STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND E. MAPPS

A Member of the State Bar

[Nos. 87-O-12533, 87-O-11669]

Filed March 27, 1990

Reconsideration denied, May 22, 1990 (see separate opinion, *post*, p. 19)

SUMMARY

Respondent was found culpable of two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of disciplinary proceedings. The hearing referee recommended disbarment, and respondent was enrolled on inactive status following such recommendation. (Hon. William A. Munnell (retired), Hearing Referee.)

The review department concluded that the facts found by the hearing referee were supported by the record, but modified the referee's conclusions of law. It also made more limited findings of aggravation and found some factors in mitigation, which the referee had not found. Analyzing Supreme Court precedent in cases involving misappropriation of client funds, the review department concluded that the public would be sufficiently protected by respondent being suspended from practice, including two years actual suspension, and being required to make a showing of rehabilitation, fitness to practice, and learning and ability in the law prior to returning to practice.

The review department also pointed out that if respondent's inactive enrollment was predicated solely on the disbarment recommendation of the hearing referee, which created a rebuttable presumption that the factors justifying inactive enrollment were met, the presumption no longer existed since the review department had recommended suspension rather than disbarment. The review department recommended that the period of involuntary inactive enrollment already served, as well as any additional, stipulated period of inactive enrollment, be credited towards the period of actual suspension ordered.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: No appearance (default)

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

HEADNOTES

[1 a, b] **107 Procedure—Default/Relief from Default**
108 Procedure—Failure to Appear at Trial
162.19 Quantum of Proof Required
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues

Where entry of attorney's default for failure to appear at disciplinary hearing resulted in the admission of all allegations in the notice to show cause, but certain of those allegations were in conflict with evidence adduced at hearing, examiner properly requested reconsideration of hearing decision to delete findings contrary to evidence adduced at hearing, and hearing referee properly deleted such findings from the decision, based on their conflict with the evidence.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record

Pursuant to rule 453 of the Transitional Rules of Procedure, the review department independently reviews the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. Its decisions are in turn subject to review by the Supreme Court which likewise conducts independent review of the record below and is not bound by the factual findings of the State Bar Court.

[3] **802.30 Standards—Purposes of Sanctions**
1099 Substantive Issues re Discipline—Miscellaneous

The Supreme Court's principal concern in the area of attorney discipline is protection of the public and preservation of confidence in the legal profession, interests served by maintaining the highest possible professional standards for attorneys. That same concern is therefore the principal concern of the review department.

[4] **213.10 State Bar Act—Section 6068(a)**

The duty to support the Constitution and laws of the United States and of this state is not violated in every case in which a violation of any provision of the Business and Professions Code has occurred.

[5] **220.10 State Bar Act—Section 6103, clause 2**

Business and Professions Code section 6103 does not define a duty or obligation of an attorney, but provides only that violation of an attorney's oath or duties defined elsewhere is a ground for discipline.

[6 a, b] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation

An attorney's misappropriations of funds from his client trust account and other client funds constituted acts of dishonesty or moral turpitude. Misappropriation of funds is a serious offense involving moral turpitude.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Even though the Rule of Professional Conduct requiring payment of client funds upon demand refers only to an attorney's obligation to pay clients, not to any obligation to pay third parties out of funds held in trust, the rule also applies in instances where the attorney is in possession of funds to be paid to a client's medical provider. Accordingly, where an attorney failed to honor a medical

lien and failed to make agreed-upon payments to the doctor, the attorney could properly be found culpable of violating that rule.

[8] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
430.00 Breach of Fiduciary Duty
When an attorney agrees to hold client funds in trust for the benefit of a non-client, the nature of that agreement creates a fiduciary duty to the non-client, as well as the client. As a fiduciary, the attorney's obligation to account for the funds extends to both parties claiming an interest in the funds. Accordingly, the rules governing handling and payment of client trust funds apply to a non-client's funds as well.

[9] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney's failure to deposit into his trust account settlement funds received for the benefit of a client is a direct violation of the Rules of Professional Conduct governing client trust funds.

[10 a, b] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted
Where an attorney was charged with, and found culpable of, embezzling client funds, and this conduct was found to constitute moral turpitude, it was not appropriate to consider such conduct also as an aggravating factor based on dishonesty. However, it was appropriate to consider the attorney's subsequent conduct in writing bad checks as reimbursement for the embezzled funds as an aggravating factor, where the evidence showed that the attorney knew or should have known that one of the checks was drawn on insufficient funds. The weight of such aggravation was not great, however, since the bad check was closely tied to the underlying misconduct and was repaid within a few months.

[11] **221.00 State Bar Act—Section 6106**
490.00 Miscellaneous Misconduct
Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard for ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude.

[12] **162.11 Proof—State Bar's Burden—Clear and Convincing**
801.90 Standards—General Issues
The State Bar must prove aggravating factors by clear and convincing evidence.

