Issues**
232.00 State Bar Act—Section 6128
257.00 Rule 2-100 [former 7-103]
490.00 Miscellaneous Misconduct
Statute which requires that if a party is represented by counsel, papers must be served on counsel rather than on the party, does not apply to the service of a summons or a writ. Therefore, respondent did not have to serve alternative writ and petition for writ on opposing party's counsel, but could serve opposing party personally.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
A respondent can only be found culpable of conduct which is charged in the notice to show cause. If the charges do not appear in the notice and the notice is not properly amended, the charges will not be sustained. However, culpability will be sustained in the event of a slight variation in the evidence from the notice, without an amendment, unless the respondent's defense can shown to have been compromised.

[3] **106.20 Procedure—Pleadings—Notice of Charges**
162.11 Proof—State Bar's Burden—Clear and Convincing
Specific charging in the notice to show cause is important; it prevents a respondent from having to guess at the charges. In addition, since the standard for a culpability finding in attorney discipline matters is clear and convincing evidence, the State Bar has the burden to charge the alleged misconduct correctly so that this standard can be met.

[4] **106.20 Procedure—Pleadings—Notice of Charges**
The allegations in the notice to show cause are a determining factor of the scope of an attorney's defense. A complete charge results normally in a full response.

[5] **106.20 Procedure—Pleadings—Notice of Charges**
165 Adequacy of Hearing Decision
A complete charge in the notice to show cause does not necessitate a lengthy pleading but does necessitate particularity to provide sufficient notice. As a result of specific charging the State Bar Court hearing judge is then provided with a proper framework within which to decide the issues raised.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
232.00 State Bar Act—Section 6128
Where an appeal and a petition for extraordinary writ had each been pursued by respondent, a notice to show cause charging respondent with "pursu[ing] appeals in bad faith" did not convey sufficient information to advise respondent that the manner of service of the writ of mandate was at issue in the disciplinary case. Respondent therefore was not held culpable for alleged misconduct in connection with the writ proceeding since the notice to show cause did not provide reasonable notice of such charges.

[7 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
Where a municipal court order finding an appeal frivolous and awarding sanctions did not explain the basis for such finding or the statutory basis for awarding sanctions, and no additional evidence was introduced to establish that the appeal was substantively without merit, the record did not clearly and convincingly establish for disciplinary purposes that the appeal was frivolous or pursued in bad faith.

[8] **191 Effect/Relationship of Other Proceedings**
162.90 Quantum of Proof—Miscellaneous
204.90 Culpability—General Substantive Issues
Civil verdicts and judgments have no disciplinary significance apart from the underlying facts. While civil findings bear a strong presumption of validity if supported by substantial evidence, the disciplinary court must assess them independently under the more stringent standard of proof applicable to disciplinary proceedings.

[9] **166 Independent Review of Record**
221.00 State Bar Act—Section 6106
232.00 State Bar Act—Section 6128
Where neither party sought review of the dismissal of misrepresentation charges, and the testimony at the hearing was in conflict on the matter, then in light of the weight accorded to credibility findings of the trier of fact and in view of the record as a whole, the review department adopted the hearing department's findings regarding the misrepresentation charge.

[10 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
204.90 Culpability—General Substantive Issues
Respondent's decision not to send a copy of a writ petition to counsel who was representing the opposing party in a related appeal appeared to have been a breach of normally expected professional courtesy and was not a model of good practice; nonetheless, because allegations of notice to show cause failed to give respondent reasonable notice of charge of which he was found culpable, review department dismissed proceeding.

ADDITIONAL ANALYSIS

Culpability
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
232.05 Section 6128

OPINION

NORIAN, J.:

Respondent D,[1] a member of the State Bar since June 1978 with no prior record of discipline, has requested review of a decision of a three-member hearing panel. The hearing panel unanimously found that respondent deceived his opposing party in a civil matter by obtaining a writ of mandate without notice to the opposing party in violation of Business and Professions Code sections 6068 (a), 6103 and 6128 (a) (all further section references are to the Business and Professions Code unless otherwise stated). The panel recommended that respondent be publicly reproved.

