

**100 Generally Applicable Procedural Issues****101 Jurisdiction**

Rules of Procedure of the State Bar, rule 220(b), which requires the court to file its decision within 90 days of taking a matter under submission, is not jurisdictional. Although filing a decision well beyond the prescribed 90 days undermines important objectives, an attorney's decision to abate his law practice pending filing of hearing decision is too speculative to establish specific, legally cognizable prejudice. *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [1]

Although the State Bar apparently believed that it had perfected its right to appeal due to having filed two requests for review, no timely request for review was filed after service of a final order disposing of a posttrial motion, and therefore the review department was without jurisdiction to hear the appeal. Due to the *sui generis* nature of disciplinary proceedings, as well as the differences between statutes and rules regarding notices of appeal applicable in civil matters and those applicable in disciplinary matters, the review department could not apply civil rules and statutes so as to consider the requests for review as prematurely filed or to stay proceedings at the trial level after a request for review had been filed. Although the State Bar asked for relief on the grounds that it never received a copy of the hearing judge's final order and that it was misled when the review department clerk's office did not reject pleadings filed after the requests for review, the evidence established that service of the hearing judge's final order was properly effectuated, and the review department clerk's failure to issue a notice of rejection of pleadings was not a ground for relief under any rule but merely a courtesy function. More importantly, because the review department was divested of jurisdiction, it was powerless to relieve against mistake, inadvertence, accident, or misfortune. *In the Matter of Ozowski* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 67. [2 a-g]

The review department concluded that the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction and found that the procedural requirement of Rules of Procedure of the State Bar, rule 662(c) did not divest the court of jurisdiction to extend the time for, or to grant relief from, payment of costs. Relying on well-settled rules of statutory construction, the review department construed the rule to be directory rather than mandatory or jurisdictional and thus found that the court retained jurisdiction to determine whether petitioner's failure to provide proof of payment of costs prior to filing the reinstatement petition should have resulted in a dismissal under the facts and circumstances of the case. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 [1a, b]

Despite its seemingly mandatory wording, Rules of Procedure of the State Bar, rule 662(c) is merely procedural, advancing a time requirement for the payment of costs, while the relevant Business and Professions Code sections confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board of Governors of the State Bar attempted to supplant the statutory authority set forth in Business and Professions Code section 6140.7 and 6086.10, or to divest the State Bar Court of jurisdiction, by implementing a rule of procedure, and indeed, the Board of Governors is proscribed from doing so by Business and Professions Code section 6086. That section is consistent with the more general rule that, where a statute empowers an administrative agency to adopt regulations, those regulations must be consistent and not conflict with the governing statute. Because there is no express language or clear intent to render the rule jurisdictional, the review department looks to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from potential constructions. If the rule were interpreted to be mandatory or jurisdictional, the rule would conflict with and/or constrict relevant statutes and other rules, inadvertently alter the reinstatement requirements, and at times produce unreasonable results. Construing the rule as directory, however, in no way interferes with or compromises the ability of the State Bar or the State Bar Court to effectuate the intent of obtaining costs as money judgments. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 [2a, b]

In construing statutes, a practical construction is preferred. A construction of Rules of Procedure of the State Bar, rule 662(c) which permits the State Bar Court to retain jurisdiction is manifestly more practical than one which cuts off the court's jurisdiction regardless of the time and resources the parties have already expended in the court proceedings. Where a reinstatement proceeding had been pending for almost a year at the time a motion to dismiss was filed, the State Bar's investigation period and the discovery period for both parties had expired, and the trial was set to commence in approximately one month, dismissal was a severe remedy for noncompliance with payment of costs, and denial of a motion to set aside the dismissal was draconian. If a petitioner fails to pay the disciplinary

costs prior to filing his reinstatement petition, the hearing judge has discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in petitioner's showing of rehabilitation or condition a petitioner's return to active status on the payment of some or all of the costs. Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. Construing Rules of Procedure of the State Bar, rule 662(c) as directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 [5a b, c]

A disciplinary action may be maintained even though the attorney has been acquitted of criminal charges that have been dismissed based on the same facts. Moreover, the State Bar Court has jurisdiction to regulate misconduct even when it occurred in another state and did not result in an out-of-state criminal conviction. *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896. [7]

The review department declined to consider applicant's argument that the Supreme Court's order in his previous disciplinary matter, filed in 1998, was void on its face because of numerous constitutional infirmities. The review department simply does not have the authority to set aside the Supreme Court's order. Once the record in applicant's previous disciplinary cases was transmitted to the Supreme Court, the review department no longer retained jurisdiction over the matter. Accordingly, the review department declined to consider applicant's collateral attack on his prior discipline. *In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731. [1]

Rule 15.2 of the Rules Governing the State Bar Program for Certifying Legal Specialists provides that a denial, suspension, or revocation of certification or re-certification by the Board of Legal Specialization based on a final disciplinary action by the Supreme Court, the State Bar Court, or any body authorized to impose professional discipline, shall be final and shall not be subject to further review. The legislative history of rule 15.2 made it abundantly clear that the State Bar proposed the adoption of this rule to the Supreme Court with the specific intent of divesting previously disciplined applicants of their right of appeal to the State Bar Court. Thus, the rule expressly deprived the State Bar Court of jurisdiction to consider applicant's procedural due process challenge. Accordingly, the review department was compelled to agree with the hearing judge, who correctly dismissed the matter for lack of jurisdiction. Although the State Bar Court lacked jurisdiction in this case, the review department construed rule 15.2 to mean that the decision of the Board denying applicant re-certification was subject to review by the Supreme Court. *In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731. [1]

The ability of federal courts and federal agencies to discipline attorneys who practice before them does not deprive a state bar of jurisdiction to discipline one of its members for engaging in misconduct while practicing before the federal courts or agencies. While neither the State Bar Court nor the Supreme Court has jurisdiction to prevent a person from practicing law in federal courts or agencies, the Supreme Court has the inherent authority to discipline attorneys licensed to practice in the State of California, and the State Bar Court has authority to conduct disciplinary proceedings and make recommendations of discipline to the Supreme Court. The federal regulations pertaining to discipline of attorneys practicing before federal immigration agencies themselves contemplate that the disciplinary agency of a state in which an attorney is admitted to practice has authority to discipline the attorney for misconduct committed in federal immigration agencies. In addition, various cases from federal courts and from the Board of Immigration Appeals have indicated that the disciplinary agencies of the states in which immigration attorneys are licensed have jurisdiction to discipline these attorneys for misconduct committed in immigration cases in federal courts and agencies. *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416. [1 a-e]

Rule of Procedure requiring hearing judges to file decisions within 90 days after taking cases under submission is neither mandatory nor jurisdictional. Thus, respondent's contention that the hearing judge's decision was void because it was filed four days after the expiration of the ninety-day time limit was rejected. Furthermore, because respondent failed to establish that he suffered any actual harm or prejudice, he was not entitled to any relief for the hearing judge's failure to file his decision timely. *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231. [8]

As the reproof imposed on respondent in the prior disciplinary proceeding is final, it and the conditions attached to it are presumed valid and enforceable. The reproof decision is subject to collateral attack only on the

grounds that the judge (1) lacked jurisdiction of the subject matter, (2) lacked personal jurisdiction over respondent, or (3) acted in excess of jurisdiction. The burden of proof is on the party who attacks the judgment to show lack of jurisdiction. Furthermore, to succeed on collateral attack, the jurisdictional defect must be proven from the face of the record in the prior proceeding. Respondent's contention that the conditions attached to his prior private reproof are subject to collateral attack because the hearing judge failed to explicitly recite in her decision two findings required by rule 956 of the California Rules of Court, that the reproof conditions would serve to protect the public and to serve respondent's interests, is an allegation that the hearing judge acted in excess of her jurisdiction. Respondent failed to prove from the face of the record in the prior reproof that the conditions attached to it would not serve to protect the public or serve respondent's interest. In any event, the unchallenged factual findings in the hearing judge's decision in the prior case establish that the hearing judge acted within her jurisdiction in attaching the conditions. Without question, the reproof conditions that he take and pass a professional responsibility examination and attend the State Bar's Ethics School will serve to protect the public and serve respondent's interests. The hearing judge's error is not a jurisdictional error that can subject the hearing judge's decision to collateral attack. At most, the error was a procedural defect that respondent waived by failing to appear in the prior proceeding and object to the hearing judge's decision on that ground. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929.[1]