[13 a, b] **545 Aggravation—Bad Faith, Dishonesty—Declined to Find**
605 Aggravation—Lack of Candor—Victim—Declined to Find
Where evidence showed that attorney was candid about mishandling of trust funds, but failed to keep promises to repay the money, this did not constitute clear and convincing evidence that the attorney made misrepresentations, because failure to keep a promise of future action, without more, is not proof of fraudulent intent.

[14] **613.90 Aggravation—Lack of Candor—Bar—Found but Discounted**
Respondent's failure to cooperate in disciplinary proceeding was an aggravating factor, but respondent was not deemed entirely uncooperative since he did meet with investigator on one occasion and attended oral argument on review despite entry of default.

[15] **760.12 Mitigation—Personal/Financial Problems—Found**
791 Mitigation—Other—Found
Where attorney's two instances of misconduct took place during the same short period of time, and attorney attributed them to the same problem of financial difficulty, this factor could properly be considered in mitigation.

[16] **822.34 Standards—Misappropriation—One Year Minimum**
Some cases of misappropriation have resulted in lengthy suspensions rather than disbarment where restitution was made.

[17] **745.10 Mitigation—Remorse/Restitution—Found**
Restitution made voluntarily and before the commencement of disciplinary proceedings is entitled to consideration as a mitigating factor.

[18] **745.10 Mitigation—Remorse/Restitution—Found**
Where respondent took a year to complete restitution, but never disavowed his debt; where respondent made partial payment before client complained, and had paid in full before disciplinary proceeding commenced; and where there was no evidence in the record tending to show whether respondent had the financial wherewithal to have made restitution any faster or sooner than he did, respondent's restitution was a mitigating factor.

[19] **801.30 Standards—Effect as Guidelines**
The Supreme Court has instructed the State Bar Court to use the Standards for Attorney Sanctions for Professional Misconduct as guidelines in determining discipline.

[20] **802.62 Standards—Appropriate Sanction—Effect of Aggravation**
802.63 Standards—Appropriate Sanction—Effect of Mitigation
1091 Substantive Issues re Discipline—Proportionality
In determining the appropriate sanction, the court must balance the aggravating circumstances with the mitigating circumstances and also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.

[21] **176 Discipline—Standard 1.4(c)(ii)**
While standard 1.4(c)(ii) hearings are not appropriate in all cases where a two-year suspension is ordered, such a hearing appears particularly appropriate where lengthy suspension is recommended in a default proceeding. A defaulting attorney has called into question the propriety of the attorney's automatic return to practice by failing to appear in defense of the serious charges levied against the attorney. Public protection requires that after a lengthy suspension, the attorney not resume practice without demonstrating rehabilitation, fitness to practice, and learning and ability in the general law.

[22] **135 Procedure—Rules of Procedure**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2403 Standard 1.4(c)(ii) Proceedings—Expedited
Procedural rules proposed by State Bar which would permit attorney in standard 1.4(c)(ii) hearing to make required showing by preponderance of evidence; would allow stipulation that attorney meets conditions; would guarantee opportunity to make required showing before expiration of

two-year actual suspension; and would provide for expedited review, appeared to answer Supreme Court's concerns regarding conduct of such hearings.

[23] **174 Discipline—Office Management/Trust Account Auditing**
Trust account auditing was required as condition of probation in order to ensure against recurrence of respondent's misconduct, i.e., misappropriation of funds held to pay medical liens.

[24] **1099 Substantive Issues re Discipline—Miscellaneous**
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
Where attorney had been placed on involuntary inactive enrollment following disbarment recommendation by hearing department, but on review, discipline recommendation was decreased to suspension and probation, review department recommended that period of involuntary inactive enrollment already served by attorney, and any additional period served thereafter, be credited towards period of actual suspension.

[25] **1099 Substantive Issues re Discipline—Miscellaneous**
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
If order placing attorney on inactive enrollment was predicated solely on hearing department's disbarment recommendation, which was later superseded by review department's recommendation of suspension, parties could stipulate, pursuant to rule 799 of the Rules of Procedure, to permit attorney's retransfer to active status pending the finality of disciplinary proceedings. Attorney also retained option of stipulating to continued inactive enrollment, in which case review department recommended that such inactive enrollment be credited toward period of actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]

Mitigation

Declined to Find

710.54 No Prior Record

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

Other

2311 Section 6007—Inactive Enrollment After Disbarment—Imposed

OPINION

PEARLMAN, P.J.:

Respondent, Raymond E. Mapps, was admitted to the practice of law in this state in 1983. He has no prior record of discipline. This case involves review of a recommendation of disbarment for two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of formal proceedings. We set this case for hearing on our own motion[1] primarily to consider whether the degree of discipline recommended by the hearing panel is excessive in light of recent Supreme Court decisions on similar facts.[2]

Analysis of Supreme Court precedent leads us to conclude that the public would be sufficiently protected by respondent being suspended from the practice of law for five years with the suspension stayed and respondent placed on probation for five years on several conditions including two years actual suspension, coupled with a requirement that respondent make a showing in compliance with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (hereinafter "standard" or "std.") before being permitted to resume the practice of law.[3]