Respondent argues that he did not have adequate notice of the charges for which he was found culpable and maintains that the record does not establish misconduct by clear and convincing evidence. The State Bar asserts that there was sufficient notice to respondent and that the record fully supports the hearing panel's findings and conclusions.

After our independent review of the record we conclude that the charging document, the notice to show cause, did not give respondent adequate notice of the charge of which he was found culpable. We therefore dismiss the proceeding.

FACTS

We first will summarize the hearing panel's findings of fact. Except as discussed hereafter, we conclude that the panel's findings of fact are supported by the record and adopt them as our own.

Respondent was counsel for a corporation (company), an enterprise operated by David Y. and Paige G. Respondent also at times represented David Y. and Paige G. individually in this matter. The company sold coin-operated air inflation equipment used at gas stations. Mike W. purchased five of the devices. Thereafter Mike W. became dissatisfied with the investment. Mike W., while at times acting on behalf of himself, had his attorney, Robin P., send a letter and notice of rescission to the company on December 7, 1983. (Exhs. 1-A, 5.)

Robin P. helped Mike W. prepare a complaint which Mike W. filed himself on November 1, 1984, in Municipal Court, Marin County, against the company, the company's two principals, Paige G. and David Y., and the equipment manufacturer. The verified complaint showed that both Mike W. and Robin P. were aware that the company was an insolvent corporation. (Exh. 1-A, p. 4.) On January 3, 1985, respondent submitted to Mike W. an offer of compromise pursuant to Code of Civil Procedure section 998. The offer provided for a judgment in the sum of $500 to be taken against the company and the dismissal of the complaint against the individual defendants. (Exh. 4.) After consulting Robin P., and after some negotiating, Mike W. signed the acceptance of an offer of $1,100 on February 5, 1985, before a notary public (exhs. B, C) and took it to respondent's office where he also signed requests for dismissal of the complaint with respect to Paige G. and David Y.

Later on the same day, February 5, 1985, Mike W. wrote a letter to respondent stating the "offer" and requests for dismissal should not be filed until "we reach agreement as to when I will receive the settlement." (Exh. 8.) By letter dated February 8, 1985, respondent acknowledged receipt of Mike W.'s February 5th letter and advised Mike W. that he had already filed by mail the offer and the dismissals with the court. Further, respondent stated that the judgment Mike W. held was against the company alone, that the individual defendants were relieved from any financial responsibility and that Mike W. might have a good case against the manufacturer. (Exh. 9.) On February 21, 1985, Robin P. filed with the municipal court a motion to set aside the dismissals on the grounds of fraud and mistake, together with an association of counsel form. (Exhs. 1-B, D.) Respondent opposed the motion, and served his responding papers on Robin P. (Exhs. E, B.)

1. In light of our disposition by dismissal of this matter we deem it appropriate not to identify respondent by name.

Following a contested hearing at which respondent, Mike W. and Robin P. appeared, the municipal court judge by minute order filed March 20, 1985, granted the motion to set aside the dismissals and imposed sanctions against respondent for $700 pursuant to Code of Civil Procedure section 128.5. (Exh. 1-C.)[2]

Respondent filed with the municipal court a notice of appeal on May 21, 1985, with respect to the municipal court's March 20th order and served Robin P. with a copy of the notice. (Exh. 1-D.) Mike W.'s attorney filed in the municipal court a motion to dismiss the appeal and asked for sanctions against respondent. (Exh. 1-E.) Respondent did not appear at the hearing on June 15, 1985. (*Id.*) The municipal court granted the motion to dismiss by order filed on June 21, 1985, and imposed additional sanctions of $500 on the ground that the appeal was frivolous. (*Id.*)[3]

On May 24, 1985, respondent filed a petition for alternative writ of mandate in superior court on behalf of Paige G. asking the superior court to issue the writ commanding the municipal court below to enter an order denying Mike W.'s motion to set aside the dismissals. (Exh. E.)