The two requisite elements of personal jurisdiction are (1) that respondent is a member of the State Bar for the duration of the proceeding and (2) that respondent was properly served with a copy of the notice of disciplinary charges. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929.[2]

Proper subject matter jurisdiction in the State Bar Court is not limited to the subject of attorney misconduct committed in the course of practicing law. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929.[3]

In the absence of any direct precedent construing rule 956 of the California Rules of Court, the review department held that the purpose of the rule's findings is to aid in ensuring that any duties attached to a reproof are reasonably related to its purposes. Although rule 956 prescribes a salutary requirement, it cannot be said that it is jurisdictional. The findings themselves do not go to the essential fairness of the underlying disciplinary proceeding or even a subsequent enforcement proceeding. If findings are omitted from a reproof decision to which rule 956 applies, the error can be called to the State Bar Court's attention in a timely manner. If not done timely, the objection is waived, absent a showing that respondent was clearly prejudiced by the omitted findings. No showing of prejudice was made in this proceeding and such a claim would be hard to envision regarding the two duties that respondent was charged with violating in this proceeding: passage of a professional responsibility examination and attendance at the State Bar's Ethics School. These are requirements imposed in almost every disciplinary probation. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929.[4]

California Rules of Court, rule 951, which explicitly authorizes the State Bar Court to extend the time within which an attorney must take and pass a professional responsibility examination, applies only when the Supreme Court orders the attorney take and pass such an examination. It does not apply when the State Bar Court orders an attorney to take and pass the examination as a condition attached to a reproof. When the State Bar Court imposes such a condition, its authority to extend the time for the attorney to comply is derived from California Rules of Court, rule 956, which authorizes the State Bar Court to attach conditions to the reprovals that it imposes. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813.[1]

Even after respondent's private reproof became final, the State Bar Court retained jurisdiction over the conditions attached to it under the Former Transitional Rules of Procedure of the State Bar (now the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings). Thus, when the hearing judge extended the time for respondent to comply with the conditions attached to the reproof after the time to comply had expired, the hearing judge did not act without jurisdiction; but in excess of jurisdiction. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813.[2]

When a party seeks or consents to a court's action that is in excess of the court's jurisdiction, the party may be estopped to complain of the court's action as long as the court had subject matter jurisdiction. Respondent was estopped from collaterally attacking a final order extending the time in which he was required to comply with conditions attached to a reproof where he consented to the order and where the court had jurisdiction of the subject. The review department concluded that the application of estoppel was in harmony with the primary goals of attorney discipline. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813.[3]

The complaining clients' settlement of their civil matter against respondent and the clients' release of all claims against him does not preclude the State Bar from proceeding with the disciplinary matter. A disciplinary proceeding is not a controversy between two individuals, the complainant and the accused attorney, but is an adverse proceeding against the accused attorney and may be instituted and prosecuted upon the complaint of any person knowing the facts upon which the proceeding is based. The complaining person or client is not a party to the disciplinary proceeding, and need not appear and testify at trial. Thus, the disciplinary case was not a right, claim, or cause of action that accrued to the complaining clients; and therefore it was not a claim that they could release or otherwise compromise. *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690. [1]

Because jurisdiction vests in only one court at a time, once a review department opinion remanding the proceeding to hearing department for further proceedings becomes final, only the hearing department had jurisdiction to rule on State Bar's motion to expand the issues to be addressed at the trial on remand. Because the review department did not adjudicate the issue of petitioner's present moral fitness in its opinion remanding the proceeding to hearing department, the hearing judge's consideration of that issue on remand was not inconsistent with the review department's remanding opinion, and the hearing judge therefore did not error in admitting additional relevant evidence on the issue. *In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630. [3]

In California, as in all the states, the regulation of the practice of law is a judicial function. The California Supreme Court has original, inherent, and plenary jurisdiction to regulate attorneys in California. The State Bar provides assistance in the area of attorney regulation; it serves as an administrative assistant to or adjunct of the Supreme Court, which nonetheless retains its inherent judicial authority. Thus, contrary to respondent's suggestions, the State Bar Court possesses the jurisdiction to adjudicate attorney disciplinary proceedings as an arm of the Supreme Court. *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495. [1]

Even though statutes authorizing conviction referral proceedings authorize only the disbarment or suspension of attorneys convicted of crimes, the State Bar Court still had jurisdiction in conviction matter to recommend to the Supreme Court that it cancel respondent's license to practice law. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483. [9]

Respondent's willful failure to disclose his arrest and pending trial on felony charges by updating his answers to the moral character questions on his initial application for admission to practice law was a fraud upon the Supreme Court because it allowed him to be admitted without adequate consideration of his moral character. Thus, the State Bar Court may recommend that his license to practice be revoked without addressing the nature of his crimes or the facts and circumstances surrounding them. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483. [12]

Respondent's argument that the State Bar Court lacked jurisdiction because any misconduct occurred in another state was rejected because there is no jurisdictional requirement that alleged misconduct occur in this state. *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442. [3]

Review Department had jurisdiction under rule 113 of Transitional Rules of Procedure to review portion of order by hearing judge which, in dismissing disciplinary proceeding pursuant to agreement in lieu of discipline, placed conditions on reopening of underlying disciplinary matter. Scope of such review was to determine whether hearing judge abused discretion in including condition in agreement in lieu of discipline which had not been agreed to by parties. *In the Matter of Respondent R* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 227. [1]

Notice to show cause under rule 550 of Transitional Rules of Procedure of State Bar is not required in conviction referral proceeding. Pursuant to Supreme Court's delegation of authority to State Bar Court in conviction referral matters (Cal. Rules of Court, rule 951(a)), only State Bar Court referral order and notice of time and place of hearing are needed to initiate a conviction referral proceeding. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [2]

Supreme Court and State Bar Court have unquestioned jurisdiction over attorneys' convictions of crime whether or not they are eligible for summary disbarment. There is no requirement that notice of time and place of hearing in conviction referral matter charge commission of "serious" offense for which admonition would be unavailable (Trans. Rules Proc. of State Bar, rule 415), or offense for which State Bar Court may recommend summary disbarment. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [3]

State Bar's motion for emergency relief from hearing judge's order regarding conduct of disciplinary investigation was not properly brought before review department under either rule 350 of Transitional Rules of Procedure or rule 1400 of Provisional Rules of Practice. However, motion by State Bar to stay or vacate order issued by hearing judge based on argument that hearing judge acted without jurisdiction was properly brought under rule 113 of Transitional Rules of Procedure. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [1]

Except with respect to motions to quash investigative subpoenas, the State Bar Court does not have jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges by the Office of the Chief Trial Counsel, and therefore had no jurisdiction to grant relief requested by attorney regarding conduct of disciplinary investigation, absent a Supreme Court order conferring authority to do so. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [2]

The State Bar Court's statutory exercise of independent decision-making authority over the determination of disciplinary and reinstatement proceedings does not extend to the investigation of such matters. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [3]

In the statute establishing the State Bar Court (Business and Professions Code section 6086.5), the reference to "committees" which are replaced by the State Bar Court does not include the standing Discipline Committee of the Board of Governors. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [4]

Former disciplinary structure under which local administrative committees had both investigative and fact-finding powers raised due process concerns. Under volunteer State Bar Court system which superseded it, investigative and prosecutorial functions were separated from fact-finding and adjudicative functions. This separation was strengthened and institutionalized by reforms which created independently appointed State Bar Court. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [5]