PROCEDURAL HISTORY

This case arose out of two consolidated proceedings tried before the Honorable William A. Munnell, retired judge, on June 8, 1989.[4] At the time of the events in question respondent was a solo practitioner. By the time the formal proceedings were instituted, respondent had notified the State Bar that he had changed his address to the Los Angeles Public Defender's Office and the notices to show cause (formal charges) were served on him there. Respondent met with the State Bar investigator and explained to the investigator that he had been having financial problems at the time of the incidents. He admitted that he had used money from his trust account in order "to make ends meet" (R.T. p. 48), and offered to complete restitution which he had already voluntarily begun. Respondent did complete repayment to both complainants but failed to file an answer in one of the two proceedings and failed to appear at the pretrial and at the formal hearing.

In formal proceeding No. 87-O-12533 filed December 1, 1988, respondent was charged with one count of misappropriation of $2,271 in funds held for medical expenses after settlement of a personal injury action brought by respondent on behalf of a client named Leron Tidwell. The count included charges of knowingly issuing a trust account check drawn against insufficient funds, failing to honor a medical lien and failing to make agreed-upon payments in a subsequent

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1. No request for review was filed by the examiner. The respondent had no right to file a request for review without first moving to set aside his default, which he did not seek to do. As part of the transition to the new State Bar Court system, the decision of a referee is automatically subject to review by this review department pursuant to rules 109 and 452 of the Transitional Rules of Procedure of the State Bar (hereinafter "Rules of Procedure" or "Rules Proc. of State Bar") adopted by the State Bar Board of Governors, effective September 1, 1989. This automatic review is not accorded decisions of full-time judges appointed by the Supreme Court under Business and Professions Code section 6079.1, effective July 1, 1989.

2. In setting the case for oral argument pursuant to rule 452(b) of the Rules of Procedure, we requested the examiner to address two issues: 1. Whether respondent was properly charged and found culpable of a violation of (former) rule 8-101(B)(4) of the Rules of Professional Conduct in case no. 87-O-12533; and 2. Whether the degree of discipline recommended by the hearing panel is excessive in light of *Weller* v. *State Bar* (1989) 49 Cal.3d 670; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448 and *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357.

3. Proposed rules governing standard 1.4(c)(ii) hearings recommended by the Executive Committee of the State Bar Court and the State Bar Board Committee on Discipline in compliance with *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071, 1080, fn. 6 are scheduled to be on the agenda of the State Bar Board of Governors for approval at its next meeting on April 7, 1990.

4. Judge Munnell tried this matter under legislation predating the trial of attorney disciplinary matters before full-time judges of the State Bar Court appointed by the Supreme Court. (Bus. & Prof. Code, § 6079.1, eff. prior to July 1, 1989.)

promissory note to Tidwell's doctor, Dr. Alexander. These acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and (former) Rule of Professional Conduct 8-101(B)(4).[5] Respondent answered admitting that he represented Tidwell and held back $2,271 of settlement funds in that action to pay medical expenses, and admitting that he failed to make the agreed-upon payments in the promissory note to Dr. Alexander.

Respondent's answer to the notice to show cause denied that he knowingly issued a check for insufficient funds, failed to honor Dr. Alexander's medical lien or misappropriated funds held for medical expenses. He further denied any wilful violation of Business and Professions Code sections 6068 (a), 6103 or 6106 or rule 8-101(B)(4) of the Rules of Professional Conduct. Respondent was subsequently served with a notice to appear at the hearing and failed to appear. Accordingly, respondent's default was entered and the allegations of the notice to show cause were deemed admitted despite the denials made in respondent's answer. (Rule 555(c), Rules Proc. of State Bar.)

In formal proceeding No. 87-O-11669 filed March 22, 1989, respondent was again charged in a single count with misappropriating funds held to pay a client's medical expenses, failing to promptly pay funds due his client and issuing a check when he knew or should have known he did not have sufficient funds available to cover the check. The notice to show cause specifically alleged in relevant part that he was hired by Tracy Walker to represent her in a personal injury matter; that he settled her case for $10,500; that he withheld $3,515 of the settlement funds to pay her treating physician; that he misappropriated the funds held to pay his client's medical expenses; that he misappropriated and failed to account for an additional $522 of settlement proceeds and that he failed to pay his client promptly the amount withheld to pay her medical bills when she informed him that the treating physician's bill had been paid by a collateral source. It further alleged that respondent issued a $200 trust account check in partial payment to his client when he knew or should have known that he did not have sufficient funds available to cover the check. All of the respondent's acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-101(A), 8-101(B)(3) and 8-101(B)(4). Respondent failed to answer this notice to show cause and his default was entered at the hearing. (Rule 555(c), Rules Proc. of State Bar.) As a consequence, the allegations of the notice to show cause were deemed admitted.