The superior court on May 24, 1985, issued the alternative writ with a return date of June 28, 1985. Respondent filed with the superior court on June 28, 1985, the proof of service of the writ which indicates service by a process server on May 28, 1985. (Exh. F.) This proof of service contains the home address of Mike W. but does not identify him by name. It states service was made upon "defendant."[4] The process server was a client of respondent experienced in serving papers for respondent and other attorneys. The hearing panel found that Mike W. was out of state on the date the writ was allegedly served on him in California. No evidence was introduced that respondent knew that Mike W. had not in fact been served. Respondent did not attempt to have the writ served on Robin P.[5] **[1 - see fn. 5]**

On June 28, 1985, the superior court partially granted respondent's unopposed petition for a writ of mandate (exh. G) and set aside the $700 sanction of the municipal court's minute order of March 20, 1985, but left the remainder of the municipal court order intact. The writ did not address the $500 in sanctions ordered on June 18, 1985, as part of the subsequent dismissal of respondent's appeal. The superior court directed respondent to prepare a formal order granting the writ. Respondent did not prepare the order.

Mike W. and his attorney took no further formal action to recover the $500 sanction ordered by the

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2. The hearing panel granted respondent's motion to strike from the record all evidence regarding monetary sanctions. (1 R.T. pp. 117-118 [see *post*, fn. 6].) In addition the panel denied the examiner's motion to amend the notice to show cause to allege the failure to pay sanctions as grounds for discipline. (1 R.T. p. 128.) We agree with the hearing panel's denial of the motion to amend on the grounds that it was untimely. Our disposition of the case renders the hearing panel's decision to strike the testimony regarding sanctions moot. We adopt the panel's finding of fact on the sanctions only for clarity.

3. In its decision, the hearing panel raised the issue of whether the municipal court had jurisdiction to entertain Mike W.'s motion to dismiss the appeal. Since the motion to dismiss the appeal and its outcome are not central to the charges in the notice to show cause, we do not adopt the panel's analysis of the issue nor do we intend by our disposition of this case to rule on the jurisdictional question.

4. The writ identifies the Municipal Court, Marin County as the respondent and identifies Mike W. as the real-party-in-interest.

5. **[1]** While an attorney may be a person authorized to receive service as an agent on behalf of a party (Code Civ. Proc., § 416.90; *Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1018), respondent was not required to serve Mike W.'s attorney. Code of Civil Procedure section 1015 requires that service of papers on parties represented by counsel must be upon the attorney, not the party. However, contrary to the State Bar's argument, section 1015 does *not* apply to the service of a summons. (Code Civ. Proc., § 1016.) Even if the procedures in Title 14, part 2, chapter 5 (Code Civ. Proc., §§ 1010-1020) did apply in this instance, service of a writ is specifically exempted from the general rule mandating service on a party's attorney. (Code Civ. Proc., § 1015.) Therefore, respondent did not have to serve the alternative writ and petition on Robin P., but could do what he maintains he had done, served the petition and alternative writ on Mike W. personally.

municipal court and, thereafter, Mike W. filed a complaint with the State Bar. (1 R.T. pp. 88-89.)[6] Both Mike W. and his attorney claimed at the State Bar hearing to have been unaware of the writ proceeding until it was disclosed to them by a State Bar examiner in April 1988. (1 R.T. pp. 33, 89-90.)