Statutory scheme regarding State Bar discipline system does not provide for State Bar Court judges to report to Board of Governors or any of its committees, nor does it require Chief Trial Counsel to report to State Bar Court. Consistent with separation of prosecutorial and judicial roles, State Bar Court has no administrative oversight role with respect to functions of Chief Trial Counsel, and does not have general, plenary authority to supervise the conduct of investigations. Board of Governors and its Discipline Committee have general statutory authority over Chief Trial Counsel and Office of Investigations, subject to review by California Supreme Court. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [6]

The State Bar Court's statutory jurisdiction (Business and Professions Code section 6051.1) to adjudicate motions to quash investigative subpoenas issued by the Office of the Chief Trial Counsel constitutes the sole exception to the State Bar Court's lack of jurisdiction during the investigation phase of disciplinary proceedings. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [7]

Review department declined to adopt construction of statute giving State Bar Court jurisdiction over motions to quash subpoenas (Business and Professions Code section 6051.1) which would do violence both to plain meaning of statute and to necessary separation of powers within disciplinary system. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [8]

When a disciplinary proceeding is pending in State Bar Court, the respondent may be able to argue that evidence sought to be used by the State Bar which was obtained by improper means should be excluded. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [9]

Nothing in the California Rules of Court delegates to the State Bar Court the Supreme Court's general review power over decisions of the State Bar Board of Governors and its committees. However, in the exercise of its inherent authority to regulate the legal profession, the Supreme Court could order the State Bar Court to adjudicate or make findings and recommendations regarding a motion for a protective order regarding a State Bar disciplinary investigation, or could adopt a rule of court giving the State Bar Court jurisdiction over such motions generally. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [10]

Respondent's attempts to have clients withdraw pending State Bar complaints as part of settlements of actions which were not for malpractice did not violate statute prohibiting attorneys from conditioning malpractice

settlements on agreement by client not to file State Bar complaint. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Trans. Rules Proc. of State Bar, rule 507.) *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752. [12]

The Legislature itself has recognized that the inherent authority of the Supreme Court controls the outcome in disciplinary proceedings. It is therefore incumbent upon the review department not only to review the statutory criteria for summary disbarment, but also to review Supreme Court precedent to assure that application of statutory summary disbarment does not conflict with Supreme Court standards for disbarment. *In the Matter of Salameh* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 729. [4]

Finality of an attorney's criminal conviction is not essential for an order referring the conviction to the State Bar Court Hearing Department for a determination whether there is probable cause to conclude that the circumstances of the conviction involved moral turpitude for purposes of interim suspension of the attorney. *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. [1]

The possibility that criminal proceedings against an attorney may be dismissed if the attorney complies with the terms of criminal probation is not relevant to the effect of the conviction in disciplinary proceedings. *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. [2]

No method of enforcement of settlement agreements in disciplinary proceedings is set forth in the Transitional Rules of Procedure, but an express provision governing this subject is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. Where one party refused to abide by a settlement agreement, the other party could have made a motion to compel enforcement of the agreement, by analogy with the statutory motion permitted by Code of Civil Procedure section 664.6, or could have asserted the agreement as an affirmative defense in the pending proceeding. *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571. [6]

Both the Legislature, by statute, and the Supreme Court, by case law, have recognized that the Supreme Court has inherent authority over regulation of the practice of law. The Supreme Court has not felt constrained by lack of authorizing legislation to exercise this inherent power, and has concerned itself with comparable treatment of respondents in comparable situations. Accordingly, Supreme Court case law constituted appropriate authority for review department recommendation that a disbarred respondent be permitted to credit time spent on inactive enrollment toward waiting period to apply for reinstatement, just as an interimly suspended attorney-felon can do by rule (rule 662, Trans. Rules Proc. of State Bar). *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559. [5]

Where respondent challenged the use of a prior disciplinary matter as evidence in aggravation because he contended the matter had been time-barred, but respondent had defaulted in the earlier proceeding and the prior discipline had been ordered by the Supreme Court over three years earlier, only the Supreme Court could grant the requested relief. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480. [19]

The required five-year waiting period before a disbarred attorney can apply for reinstatement may be shortened to three years for good cause. By rule, the five-year and three-year periods run from the date of any interim suspension, and Supreme Court precedent has given the same effect to inactive enrollment. (Trans. Rules Proc. of State Bar, rule 662.) The issue whether the waiting period may run from the start of a suspension other than an interim suspension has not been decided, and did not need to be addressed by the review department in recommending disbarment, but could be raised by respondent before a hearing judge if respondent wished to seek reinstatement at the earliest possible time. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480. [22]

Summary disbarment is statutorily authorized if an attorney commits a California or federal felony as to which: (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement; and (2) the offense was committed in the course of the practice of law or in any manner such that a client of the attorney was a victim. If the State Bar Court determines that disbarment would be ordered by the Supreme Court without regard to mitigating circumstances, a recommendation of summary disbarment is justified. *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473. [2]

By statute, summary disbarment is available only for a narrow range of grievous misconduct. Grand theft by an attorney in the capacity of executor of an estate, though egregious, does not come within the statutory definition of an offense justifying summary disbarment unless it was committed in the practice of law or in such a manner that a client was a victim. *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473. [7]

The Supreme Court has delegated to the State Bar Court its statutory power to place on interim suspension attorneys who have been convicted of crimes. *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465. [2]

Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by a lay person, the services the attorney renders in the dual capacity all involve the practice of law, and the attorney must conform to the Rules of Professional Conduct in the provision of all of them. This rule applies to an attorney who is appointed both attorney and executor of a probate estate. *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366. [1]

Where respondent was convicted after being admitted to practice law for criminal conduct occurring before such admission, there was statutory authority for disciplining respondent as an attorney, based on the conviction. Had the conviction occurred earlier, the disciplinary system would still have had jurisdiction over the misconduct under the Supreme Court's inherent authority. *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297. [1]

Admission of attorneys to practice law is an exercise of one of the inherent powers of the California Supreme Court, which relies on the Committee of Bar Examiners of the State Bar to administer and carry out the bar admission process, including examining applicants for admission and investigating their fitness. An applicant who is denied certification by the Committee may seek independent adjudication by the State Bar Court. The determination of moral character made by that court is final and binding, subject to review by the Supreme Court. *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279. [1]

Judges in State Bar proceedings have inherent authority to exercise reasonable control over the proceedings in front of them. *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279. [15]

A disciplinary proceeding is seldom the proper forum for attorney fee disputes. In a matter arising from a dispute between attorneys, where respondent did not mishandle any sum that could be considered trust funds and respondent's instruction to staff to endorse the other attorney's name to settlement drafts was not dishonest, corrupt, or reflective of bad moral character, the review department affirmed the dismissal of the proceeding. *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234. [1]

Rule 951(a), California Rules of Court, delegating certain powers to the State Bar Court regarding the discipline of attorneys convicted of crimes, limits the State Bar Court to recommending summary disbarment to the Supreme Court, rather than imposing it directly. *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71. [9]

The State Bar Court acts as the administrative arm of the Supreme Court on attorney disciplinary matters and acts pursuant to its mandate. *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737. [8]

The State Bar Court, as an arm of the Supreme Court in attorney disciplinary matters, does not sit as a collection board for clients aggrieved over fee matters, nor is its jurisdiction derivative of fee arbitration proceedings. The administration of attorney discipline, including such remedial orders as restitution, is independent of any remedy that an aggrieved client may pursue. In a disciplinary proceeding to protect the public, the alleged flaws in a fee arbitration proceeding and resulting judgment have little relevance. Accordingly, the State Bar Court has jurisdiction over a disciplinary matter even though there has already been a factually related fee arbitration. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [4]

Respondent's fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [15]