On count one,[6] the *Tidwell* matter, the referee found that the State Bar examiner proved the truth of the allegations by clear and convincing written and oral evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103, and 6106 and Rules of Professional Conduct 8-101(d)(4) [sic]. On count two, the *Walker* matter, the referee found that the examiner likewise proved the truth of the allegations by clear and convincing oral and documentary evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-101(A) and 8-101(B)(3) and 8-101(B)(4).

The referee's original decision was filed on July 12, 1989. Thereafter, the examiner, by written motion, requested reconsideration of two findings which were then deleted from the amended decision filed by the referee on August 24, 1989. These findings related to the charge in the *Walker* matter that an additional $522 of the settlement was unaccounted for and misappropriated. The evidence

5. New Rules of Professional Conduct became operative on May 27, 1989. As part of the general revision of the Rules of Professional Conduct, former rule 8-101(B)(4) of the Rules of Professional Conduct was readopted as rule 4-100(B)(4) without substantial modification. All further references to the Rules of Professional Conduct herein are to the rules in effect during the period January 1, 1975, through May 26, 1989.

6. The referee referred to the two consolidated proceedings against respondent as if they were two "counts" in a single proceeding rather than two separate original proceedings. For convenience, we have adopted this terminology.

produced at the hearing showed to the contrary, and the examiner so noted for the record. (R.T. p. 54.) **[1a]** After receiving the original decision, including findings against the respondent on this issue, the examiner commendably moved for reconsideration and the referee deleted these findings in his amended decision.[7] **[1b - see fn. 7]**

The referee concluded that both offenses involved moral turpitude. He found no mitigating factors and found numerous aggravating factors, including misleading clients and failing to cooperate with the State Bar by failing to appear. In addition to recommending disbarment, the referee also recommended the initiation of an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007 (c) which the examiner subsequently commenced. The hearing on the section 6007 (c) proceeding took place before Hearing Judge JoAnne Earls Robbins on October 19, 1989, and she subsequently ordered respondent inactively enrolled, effective October 27, 1989. The effect of our decision on such order is discussed *post*.

FACTS

We agree with the referee's essential findings of fact on both counts as set forth in his amended decision at pages 1 through 3 and restate the facts here.[8]

Count One—The Tidwell Matter

In formal proceeding No. 87-O-12533, the respondent had been retained by Leron Tidwell on or about November of 1986 to represent him in a personal injury action. The case was settled for $7,500 in January of 1987—within two months of respondent being retained. The settlement check was deposited in respondent's trust account; respondent disbursed to Tidwell the appropriate funds and retained $2,271 to cover the medical lien of Dr. Alexander, the complaining witness in the subsequent State Bar proceedings. Respondent timely issued a trust account check for the full amount of Dr. Alexander's lien; however, this check was returned for insufficient funds. (R.T. pp. 15-16; exh. 4.)

After many unreturned telephone calls from Dr. Alexander over the next two months, respondent came to the doctor's office in early April 1987, gave him a valid check for $500, and signed a promissory note for the balance due. (R.T. pp. 17-19; exh. 5.) Respondent then failed to make the payments called for by the note. (R.T. p. 20.) After many more unreturned telephone calls from the doctor, and after the State Bar had contacted respondent concerning its investigation of both cases, respondent paid the remaining balance due on March 9, 1988.[9] (R.T. pp. 20-21; see exhs. 13, 14, & 15.)

Count Two—The Walker Matter

In formal proceeding No. 87-O-11669, the complaining witness was the client, Tracy Walker. Respondent was retained by Walker on or about January 10, 1986, to represent her in a personal injury matter. On or about November 4, 1986, the case was settled for $10,000. He promptly paid Walker her share of the proceeds[10] and retained approximately $3,500 to pay medical bills. Respondent cashed the settlement draft without depositing the draft in his trust account. In December 1986, about a month after

7. **[1b]**The entry of respondent's default in the *Walker* matter resulted in the admission of misappropriation and failure to account for the $522 as alleged in the notice to show cause. Nonetheless, the taking of evidence negating such allegations permitted the referee to reject the allegations based on a conflict between the admission and the evidence adduced at trial. (See *Riddle* v. *Fiano* (1961) 194 Cal.App.2d 684 [refusing to reverse a trial court's ruling that evidence adduced by the plaintiff in proving a default negated the admitted allegations of the complaint].)

8. As noted *ante*, the factual allegations of both notices to show cause must be deemed admitted by virtue of respondent's default. The introduction of evidence at the hearing on both counts was essentially cumulative.

9. There is no evidence that the doctor ever requested interest on the overdue balance. The total payment called for by the promissory note exceeds the amount due to the doctor by $8.00; however, there is no evidence as to whether this excess was supposed to represent interest or simply resulted from a computational error.