On October 4, 1988, a notice to show cause was filed against respondent charging that he had obtained the request for dismissal by misrepresenting to Mike W. that the individual defendants would pay Mike W. $1,100. The notice further stated that after filing the offer of compromise (Code Civ. Proc., § 998, subd. (b)(1)) and signed request for dismissal, respondent advised Mike W. that the effect of the settlement totally relieved the individual defendants from any financial responsibility to Mike W. In addition, the notice charged respondent with "pursuing appeals in bad faith." The notice alleged that respondent's conduct violated sections 6068 (a), 6103, 6106 and 6128 (a).[7]

The hearing panel found that the State Bar failed to prove by clear and convincing evidence that respondent obtained Mike W.'s settlement agreement by misrepresentation or deceit.[8] The hearing panel did find the following, that respondent: failed to serve counsel of record for Mike W. with the application for the alternative writ of mandate; knew or should have known that Mike W. was not properly served with the application; did not appear at the hearing on the motion to dismiss the appeal to avoid disclosing the writ proceeding to the municipal court, Mike W. or Robin P.; and acted in bad faith and with intent to deceive Mike W., his counsel and the court. The hearing panel concluded that respondent violated sections 6128 (a), 6103 and 6068 (a).

ISSUES ON REVIEW

1. Adequate Notice of the Charges

Respondent argues he did not receive adequate notice of the charges because the notice to show cause did not indicate that his alleged knowledge of the failure of the process server to complete the service of process of the writ would be at issue in the case and respondent was denied a fair hearing as a result. Thus, respondent argues, the panel's finding of culpability on this unnoticed matter must be set aside as a violation of due process. The State Bar contends that respondent was provided with adequate notice of the charges in that the allegation in the notice to show cause that respondent pursued appeals in bad faith encompassed respondent's conduct concerning the petition for an alternative writ of mandate.

[2] Respondent can only be found culpable for conduct which is charged in the notice to show cause. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35; *Arm v. State Bar* (1990) 50 Cal.3d 763, 775; *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.) If the charges do not appear in the notice and the notice is not properly amended, the charges will not be sustained. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1151-1152; *Arm v. State Bar, supra*, 50 Cal.3d at p. 775; *Rose v. State Bar* (1989) 49 Cal.3d 646, 654.) However, culpability will be sustained in the event of a slight variation in the evidence from the notice without an amendment unless the respondent's defense can be shown to have been compromised. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 34; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928-929.)

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6. The two volumes of reporter's transcripts in this matter are not consecutively numbered. We have referred to the hearing on May 25, 1989, as 1 R.T.

7. Section 6068 describes the duties of an attorney which include, under subdivision (a), the duty to support the Constitution and state and federal laws. Section 6103 provides, in relevant part, that any violation of an attorney's duties constitutes cause for disbarment or suspension. Section 6106, in relevant part, provides that the commission of any act involving moral turpitude, dishonesty or corruption is a cause for disbarment or suspension. Section 6128 (a), in relevant part, makes it a misdemeanor to intentionally deceive a court or a party.

8. The hearing panel granted respondent's motion to dismiss this portion of the charges at the close of the State Bar's case. (See rule 411, Trans. Rules Proc. of State Bar.)

The notice to show cause specified that respondent "pursued appeals in bad faith." The notice also identified section 6128 (a) as the code section respondent allegedly violated. The notice also advised respondent that the underlying Mike W. lawsuit was at issue. Respondent had been sanctioned for filing a frivolous appeal from the order setting aside the dismissals and the words "pursued appeals in bad faith" fairly put him on notice of a disciplinary charge resulting from this conduct. There was no specific reference to the writ proceedings in the notice nor was the notice amended to include mention of it.

Respondent objected to the introduction of evidence concerning service of the writ on Mike W. from the outset of the hearing, on the grounds that it was outside the allegations in the notice to show cause and that he would need additional time to prepare to meet the additional allegations. Only after his objection was overruled and upon the completion of the State Bar's case-in-chief, did respondent present evidence on the issue to the hearing panel.