State Bar Court jurisdiction was confirmed by evidence establishing the sole requisite fact, i.e., respondent's membership in the State Bar. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [18]

Section 6078 authorizes the State Bar Court to hold a hearing on charged violations of law and to recommend disbarment in those cases warranting disbarment, but section 6077 declares that a Rule of Professional Conduct violation does not warrant discipline in excess of three years suspension. *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476. [8]

Section 6103's authorization of discipline, including disbarment, is limited by its terms to occasions when an attorney violates the oath and duties defined in the Business and Professions Code or violates a court order. *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476. [9]

Decisions in involuntary inactive enrollment proceedings under section 6007(b) are reviewable by the review department pursuant to rules 450-453, Trans. Rules Proc. of State Bar. *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424. [1]

As a sui generis arm of the Supreme Court, the State Bar Court may recommend that the Supreme Court declare a statute or rule unconstitutional, but in proceedings not requiring Supreme Court action, the State Bar Court's authority is limited to interpreting existing law. *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424. [5]

The time limit for filing an answer to the notice to show cause is not jurisdictional, and an answer will be accepted for filing at any time prior to the actual entry of default, no matter how belatedly it is submitted. *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192. [6]

The State Bar Court retains jurisdiction over a matter until it transmits the record to the Supreme Court. *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83. [1]

## 102 Improper Prosecutorial Conduct

### 102.10 Improper reopening of investigation

Initiation of disciplinary proceeding against respondent was not barred under former rule 511 of the Rules of Procedure of the State Bar by State Bar's decision to monitor appeal in malpractice case against respondent instead of pursuing formal investigation. *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335. [2]

A disciplinary proceeding was not barred under rule 511, Transitional Rules of Procedure of the State Bar, even though a letter was sent from the Los Angeles office of the State Bar ostensibly closing the case, where there remained a separate open, active investigative file in the San Francisco office. The closure of the Los Angeles investigation did not serve to extinguish the open investigation by the San Francisco office. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [1]

Evidence provided by State Bar demonstrated that closure and reopening of investigation of disciplinary matter was in compliance with applicable rules and did not bar disciplinary proceedings; respondent had not been prejudiced by delay. *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229. [12]

### 102.20 Delay in prosecution

Delay in prosecution bars a disciplinary proceeding only if the delay caused specific actual prejudice resulting in the denial of a fair trial. *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390. [2]

Where respondent challenged the use of a prior disciplinary matter as evidence in aggravation because he contended the matter had been time-barred, but respondent had defaulted in the earlier proceeding and the prior discipline had been ordered by the Supreme Court over three years earlier, only the Supreme Court could grant the requested relief. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480. [19]

No delay in bringing disciplinary charges occurred where complaint against respondent was sent to State Bar in July 1988, respondent's last act of misconduct was in June 1989, and notice to show cause was filed in May 1990. In addition, where none of evidence allegedly lost due to delay was material to issue of respondent's misconduct, no specific prejudice was demonstrated from alleged delay in bringing charges. *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366. [4]

Excessive delay in the conduct of a disciplinary proceeding may be a mitigating circumstance, but the attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. A delay in a disciplinary proceeding merits consideration only if it has caused specific, legally cognizable prejudice. Where respondent was able to present evidence on all issues as to which respondent claimed prejudicial delay, and did not specify what missing evidence would have shown, respondent failed to show that delay caused specific prejudice. *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335. [21]

Where a fire which destroyed some of respondent's files did not occur until over a year after respondent had promised the State Bar to check his files in response to a client complaint, respondent demonstrated no prejudice from the State Bar's delay in bringing formal charges arising out of the complaint. *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128. [1]

The passage of time since respondent's misconduct and the failure of the State Bar to consolidate respondent's two disciplinary matters did not render the disbarment recommendation in the second matter unfair. Consolidation of disciplinary matters, while preferable when reasonably possible and not prejudicial, is not mandatory, and independent consideration of separate matters involving the same attorney is not uncommon. Where an investigation by state law enforcement and the State Bar of respondent's misconduct in the second matter was still ongoing after the initiation and disposition of respondent's earlier disciplinary matter, consolidation would not have been possible. Further, it could not be presumed that if the matters had been consolidated, the recommended discipline would have been suspension rather than disbarment, given the far greater seriousness of the misconduct in the second matter. Finally, respondent had shown no prejudice from the delay, and had benefited from being able to practice almost continually in the interim. *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96. [8]

In order to establish a denial of a fair trial because of delay between the making of a complaint to the State Bar and the filing of a formal notice to show cause, an attorney must show specific instances of actual prejudice from the delay. Where information in support of respondent's claim of prejudice was available and known to respondent at the time of respondent's motion to dismiss before the hearing judge, but was not set forth in support of the motion, respondent could not improve on review the record he had the opportunity to make in the hearing department. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [2]

Respondent's fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [15]

There is no statute of limitations in attorney disciplinary proceedings. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [17]

Delays in disciplinary proceedings merit consideration only if they have caused specific, legally cognizable prejudice (e.g., by impairing the presentation of evidence). Where respondent was not prepared to state that his case would have been stronger if no delays had occurred, and respondent received credit for time on interim suspension following conviction, respondent failed to demonstrate prejudice from delay in disciplinary proceeding. *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502. [1]

Where respondent failed to identify any specific prejudice resulting from delay of approximately three and one half years in filing of notice to show cause after client's initial complaint, and merely made generalized reference to fading memories, delay was not a basis for the dismissal of charges. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139. [8]

**102.30 Investigative and/or pretrial misconduct**

*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668.

The State Bar was not barred from relying on Michigan proceedings to impose discipline in California under the authority of Business and Professions Code section 6049.1 notwithstanding that, at the time of a prior California disciplinary case in which the State Bar and respondent entered into a stipulation disposing of the charges, the State Bar knew of disciplinary proceedings pending in Michigan but nevertheless advised respondent in writing pursuant to Rules of Procedure of the State Bar, rule 133(a)(12) that there were no additional State Bar investigations pending against him. The clear purpose of Rules of Procedure of the State Bar, rule 133(a)(12) is to require the State Bar to give notice to respondents before the State Bar Court or to attorneys being investigated by the State Bar of the pendency of other complaints lodged with the State Bar against such attorneys, and to expand that requirement to include complaints lodged in other jurisdictions would impose a far greater burden than that contemplated. At the time of the stipulation, both respondent and the State Bar knew of the Michigan proceedings, yet the stipulation did not in any way deal with the California consequences of the Michigan matter, there was no evidence that the Michigan proceedings were included in discussions leading to the stipulation, respondent entered into the stipulation without inquiring about including the Michigan matter in the stipulation, and the State Bar had no way to evaluate the seriousness of the Michigan proceedings. *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349. [1]

State Bar's motion for emergency relief from hearing judge's order regarding conduct of disciplinary investigation was not properly brought before review department under either rule 350 of Transitional Rules of Procedure or rule 1400 of Provisional Rules of Practice. However, motion by State Bar to stay or vacate order issued by hearing judge based on argument that hearing judge acted without jurisdiction was properly brought under rule 113 of Transitional Rules of Procedure. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [1]

Except with respect to motions to quash investigative subpoenas, the State Bar Court does not have jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges by the Office of the Chief Trial Counsel, and therefore had no jurisdiction to grant relief requested by attorney regarding conduct of disciplinary investigation, absent a Supreme Court order conferring authority to do so. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [2]

Statutory scheme regarding State Bar discipline system does not provide for State Bar Court judges to report to Board of Governors or any of its committees, nor does it require Chief Trial Counsel to report to State Bar Court. Consistent with separation of prosecutorial and judicial roles, State Bar Court has no administrative oversight role with respect to functions of Chief Trial Counsel, and does not have general, plenary authority to supervise the conduct of investigations. Board of Governors and its Discipline Committee have general statutory authority over Chief Trial Counsel and Office of Investigations, subject to review by California Supreme Court. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [6]