10. Nothing in the record indicates that Walker had any complaints about the way respondent handled the underlying case or about the amount of the settlement he obtained.

the underlying personal injury case had settled, Walker informed respondent that her treating physician had been paid by other insurance and that she was therefore entitled to the part of the settlement proceeds withheld for that purpose. (R.T. pp. 29-30.) Respondent said he would verify this information and get back to her, but he did not do so. (R.T. p. 31.) When she reached him the following month after a number of unreturned telephone calls, he acknowledged her right to the money, but he informed her he did not have all of the money and would give her what he could. (R.T. pp. 32-33.)

In late January, a month or so after Walker's first request for the money, respondent sent Walker a check for $438, followed by a second check for $250 in late February. (Exh. 10.) A third check for $200 followed in mid-March, but it was returned for insufficient funds. (R.T. pp. 35-36; exh. 11.) About five times, Walker was told to come to respondent's office to pick up payments, only to find upon her arrival that respondent was gone, and no payment was waiting. (R.T. pp. 38-39.) Walker testified that she contacted respondent "over a hundred times" (R.T. p. 41), and also filed worthless document charges against respondent with the local police in regard to respondent's returned check (R.T. p. 37). It took approximately eight months from the time the third installment check was returned for Walker to receive everything she was owed, in the form of some small cash payments and a check for $2,500 in October of 1987. (R.T. pp. 39-40; exh. 12.) Respondent had already made full restitution by the time formal proceedings were instituted.

DISCUSSION

We note at the outset that this is the first opinion after oral argument issued by the new Review Department of the State Bar Court created by Business and Professions Code section 6086.5. This review department is a panel of three judges appointed by the Supreme Court to sit in review of referee and hearing department decisions on and after September 1, 1989. (Bus. & Prof. Code, §§ 6079.1, 6086.65.) **[2]** One feature that remains the same from the predecessor system is that we "independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department." (Rules Proc. of State Bar, rule 453; cf. *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) Our decisions are in turn subject to review by the Supreme Court which likewise conducts independent review of the record below and is not bound by the factual findings of the State Bar Court. (See, e.g., *In re Young* (1989) 49 Cal.3d 257, 264.)

[3] The Supreme Court's principal concern in the area of attorney discipline is "protection of the public and preservation of confidence in the legal profession, interests served by maintaining the highest possible professional standards for attorneys." (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.) That same concern must therefore be the principal concern of our review department as we examine each case that comes before us.

Upon our independent review of the record below we have determined that the facts found by the referee with regard to culpability (amended decision, pp. 1-3) are amply supported by the record, and we have essentially adopted them as our own in describing the facts of these two consolidated matters, *ante*. However, in accordance with controlling law, we reject the referee's conclusions as to the adequacy of those facts to support two of the statutory violations charged in each of the notices to show cause. In light of our independent review of the record and the case law, we also substitute our own findings with respect to aggravating and mitigating factors and adopt our own recommendation of discipline.

The referee concluded with respect to count one, the *Tidwell* matter, that respondent had violated Business and Professions Code sections 6068 (a), 6103 and 6106 as well as rule 8-101(B)(4) of the Rules of Professional Conduct. **[4]** We find no violation of section 6068 (a). That section refers to the duty of an attorney "To support the Constitution and laws of the United States and of this state." Arguably, a violation of such provision could be found in every case in which a violation of any provision of the Business and Professions Code has occurred. The Supreme Court has declined to interpret section 6068 (a) in this broad manner. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814.) As in *Baker* we find no violation of section 6068 (a) on the facts adduced below.

[5] Similarly, the Supreme Court held in *Baker* that Business and Professions Code section 6103 "does not define a duty or obligation of an attorney, but provides only that violation of his oath or duties defined elsewhere is a ground for discipline."[11] (*Id.* at p. 815.) We therefore find no violation of section 6103 under count one.

[6a] The referee did properly conclude that respondent's admitted misappropriation of funds from his client trust account as alleged in paragraphs 3 and 4 of the notice to show cause in the *Tidwell* matter violated Business and Professions Code section 6106. "Misappropriation of funds is a serious offense involving moral turpitude." (*Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1045 [unauthorized withdrawal from former firm's pension fund, and misappropriation of check made payable to former firm, were acts of moral turpitude]; see also *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 850-851, 858-859 [failure to keep sufficient funds in trust account to pay undisputed portion of treating doctor's medical lien violated former rule 9; gross negligence in record keeping and handling funds, affecting non-clients, constituted moral turpitude; public reproval imposed]; *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156 [attorney who misappropriated amount owed to client's workers' compensation carrier for its lien on personal injury recovery committed act of moral turpitude].)

[7] Respondent was also properly found culpable of a violation of rule 8-101(B)(4)[12] in the *Tidwell* matter as charged in paragraphs 4 and 5 of the notice to show cause, even though the rule refers only to meeting obligations to pay *clients*, not to meeting obligations to pay *third parties* out of funds held in trust. Respondent's failure to honor the medical lien of Dr. Alexander and failure to make agreed upon payments to Dr. Alexander may be treated as a failure to "[p]romptly pay or deliver to the client as requested by a client the funds . . . in the possession of the member of the State Bar which the client is entitled to receive." (Rule 8-101(B)(4), Rules of Professional Conduct.)