A writ proceeding is an original proceeding and is not an appeal. (Cal. Const., art. VI, § 10; Cal. Rules of Court, rule 56.) The appeal and the writ matters were filed in different courts on different days and requested different forms of relief. Moreover, the disciplinary issue regarding the appeal was whether it was substantively frivolous. The disciplinary issue regarding the writ was whether respondent knew that the writ had not been served and sought to mislead the court and take improper advantage of opposing counsel. A similar issue of notice was raised in *Arm v. State Bar, supra*, 50 Cal.3d 763. There, the attorney had been found culpable by the former, volunteer review department of misleading both the judge and opposing counsel concerning his imminent disciplinary suspension. While acknowledging that deception of counsel is an independent ground for discipline, the Court struck the culpability finding for that conduct because the attorney had only been charged in the notice to show cause with misleading the trial court. (*Id.* at p. 775.)

[3] This department's opinion in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163 discussed the importance of specific charging in the notice to show cause. We pointed out that specific charging prevents respondent from having to guess at the charges. In addition, since the standard for a culpability finding in attorney discipline matters is clear and convincing evidence, the State Bar has the burden to correctly charge the alleged misconduct so that this standard can be met. **[4]** It is also apparent that the allegations in the notice to show cause are a determining factor of the scope of respondent's defense. A complete charge results normally in a full response. **[5]** However, this requirement of a complete charge does not necessitate a lengthy detailed pleading but does necessitate particularity to provide sufficient notice. As a result of specific charging the State Bar Court hearing judge is then provided with a proper framework within which to decide the issues raised.

[6] After considering the facts and legal arguments on this issue, we disagree with the hearing panel that the notice language charging respondent with "pursu[ing] appeals in bad faith" conveyed sufficient information to advise respondent that the manner of service of the writ of mandate was at issue, particularly in this matter where an "appeal" and a petition for extraordinary writ were each pursued. As a consequence, respondent is not held culpable for alleged misconduct in connection with the writ proceeding since the notice to show cause did not provide respondent with reasonable notice of the charges. (See Bus. & Prof. Code, § 6085.)

2. Pursuit of Appeals in Bad Faith

[7a] As noted above, the notice to show cause alleges that respondent "pursued appeals in bad faith." The record does not clearly and convincingly establish that the appeal was frivolous or pursued in bad faith. The municipal court order finding that the appeal was frivolous and filed for purpose of delay and awarding sanctions (exh. 1-E) does not explain the basis for the finding or even the statutory basis for awarding sanctions. **[8]** Civil verdicts and judgments ". . . have no disciplinary significance apart from the underlying facts. While civil findings bear a strong presumption of validity if supported by substantial evidence, we must nonetheless assess them independently under the more stringent standard of proof applicable to disciplinary proceedings." (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) **[7b]** No evidence was introduced to establish that the appeal

was substantively without merit. Although respondent did abandon the appeal, he did so because he thought the appeal was superseded by the writ. (1 R.T. p. 142.) Regardless of the correctness of respondent's actions, there is no clear and convincing evidence that they were taken in bad faith.

3. Misrepresentations Concerning the Stipulated Settlement Offer

[9] Neither party sought review of the dismissal of the charges alleging that respondent obtained Mike W.'s settlement agreement by misrepresentation or deceit. The hearing panel heard conflicting testimony from Mike W. and respondent as to representations made as to payment of the Code of Civil Procedure section 998 offer. The hearing panel found respondent's testimony to be more credible than Mike W.'s. (Decision, p. 6.) In light of the weight accorded to the credibility findings of the trier of fact (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055), and in view of the evidence in the record as a whole, we conclude the findings on these charges are supported by the record and we adopt them as our own.

CONCLUSION

[10a] We do not condone the manner in which respondent performed his legal duties. As an example, respondent's decision not to send a copy of the writ petition to opposing counsel on the appeal appears to have been a breach of normally expected professional courtesy. His failure to bring closure to his appeal did not illustrate professionalism. His actions were not what would be offered as a model of good practice.

[10b] Nonetheless, for the reasons stated above, upon our independent review of the record, we find that the allegations set forth in the notice to show cause failed to give respondent reasonable notice of the charge of which he was found culpable. We therefore dismiss this proceeding.

We concur:

PEARLMAN, P.J.
STOVITZ, J.