When a disciplinary proceeding is pending in State Bar Court, the respondent may be able to argue that evidence sought to be used by the State Bar which was obtained by improper means should be excluded. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [9]

Nothing in the California Rules of Court delegates to the State Bar Court the Supreme Court's general review power over decisions of the State Bar Board of Governors and its committees. However, in the exercise of its inherent authority to regulate the legal profession, the Supreme Court could order the State Bar Court to adjudicate or make findings and recommendations regarding a motion for a protective order regarding a State Bar disciplinary investigation, or could adopt a rule of court giving the State Bar Court jurisdiction over such motions generally. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. [10]

A State Bar disciplinary matter does not deal with civil responsibility where a party might be under a duty to mitigate harm or damages. The State Bar is entitled to investigate whatever information it acquires about misconduct without notifying the attorney involved contemporaneously, and it did not act improperly by failing to notify attorneys promptly when it learned of solicitation of clients by attorneys' agents. State Bar rules require only that attorneys be given an opportunity to explain or deny matters under investigation prior to issuance of notice to

show cause. (Trans. Rules Proc. of State Bar, rule 509(b).) *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635. [3]

Where respondents' non-lawyer agents solicited a client who, unknown to them, was a State Bar attorney, and invited that attorney to respondents' office, that attorney did not improperly search respondents' law office by reading papers spread out on table in front of him by respondents' staff, without touching papers or opening any cabinets, drawers, or files. Such conduct would not have been improper if committed by a police agency in collecting evidence in a criminal case. *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635. [5]

State Bar prosecutors have statutory authority to apply to superior court to grant immunity from criminal prosecution to a witness in an attorney disciplinary proceeding. Where such procedures were properly invoked, and respondents showed no prejudice to themselves on account of the procedures followed in seeking such immunity, respondents were not entitled to relief based on asserted error in such procedures. *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635. [6]

Where State Bar demonstrated that Board of Governors policy had been properly observed with regard to State Bar investigators' interviews of respondents' current clients who had not made complaints against them, respondents were not entitled to relief based on occurrence of such interviews. *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635. [7]

Issue of alleged misconduct of examiner during pretrial discovery was moot, where issue had been addressed by order of hearing judge which respondent did not challenge on review, and where only prejudice alleged was unnecessary prolongation of interim suspension for which review department gave respondent credit against recommended actual suspension. *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297. [12]

Where examiner's pre-trial statement listed respondent's prior record of discipline among exhibits to be offered at trial, but did not detail or characterize such prior record in any way, and copy of prior record was not considered by hearing judge until after determination of culpability, and respondent demonstrated no prejudice from reference in pre-trial statement and had failed to raise issue before hearing judge, respondent was not entitled to any relief based on asserted violation of rule 571, Trans. Rules Proc. of State Bar. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219. [4]

A disciplinary proceeding was not barred under rule 511, Transitional Rules of Procedure of the State Bar, even though a letter was sent from the Los Angeles office of the State Bar ostensibly closing the case, where there remained a separate open, active investigative file in the San Francisco office. The closure of the Los Angeles investigation did not serve to extinguish the open investigation by the San Francisco office. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [1]

Even if it were established that examiner had sent complaining witness's letter to hearing referee, respondent had waived any claim of prejudicial misconduct by his counsel's failure to preserve the objection at trial, and in any event no identifiable prejudice resulted from the referee's exposure to the letter's hearsay statements where the referee heard five days of testimony, including testimony on the same subject by the letter's author and by persons with personal knowledge. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139. [7]

### 102.35 Failure to disclose exculpatory evidence

Even if State Bar prosecutor had duty to disclose exculpatory evidence, unpublished, non-precedential trial court decision did not constitute such evidence, nor was it controlling precedent which prosecutor had duty to disclose to court. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [14]

### 102.40 Misconduct during trial

*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668.

*In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52.

**102.90 Other improper prosecutorial conduct**

*In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615.

The State Bar is required by statute to disclose to criminal investigatory agencies certain incriminating information discovered about an attorney as a result of an investigation or formal proceeding. The State Bar also is obligated by statute to refer all convictions to the State Bar Court. Where it appeared that the State Bar complied with these statutory duties by disclosing information to federal authorities well before the start of trial in an earlier original proceeding and by notifying the State Bar Court after respondent sustained a federal conviction, there was no evidence that the subsequent State Bar Court conviction proceeding was the product of vindictive prosecution tactics of the State Bar. *In the Matter of Curtis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 601. [1]

It is not evident whether defense of selective prosecution is applicable in State Bar disciplinary proceedings. Even if such defense were available, respondent would have been required to show an intentional violation of essential principle of practical uniformity and an element of intentional or purposeful discrimination. That is respondent would have been required to demonstrate that she had been deliberately singled out for prosecution on basis of some invidious criterion. There is no evidence in record on any of these issues. *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23. [14 a-c]

It is not clear that selective prosecution may be raised as defense in State Bar disciplinary proceedings. Even if such defense were available, it cannot be premised on asserted discrimination due to notoriety rather than on constitutionally prohibited basis such as race, gender, or exercise of constitutional rights. In absence of allegation of prohibited basis for prosecution, State Bar's failure to prove all charges was not sufficient to show invidiously discriminatory prosecution. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266. [16]

*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138.

Even if selective prosecution were a valid defense in State Bar proceedings, claim that respondent was singled out for prosecution based on success and fame could not succeed in absence of authority that claims of selective prosecution may be premised on asserted discrimination due to notoriety rather than on a constitutionally prohibited basis such as race, sex, or exercise of constitutional rights. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [9]

It is not clear that selective prosecution may be raised as defense in State Bar disciplinary proceedings, in which respondents do not enjoy full panoply of procedural protection afforded to criminal defendants. If such defense were available, burden of proof to establish selective prosecution would be on respondent. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [10]

Pursuant to case law, selective prosecution claims should be raised by motion prior to trial, and as a practical matter, such claims have little chance of success if not raised initially by pretrial motion, due to difficulty of proving them without aid of discovery. However, it is not clear that such claims cannot be raised as part of respondent's defense case at trial; accordingly, review department considered such claim despite respondent's failure to raise it by pretrial motion. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [11]

Even if claim of selective prosecution could be founded on alleged discrimination on basis of success and fame, there was insufficient evidence to support such claim, where principal factual basis was that many charges were dismissed or were assertedly without merit. A prosecutor's failure to prove all charges brought in a case has not been held to be sufficient to show invidiously discriminatory prosecution. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [12]

State Bar Court is reluctant to interfere with reasonable exercise of prosecutorial discretion. When presented with a complaint, State Bar can legitimately charge attorney based on facts as they appear from investigation. Where large number of counts filed against respondent resulted primarily from size and volume of respondent's practice and his chronic problem with handling medical liens, fact that State Bar could not establish factual or legal basis for some counts and charges was not sufficient to establish that charges were brought without reasonable basis or that respondent was victim of prosecutorial misconduct. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [13]

Claim of selective prosecution in probation revocation proceeding was without merit, where such claim was based on asserted failure to give respondent same opportunity as other lawyers to cure defects in probation report, but revocation proceeding was also based on failure to pay restitution due ten months earlier; respondent's subsequent probation reports were also inadequate; and respondent failed to connect cited authorities on doctrine of selective enforcement to facts of proceeding. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81. [8]

Where review department imposed public reproof, it was statutorily required to order that respondent pay costs of disciplinary proceeding. Respondent's request to be relieved of such order to pay costs, on ground that State Bar abused its discretion in filing one of the charges, was rejected as premature in light of statute and rules permitting respondent to seek relief from order assessing costs after its effective date. (Trans. Rules Proc. of State Bar, rules 460-464.) *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703. [10]

Where a settlement judge's order following a settlement conference indicated that a final compromise had been reached, the order was binding and an attorney's failure to abide by it, without moving for relief therefrom, constituted a violation of the statutes requiring obedience to court orders and respect for courts and judicial officers. *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571. [5]