[8] In *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, the injured party was likewise not a client, but the Court nonetheless interpreted rule 8-101(B)(4) to apply: "We reject petitioner's claim that he had no obligation to account to or pay funds to Camila, however. As the review department concluded, the nature of the agreement pursuant to which the proceeds from the sale of the restaurant were deposited in petitioner's trust account created a duty to Camila as well as to petitioner's client. As a fiduciary his obligation to account for the funds extended to both parties claiming an interest in them. Having assumed the responsibility to hold and disburse the funds as directed by the court or stipulated by both parties, petitioner owed an obligation to Camila as a 'client' to maintain complete records, 'render appropriate accounts,' and '[p]romptly pay or deliver to the client' on request the funds he held in trust." (*Id.* at p. 979.)

With respect to count two, the *Walker* matter, the referee's findings of fact are also clearly supported by the record, but the conclusions of law must be modified in light of the recent decision of the Supreme Court in *Baker* v. *State Bar*, *supra*. As with the *Tidwell* matter, we find neither a violation of section 6068 (a) nor of section 6103 on the factual record adduced here. [6b] We do conclude that by admittedly misappropriating his client's funds as alleged in paragraph 1 of the notice to show cause in the *Walker* matter, the respondent committed an act of moral turpitude within the meaning of section 6106. (See, e.g., *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815 [misappropriation of funds advanced for

11. Business and Professions Code section 6103 provides as follows: "Sanctions for Violation of Oath or Attorney's Duties. A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

12. The relevant portion of the referee's amended decision refers to a violation of rule "8-101*(d)*(4)"; as there is no such subsection, this is presumably a typographical error for rule 8-101*(B)*(4), which was the rule violation charged in the notice to show cause.

filing fees and costs and issuance of a check without sufficient funds to cover it]; *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327 [attorney's failure to deposit client's cash in trust account, to keep proper records concerning client's funds, and to obtain receipts constituted gross negligence amounting to moral turpitude; public reproval imposed].)

[9] We further conclude that in the *Walker* matter respondent violated Rules of Professional Conduct 8-101(A) and 8-101(B)(4). Respondent admittedly failed to deposit the settlement funds in his trust account as alleged in paragraph 1 of the notice to show cause in direct violation of rule 8-101(A). By admittedly failing to honor promptly his client's request for payment as alleged in paragraph 2 of the notice to show cause, respondent also did not "promptly pay or deliver to the client" funds due her in violation of rule 8-101(B)(4). However, we do not find that respondent violated rule 8-101(B)(3) since failure to account was alleged only with respect to the $522 of settlement proceeds which charge was disproved at the hearing. See discussion *ante*.

In short, the referee's findings of fact as to count one (amended decision, pp. 1-2) and count two (amended decision, p. 3) support the conclusion that respondent violated section 6106 of the Business and Professions Code and rule 8-101(B)(4) of the Rules of Professional Conduct as to both counts, and also rule 8-101(A) as to count two only.

Aggravating Factors

In aggravation, the referee found that: (1) respondent's embezzlement of clients'[13] funds and issuance of bad checks constituted moral turpitude; (2) respondent consistently misled and lied to his clients[14]; (3) respondent failed to respond to his clients'[15] repeated requests for information; (4) respondent failed to cooperate with the State Bar examiner and investigator; (5) respondent failed to appear at the pretrial, and (6) respondent failed to appear at the hearing. (Amended decision, p. 4.)

On independent review of the record we make more limited findings in aggravation. **[10a]** The embezzlement clearly constitutes moral turpitude with respect to both counts. We have already so concluded as part of the basic charges proved at trial. We do not count it again as a separate aggravating factor. However, it is appropriate to consider whether respondent's subsequent conduct in writing bad checks is an aggravating factor.

[11] Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard of ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude. (See *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic* v. *State Bar* (1985) 40 Cal.3d 314, 324.) In the present case, respondent is deemed to have admitted the allegations in paragraph 4 of the *Tidwell* matter and paragraph 3 of the *Walker* matter that he issued a check to each of the complainants when he "knew or should have known" that he did not have the funds available to cover the check. However, the examiner introduced evidence at the hearing from bank records[16] showing only that respondent knew or should have known that the bad check he wrote to Walker would not clear his account. The referee proceeded to make a specific finding that "said check was issued by respondent when he knew or should have known that he had insufficient funds in his trust account to cover the $200 check." (Decision, p. 3.) The referee made no similar finding with respect to the $2,271 bad check issued to Dr. Alexander. **[12]** (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933 [State Bar must prove aggravating factors by clear and convincing evidence]; see also std. 1.2(b).) **[10b]** We need not reach the question of scienter in issuing the check to Dr. Alexander since the finding of scienter in

13. Technically, only one client was involved. The other complainant was not a client, but was a third party to whom respondent owed a fiduciary obligation on his client's behalf. (See discussion *ante*.)