Prosecutors must be held to the ethical standards which regulate the legal profession as a whole. *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571. [10]

Where respondent was not charged with failure to return an unearned advance fee, no finding of culpability for such misconduct could be entered absent an amendment of the charges. Where evidence was insufficient to support such charge, motion to amend was properly denied as an idle act. However, where, despite a clear directive as to the need to amend and an opportunity to move for such amendment in advance of trial, deputy trial counsel waited until after evidence was in to move to amend to conform to proof, motion to amend could also have been denied simply for inexcusable delay in seeking amendment. *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559. [3]

It is not improper for the Office of Trials to pursue on review a challenge to the exclusion of evidence of uncharged misconduct in one proceeding while simultaneously prosecuting a second proceeding based on the same misconduct, so long as both courts are made aware of the pendency of the other proceeding. The second proceeding could be abated until resolution of the first case. Where this did not occur, it was proper for the hearing judge to adjudicate the second case promptly and then request that the review department take judicial notice of the decision in the second case, thus permitting the review department to consolidate the cases on review. *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389. [5]

State Bar's pretrial dismissal of three out of four original counts in notice to show cause did not entitle respondent to any relief, where respondent did not demonstrate how such dismissal caused specific prejudice. *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366. [6]

Where examiner's conduct in connection with obtaining depositions of State Bar's non-party witnesses, while not in bad faith, clearly fell short of her duty under the circumstances, review department upheld hearing judge's order permitting such witnesses to testify only if first deposed, and modified such order to require examiner to subpoena the witnesses and to pay transportation costs as a condition of permitting witnesses' testimony. *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279. [13]

It was not an abuse of discretion for the hearing judge to conclude that partial relief from costs was justified, even in the absence of evidence of bad faith on the part of counsel for the State Bar, based on the State Bar's lack of responsiveness to respondent's extraordinary efforts to provide information and good faith offers to settle the matter prior to the filing of formal charges. Elimination of all costs assessed for the stage after filing formal charges, and of half of the State Bar's costs for the pre-filing stage, was within the hearing judge's discretion. *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273. [3]

Under Supreme Court precedent and the State Bar Rules of Procedure, before entering into a stipulation resolving a disciplinary matter, the State Bar should notify the respondent of any other pending investigations or complaints. However, where respondent had been notified of a second complaint before respondent entered

into a stipulation to a public reproof in an earlier, separate matter, respondent demonstrated no prejudice from the failure of the earlier stipulation to refer to the pendency of the second complaint. (Rules Proc. of State Bar, rule 406.) *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128. [2]

The Office of Trial Counsel has discretion whether or not to file formal charges in a matter eligible for disposition by admonition. The State Bar Court cannot dismiss a proceeding prior to hearing on the ground that it meets the criteria for admonition, unless a case for selective prosecution is established. (Trans. Rules Proc. of State Bar, rule 415.) *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [5]

Highly generalized claims of bias have been rejected as being overbroad. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [7]

It is not clear that the doctrine of selective prosecution applies in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. But even if it does, there are several threshold procedural and evidentiary hurdles to be overcome before a case of selective prosecution can be established, and where respondent did not even attempt to make the requisite showing, respondent's claim of selective prosecution was without merit. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [22]

Charges should only be filed when the Office of Trial Counsel ascertains that reasonable cause exists to charge that particular conduct occurred which violated a particular regulatory provision. (Rule 510, Rules Proc. of State Bar.) *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [18]

### 103 Disqualification/Bias of Judge

The burden of showing a claim of bias or prejudice rests on the complaining party. Respondent's assertion that the hearing judge made numerous legal errors to support his allegation of judicial bias was without merit because even if a judge makes numerous mistakes as to questions of law, that does not form a ground for a charge of bias and prejudice. *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844. [7]

The fact that a portion of a hearing judge's salary might be paid from part of the costs that the State Bar recovers from disciplined attorneys does not create a condition disqualifying the judge because the amount of costs actually recovered are relatively nominal to the State Bar's Budget. *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195. [10]

The hearing judge's appropriate role is to decide the issues on the evidence presented. If that process leads the hearing judge to conclude that the party bearing the burden of proof had not prevailed, then the judge's duty is to find against the particular party on that issue or to recommend that only that degree of discipline, if any, which is warranted by the evidence presented. The party failing in its burden runs the very risk that the judge will so act. Absent extraordinary circumstances, a hearing judge is not authorized to require the production of added evidence beyond which the parties have chosen to present. If parties or witnesses testify, the hearing judge is at liberty to ask questions of a type consistent with the judicial function of supervising or regulating the trial. Moreover, allegations against other attorneys can be referred to the State Bar for new investigation. *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888. [2]

Respondent's claim that the State Bar Court is an entity created, owned, and run by the prosecuting party was frivolous. The current State Bar Court is modeled after courts of record. State Bar Court judges are appointed for specified terms by the Supreme Court and are subject to discipline by the Supreme Court upon the same grounds as judges of courts of record. The prosecution does not assign cases to State Bar Court judges, nor do their salaries depend upon finding attorneys culpable of misconduct. Although the Board of Governors of the State Bar is responsible for paying the salaries of State Bar Court judges, these salaries are set by law to equal those of judges of courts of record and come from annual membership fees. Thus, respondent provided no evidence that the State Bar Court is improperly dependent on, or controlled by, the prosecution. *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495. [2]

*In the Matter of Langfus* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 161.

Where respondent not only declined to challenge hearing judge for bias in timely manner but also expressed belief that such judge was a fair and good judge, and did not assert bias until after judge heard evidence on culpability and expressed tentative finding that respondent was culpable, and record showed that judge was fair and receptive to hearing all relevant evidence, respondent's claim of racial bias on judge's part was without merit and did not appear to be made in good faith. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [5]

Statute providing for respondents to pay costs of disciplinary proceeding upon determination of sanction of public reproof or greater discipline, and also providing for assessment of costs against State Bar in case of complete exoneration of attorney, is neutral in its application. Moreover, since salaries of State Bar Court judges are set by statute and are unaffected by assessment or collection of costs by State Bar, and State Bar Court's ruling on costs is only a recommendation to Supreme Court that costs be assessed, cost statute does not provide basis for alleging bias of State Bar Court judges based on alleged personal financial interest. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [6]

There is no basis for charging impropriety simply because a judge judged prior proceedings involving the same lawyer. Fact that hearing judge in conviction referral proceeding had presided over respondent's prior disciplinary proceeding did not make such judge a percipient witness to improperly considered evidence, nor had such judge functioned as investigator in prior proceeding. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [7]

Claim of unfairness on part of hearing judge was not meritorious, and did not entitle respondent to new hearing, where such claim was very generalized, concerned some matters peripheral to charges, showed no example of specific prejudice, and was rooted in unproven charge of conspiracy, and where record showed that hearing judges acted fairly and took many steps to accommodate respondent, who had ample opportunity to present evidence. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219. [5]

*In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128.

A hearing judge's statement that the State Bar Court has a duty to ensure that suspended attorneys are scrupulously honest regarding their suspensions did not indicate that the judge had improperly shifted the burden of proof on culpability at the disciplinary hearing from the State Bar to the respondent. The view that suspended attorneys have a duty not to mislead the public about their suspensions has also been expressed by the Supreme Court. *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83. [8]

The party making a claim of judicial bias must show that a person in possession of all the relevant facts would reasonably conclude that the hearing judge was biased or prejudiced against that party. The standard is an objective one and the partisan views of the litigants do not control. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [3]

A hearing judge may question witnesses in order to elicit or clarify testimony and test credibility, but may not, in so doing, become an advocate for one of the parties. Where the judge's treatment of witnesses on both sides was evenhanded and did not overstep the judge's factfinding role, there was no evidence of prejudice or bias. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [4]

A hearing judge's denial of respondent's request to remove and copy exhibits already admitted into evidence, due to concern for the integrity of the record, was not improper, and did not show bias. Moreover, by failing to seek relief before the hearing judge after being denied access to the exhibits by the State Bar Court clerk's office, respondent waived his right to raise the issue before the review department. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [5]

A variance between the hearing judge's tentative findings on culpability from the bench, and the judge's detailed written findings of fact and conclusions of law, did not demonstrate bias. The ultimate written decision controlled, and where it was supported by the evidence, the judge's remarks in summing up the evidence were not a basis for reversal. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [6]

The failure of the hearing judge to rule on respondent's motion to dismiss until after the hearing did not result from bias, but from respondent's filing of the motion less than a week prior to the hearing. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32. [7]

Highly generalized claims of bias have been rejected as being overbroad. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [7]

Where a standard for judicial disqualification in the State Bar's Rules of Procedure was drawn from a similar provision in the Code of Civil Procedure, case law under the statute could be looked to in applying the State Bar rule. (Rule 230, Rules Proc. of State Bar.) *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [10]

In pleading a violation of the ethical rule requiring payment of client trust funds on demand, there must be an allegation that the restions for the record and then move forward with the case, were reasonable, did not demonstrate bias under the circumstances and did not deprive respondent of the statutory right to legal assistance. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [11]

Bias on the part of the hearing referee was not demonstrated when the referee, without the knowledge of the parties, corresponded with an out-of-state trial court judge in an attempt to coordinate conflicting trial schedules. While the better method would have been for the referee to have advised the parties of his intent to contact the trial court judge and to have copied the parties on any correspondence, the referee's conduct was not improper in nature and did not establish an appearance of bias constituting a denial of due process. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [12]

A State Bar Court referee who referred respondent's out-of-state counsel to the Office of Trial Counsel for investigation for alleged misconduct and possible revocation of their admission to practice *pro hac vice* was not in the same position as a trial court judge ruling on a contempt matter, and the referee's conduct did not demonstrate bias. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676. [13]

Where record contained numerous evidentiary rulings favorable to respondent, and showed courteous treatment of respondent by the referee; referee's evenhandedness was also shown by dismissal of two out of four charged counts in their entirety, and referee's handling of hearing was in accord with proper judicial temperament and demeanor, record did not show evidence of bias or prejudice. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [19]

Party claiming judicial bias has burden to clearly establish such bias and to show specific prejudice; disagreement with how referee weighed issues, and showing of immaterial factual errors, did not establish bias on part of referee who acted in patient, fair, and commendable manner during hearing. *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583. [1]

To prevail on a claim of error by the hearing referee in denying respondent's motion for mistrial based on the assertedly prejudicial effect on the referee of the examiner's revelation during the hearing that the examiner had been hired as State Bar Court counsel, respondent was required to do more than hint at bias. Where respondent failed to show how any bias specifically prejudiced him, and record showed no error or bias, motion for mistrial was properly denied. *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456. [2]

Rule 232 of the California Rules of Court contemplates preparation of a tentative decision after the completion of the trial, not in midstream, as a preliminary stage in the procedure for requesting a statement of decision. Therefore, rule 232 does not support the legitimacy of issuing a tentative decision when only one side has presented evidence. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301. [3]

Duty of trial judge differs from that of juror with respect to expressing opinions on aspects of case before its submission, and there is nothing wrong with preparing tentative findings after culpability phase of hearing. However, where referee prepared preliminary findings before defense had put on its case, and lengthy delay ensued which referee indicated had affected the fact-finding process, this gave the appearance that a decision had been reached as to the basic facts at issue before respondent testified. When tentative findings were prepared and presented to the parties after only one side had presented evidence, it gave the appearance that the judge did not truly retain an open mind. Thus, certain of referee's findings were improperly reached. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301. [4]

Cases holding judges to have acted prejudicially are generally ones in which judges have refused to hear evidence at all on a certain point, or have indicated that they will not grant certain relief even if the party requesting it is legally and factually entitled to it. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301. [5]

Although referee indicated that he had not reached a final decision despite preparation of draft findings, he appeared to have placed a greater burden of proof on the respondent than permitted by law. If a trier of fact imposes the wrong burden of proof, that itself can constitute reversible error. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301. [6]

As sole trier of fact, hearing judge had responsibility to declare in decision how he weighed evidence at hearing, including credibility of party as witness, where party's attitude toward reformation and restitution was fundamental issue in proceeding. Judge's occasional use of blunt language did not show bias. *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219. [9]

## 104 Disqualification of Counsel and Other Persons

The review department found no merit to respondent's argument that the culpability findings must be reversed based on his claim of conflict of interest. Respondent failed to demonstrate how the investigation and prosecution of his former counsel demonstrated any conflict of interest or unfairness toward him. At trial, respondent was represented by other counsel who advanced his interests vigorously. Moreover, respondent failed to support his claim by any citation of legal authority. *In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126. [1]

## 105 Service of Process

The two requisite elements of personal jurisdiction are (1) that respondent is a member of the State Bar for the duration of the proceeding and (2) that respondent was properly served with a copy of the notice of disciplinary charges. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929. [2]

Respondent's highly generalized argument regarding inadequate notice of certain hearings warranted no relief, where respondent had been made aware of duty to keep State Bar informed of current address and given opportunity to correct the official State Bar record thereof, and notices had been served on respondent at another address in addition to the address of record. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219. [1]

Respondent's fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [15]

Personal service is not required in State Bar proceedings, and actual notice is not an element of proper service. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [16]

Where an attorney had failed to comply with the statutory duty to maintain a current address on the State Bar's member records and to notify the State Bar within 30 days of any address change, the attorney failed to show good cause for relief from default even though he did not receive notice of the State Bar proceedings until the review department's opinion was published. Because the address requirement is reasonable, an attorney receives reasonable notice of documents properly sent to the attorney's address of record with the State Bar. *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83. [2]

## 106 Issues re Pleadings

### 106.10 Sufficiency of pleadings to state grounds for action sought

Attorney's due process right not violated when notice of disciplinary charges characterized his post-conviction disclosure duty as legal rather than ethical. Such characterization did not deny attorney sufficient opportunity to defend. *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171 [3]

In reviewing a motion to dismiss a disciplinary charge based on a contention that the notice of disciplinary charges is defective due to its failure to state a disciplinable offense, the review department treats the factual allegations of the notice of disciplinary charges as true and disregards all factual matters outside the ambit of the notice of disciplinary charges except for judicially noticeable facts, since the purpose of the motion is to test the sufficiency of the notice of disciplinary charges and not to contest the charges. Where the notice of disciplinary charges alleged (1) that respondent, as general partner of a California limited partnership having a fiduciary duty to the limited partners, made preliminary distributions of partnership profits but failed to disburse any funds to one limited partner due to that limited partner's refusal to sign a release of liability and (2) that despite the limited partner's repeated request for the funds, respondent never released the funds and subsequently informed the limited partner that he no longer had the funds, the notice of disciplinary charges was sufficient to state a disciplinary offense, i.e., that respondent committed an act involving moral turpitude by breaching his fiduciary duty to the limited partner and misappropriating funds to which the limited partner was entitled. *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal State Bar Ct. Rptr. 364 [3a-c]

A first amended notice to show cause supersedes both the original notice and any proposed but unfiled first amended notices. The sufficiency of the first amended notice to show cause is determined without reference to either the original notice or any earlier proposed first amended notice. *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442. [1]

Violation of State Bar Act section that is not, by its terms, disciplinable offense may be grounds for finding violation of statute requiring attorneys to uphold law. Where respondent was charged with violating statutory fee limitations and written fee agreement and disclosure requirements which are not, by their terms, disciplinable offenses, charge of violating statute requiring attorneys to uphold law was required as conduit to allege other violations, and such charge should not have been dismissed as unnecessary. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266. [4]