14. See *ante*, fn. 13.

15. See *ante*, fn. 13.

16. The bank records (exh. 17) show that respondent had a check returned to him in February for insufficient funds and without making an additional deposit in March he wrote another $200 check which was returned for insufficient funds.

issuing the check to Walker itself supports a finding that respondent's misconduct in misappropriating funds was followed by an act of bad faith which constitutes an aggravating factor under standard 1.2(b)(iii). As an aggravating factor, however, it is not of great weight given the fact that the *Walker* bad check and, indeed, both bad checks were so closely tied to the basic misconduct and both were replaced with good checks within a few months, a mitigating factor discussed *post*.

[13a] As to the second finding in aggravation, the referee's finding that respondent "consistently misled and lied to his clients", we disagree.[17] The record shows that respondent was candid in admitting to both complaining witnesses that the money belonged to them and that he had not maintained all of their funds in his trust account. The referee ignored this evidence and looked solely to evidence of promises of payment which respondent made and later failed to keep in a timely manner. The referee apparently felt that such broken promises on the timing of payment gave rise to the inference that *at the time* respondent made these promises, *he already had the intent not to keep them*. This by itself is not proof of fraudulent intent. (Cf. *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [cause of action for fraud will not survive a motion for nonsuit "if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise"].)

If respondent had failed even to attempt performance after continued assurances that he would make good on returned checks, the situation would be different. (Cf. *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109.) However, the record here discloses that at the time he made such promises he had already made good on some promised partial payments to both complainants. He also subsequently made good on the entire debt within the year. **[13b]** While the complainants were understandably angered by the delay in repayment we do not have proof by clear and convincing evidence that respondent aggravated his original misappropriation by thereafter making repeated misrepresentations to the complaining witnesses.

[14] However, like the referee below we do find respondent's noncooperation in failing to answer one notice to show cause and in failing to cooperate in discovery and to appear for pretrial and trial in the other proceeding an appropriate aggravating factor.[18] (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933 [failure to appear demonstrates lack of concern for disciplinary process and failure to appreciate seriousness of charges].) Nonetheless, we find that respondent did not evince an entirely uncooperative or unremorseful attitude. He did meet with the investigator on one occasion, during which he acknowledged and explained his misconduct, and offered to make restitution which, indeed, he had already begun to do and which he thereafter completed. He also attended oral argument on review of the disbarment recommendation although he had not moved to set aside his default and therefore acknowledged for the record that he had no right to address the review department on the merits of the case.

Mitigating Factors

The referee found no mitigating factors. (Amended Decision, p. 4.) We disagree. Although respondent's short prior period of practice without any disciplinary offenses does not constitute a mitigating factor, the case law establishes that the facts disclosed by the record in this case include two mitigating factors which should be considered in determining the appropriate degree of discipline to be imposed.

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17. We note that neither notice to show cause charged respondent with misrepresentations to his client or Dr. Alexander. While not all aggravating factors need be charged, a question may arise in a default proceeding on the fairness of notice of uncharged aggravating factors. Because we conclude that the evidence adduced at the hearing failed to prove this factor, we do not address the issue of fair notice in this case.

18. The record shows that service of the notices to show cause and other papers, including notices of the pretrial and hearing dates, was properly made on respondent at the address shown for him in the State Bar's official records. (Bus. & Prof. Code, § 6002.1.) In addition, there is some evidence that mail sent to this address actually did reach respondent, because he filed an answer to the notice to show cause in one of the proceedings, which was served on him at this address. It also appears from the record that respondent did not respond to the investigator's requests for information about his trust account records, so that the examiner was required to subpoena the trust account records directly from the bank.

Single Period of Misconduct

[15] Respondent's two instances of misconduct took place during the same short period of time and respondent attributed them to the same problem of financial difficulty. This is a factor which can properly be considered in mitigation. (See, e.g., *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1089; *Frazer* v. *State Bar* (1987) 43 Cal.3d 584, 578; *Doyle* v. *State Bar* (1976) 15 Cal.3d 973, 979-980.)

Assumption of Full Responsibility and Restitution

In *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, the respondent had misappropriated $24,000 in client funds. The Supreme Court refused to impose any actual suspension. In *Snyder* v. *State Bar*, *supra*, 49 Cal.3d at p. 1310, the Court described two of the factors involved in reaching the decision in *Waysman*: (1) the attorney's immediate assumption of full responsibility and (2) the attorney's voluntary commencement of restitution within five months of the misappropriation. **[16]** Other cases of misappropriation have resulted in lengthy suspensions rather than disbarment where restitution was made. (*Weller* v. *State Bar*, *supra*, 49 Cal.3d at p. 676 [restitution to one client made prior to complaint to State Bar; restitution to second client made after complaint made, but before issuance of notice to show cause]; see also *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1089 [full restitution, made in installments beginning before complainant contacted State Bar, constituted mitigating factor].)