Statute requiring attorneys to uphold law is not always proper vehicle for charging violation of State Bar Act when statute is already covered as a disciplinable offense in another part of the Act. Because statutes requiring written attorney fee agreements containing certain information specify non-disciplinary remedies for attorneys' failure to comply with them, and because failure to comply with such statutes may be charged as violations of Rules of Professional Conduct regarding illegal fees, competence, and communication with clients, violation of such statutes is not disciplinable under statute requiring attorneys to uphold law. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266. [11]

Conclusion that violations of statutes requiring written fee agreements and specified disclosures are not disciplinable offenses does not preclude consideration of attorney's failure to comply with such statutes as aggravating circumstance. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266. [12]

An attorney's disobedience of a court order involves moral turpitude for disciplinary purposes only if the attorney acted in either objective or subjective bad faith. Review department declined to find respondent culpable of moral turpitude for failure to appear as ordered at settlement conference, where such culpability was argued for first time on review, notice to show cause did not allege that failure to appear was in bad faith, and hearing judge made no findings regarding respondent's objective or subjective bad faith in failing to obey order to appear. *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211. [6]

Before the State Bar files charges, it has a duty to determine whether reasonable cause exists to charge statutory or rule violations. (Trans. Rules Proc. of State Bar, rule 510.) *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179. [2]

Statute requiring attorneys to uphold law does not provide basis for discipline except where it serves as conduit to charge violation of state or federal statute other than disciplinary provisions of Business and Professions Code. Where no such statutory violation was charged in matter involving failure to honor contractual lien, no violation could be found as a matter of law. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. [22]

Supreme Court and State Bar Court have unquestioned jurisdiction over attorneys' convictions of crime whether or not they are eligible for summary disbarment. There is no requirement that notice of time and place of hearing in conviction referral matter charge commission of "serious" offense for which admonition would be

unavailable (Trans. Rules Proc. of State Bar, rule 415), or offense for which State Bar Court may recommend summary disbarment. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. [3]

Where record established that respondent agreed to handle litigation and thereafter abandoned case; former and current Rules of Professional Conduct were virtually identical regarding duties imposed on an attorney who wishes to withdraw from employment; both rules were charged in notice to show cause, and violation clearly occurred during period when either one rule or the other was in effect, review department found respondent culpable of improper withdrawal despite lack of evidence regarding exactly when relevant events occurred. *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389. [2]

The respondent in a probation revocation matter may not be subjected to greater discipline than imposition of the entire period of suspension previously stayed if the notice to show cause does not appropriately charge violations that could result in greater discipline. Where notice to show cause stated that respondent was to show cause why stay of suspension should not be set aside and stayed suspension imposed, imposing entire stayed suspension was maximum discipline that State Bar Court could recommend. *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244. [18]

On review of a facial challenge to the legal sufficiency of charges in the notice to show cause, the sole issue presented is whether the facts alleged in the notice, if proven, would constitute a disciplinable offense. For the purpose of such review, the review department treats the factual allegations of the notice as true, but draws independent conclusions regarding the legal import of those facts. (Trans. Rules Proc. of State Bar, rule 554.1.) *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [1]

The Transitional Rules of Procedure of the State Bar, unlike equivalent California and federal rules, provide for review as of right following the denial of a motion to dismiss, as well as the grant of such a motion. However, this does not affect the type of review to be afforded on the merits. (Trans. Rules Proc. of State Bar, rule 554.1.) *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [3]

Both at hearing and on review, the court considering a motion to dismiss a notice to show cause for failure to state a disciplinable offense should disregard all factual matters outside the ambit of the notice, except for judicially noticeable facts. Accordingly, the review department considered respondent's uncontroverted statement that the alleged client referred to in the notice to show cause was respondent's spouse, and also considered respondent's date of admission to the bar and lack of any prior disciplinary record. However, respondent's other factual assertions in support of his motion to dismiss were not suited for judicial notice and were not considered on review. *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [4]

Under section 6125 of the Business and Professions Code, members of the State Bar who are on inactive status may not practice law in California. Section 6068(a) makes violation of section 6125 a disciplinable offense. A member on inactive status who is alleged to have committed acts constituting the practice of law is properly charged with violating sections 6125 and 6068(a). *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [6]

Section 6103 of the Business and Professions Code does not provide a basis for charging an attorney with any misconduct other than violating a court order. Where respondent who was charged with unauthorized practice of law while inactive had transferred to inactive status voluntarily and not as a result of a court order, section 6103 charge should have been dismissed. *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [7]

A broad scope of activities may be held to constitute the practice of law, but the unauthorized practice of law outside of court appearances is difficult to define. Where respondent, while on inactive status, allegedly referred to a family member as respondent's client in a letter to another lawyer and expressed an intention to seek statutory fees in a probate matter involving the family member, respondent was properly charged with unauthorized practice of law. *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121. [8]

Respondent's fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. [15]

Notice to show cause properly charged respondent with practicing law while suspended, in violation of sections 6125 and 6126(b), despite language in notice describing respondent as having made court appearance while “on inactive . . . status,” when respondent was actually suspended for nonpayment of dues. *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602. [1]

It is important for decisions of the State Bar Court to identify with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. This specificity is essential to the respondent’s due process right to adequate notice, as well as to meaningful Supreme Court review of the recommendation of the State Bar Court. The notice to show cause must be sufficient to support the charges relied upon in the decision, because the findings of the State Bar Court must rest on the charges filed. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [6]

In pleading a violation of the ethical rule requiring payment of client trust funds on demand, there must be an allegation that the respondent was in possession of identified funds, securities or other property of a client; that the client was entitled to receive the funds, securities or property, and that there was a request by the client that the respondent pay or deliver the funds, securities or other property. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [9]

Reference in notice to show cause to undisclosed loans made from client trust funds would appear to charge violation of rule requiring disclosure of receipt of client funds, but not of rule requiring payment of funds to client on demand, since clients would not be in a position to demand funds which they were unaware were transferred out of trust. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [10]

Inadequacies in pleading not only made notice to show cause insufficient under rule 550, Trans. Rules Proc. of State Bar, but also caused questions as to whether notice met requirements of rule 554.1, providing that a notice to show cause may be dismissed on ground that it fails to state a disciplinable offense as a matter of law. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [11]

If State Bar intends to charge violation of rule of professional conduct regarding duty of competence, there must be an allegation that respondent intentionally or with reckless disregard or repeatedly failed to perform legal services competently, and notice should state what particular conduct is characterize as violating this standard. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [12]

The degree of specificity required in a notice to show cause does not necessitate lengthy detailed pleading. A notice to show cause does not have to include explicit details of a respondent’s alleged misconduct, nor does it have to match the subsequent proof at the hearing as long as the difference is immaterial or the pleading is amended and the respondent is given an opportunity to respond to the additional allegations. *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. [21]

Contention by State Bar that respondent violated attorney’s duty to obey state and federal laws by failing to pay payroll taxes as required by penal and civil statutes was rejected by review department, despite respondent’s admission that taxes were not paid, because notice to show cause did not charge violation of employer withholding statutes, and no evidence was introduced to prove they were violated, thus depriving respondent of opportunity to defend. *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113. [10]

## 106.20 Adequate notice of charges

Attorney’s due process right not violated when notice of disciplinary charges characterized his post-conviction disclosure duty as legal rather than ethical. Such characterization did not deny attorney sufficient opportunity to defend. *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171 [3]

Because respondent’s motion to dismiss the notice of disciplinary charges based on insufficient notice of one of the charges was filed later than the date his response to the notice of disciplinary charges was due, in violation of Rules of Procedure of the State Bar, rule 262(c)(2), respondent’s assertion was waived as a basis for dismissal. *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal State Bar Ct. Rptr. 364 [4]

Absent a motion by the State Bar to amend the notice of disciplinary charges in a way that would have given respondent a sufficient opportunity to defend, the hearing judge should have sustained respondent’s objection