[17] In *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, the Supreme Court explained the role of restitution in assessing the appropriate degree of discipline: "Restitution does not absolve [the attorney] of the original misappropriation [citation], but it is not entirely accurate . . . to characterize the restitution as having been made 'merely as a matter of expediency and under pressure' and on that ground to accord it little weight. Our decisions declining to give credit for restitution on such reasoning have generally involved restitution made after disciplinary proceedings had commenced. [Citations.] Restitution made voluntarily and before the commencement of disciplinary proceedings is entitled to consideration as a mitigating factor. [Citation.] [This case] is somewhere between these two extremes." (*Id.* at pp. 1366-1367.)

The same is true here. **[18]** While respondent took a year to complete payments, he never disavowed his debt to either complainant. The referee below focused on the repeated efforts Walker made to get complete restitution. However, the record reflects that respondent acknowledged the misappropriation and paid Walker two installments before she ever complained about him to anyone. He had repaid her in full, and begun to pay the doctor, before the State Bar first contacted him. He had paid both complainants in full before the first notice to show cause was filed. There is no evidence in the record tending to show whether respondent had the financial wherewithal to have made restitution any faster or sooner than he actually did. Thus, "petitioner's actions with regard to restitution reflect a recognition of his misconduct and an attempt to atone in some manner for his actions, [and] they properly constitute mitigating circumstances." (*Weller* v. *State Bar*, *supra*, 49 Cal.3d at p. 676.)

Recommended Discipline

[19] In determining the appropriate recommended discipline we start with the Standards for Attorney Sanctions for Professional Misconduct which the Supreme Court has instructed us to treat as guidelines. (*In re Young* (1989) 49 Cal.3d 257, 268, fn. 11.) Standard 2.2(a) provides that: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

As discussed above, the referee found some aggravating factors which are not supported by clear and convincing evidence and failed to consider any mitigating factors which we have found to exist. He therefore recommended disbarment.

[20] In determining the appropriate sanction, as guided by standard 1.6(b), we balance the aggravating

circumstances with the mitigating circumstances. We also must consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The Court in *Snyder*, *supra*, noted that "we have repeatedly held that misappropriation is a serious offense warranting severe discipline in the absence of 'clearly extenuating circumstances.'" It analyzed the factors in *Snyder* and concluded that disbarment was not warranted, but two years suspension was. (*Id.* at pp. 1308-1309.)

We likewise conclude that respondent has committed breaches of trust warranting severe discipline, but the circumstances of this case do not require that the discipline imposed be disbarment in order to protect the public, the courts and the legal profession. (See, e.g., *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d at p. 1367; see also *Snyder* v. *State Bar*, *supra*, 49 Cal.3d at p. 1308.)

In *Lawhorn*, the discipline imposed consisted of a five-year suspension, stayed, with five years probation, including actual suspension for two years, and the standard probation conditions.[19] *Snyder* likewise imposed a two-year actual suspension. In *Weller* the court imposed three years actual suspension. There, the misconduct was not only substantially worse than that in this case (misappropriations totalling $14,000), the respondent also had a prior record of misappropriation. (See *Weller* v. *State Bar*, *supra*, 49 Cal.3d at p. 672.) Also, in *Weller* the client was subjected to the embarrassment of having his wages repeatedly garnished to pay the hospital bill that the attorney had been instructed to pay out of settlement funds.

Taking into account all of the factors of this case, the public would appear adequately protected by five years suspension, stayed, with actual suspension for two years and until respondent satisfies the showing required by standard 1.4(c)(ii), and five years probation. Respondent should also be required to comply with rule 955 notice requirements (rule 955, California Rules of Court) and to pass the Professional Responsibility Examination prior to the expiration of actual suspension. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 892.)

In recommending that a standard 1.4(c)(ii) hearing be ordered, we note that the Supreme Court has declined to impose standard 1.4(c)(ii) in its recent decisions in *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071 and *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302. We do not believe the problems perceived by the Court with regard to imposing the standard 1.4(c)(ii) requirement in those cases are present here. Standard 1.4(c)(ii) provides that: "Normally, actual suspensions imposed for a two (2) year or greater period shall require proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law before the member shall be relieved of the actual suspension." **[21]** While standard 1.4(c)(ii) hearings are not appropriate in all cases where a two-year suspension is ordered (see, e.g., *Snyder* v. *State Bar*, *supra*, 49 Cal.3d at p. 1312), such a hearing appears particularly appropriate where, as here, lengthy suspension is recommended in a default proceeding.

Respondent has called into question the propriety of his automatic return to practice by failing to appear in defense of the serious charges levied against him. Public protection would appear to require that after imposition of a lengthy suspension, respondent not resume practice until he demonstrates his rehabilitation, fitness to practice and learning and ability in the general law.

[22] We note that the proposed new rules for standard 1.4(c)(ii) hearings, if adopted by the State Bar Board of Governors, would permit respondent to make the requisite showing by a preponderance of the evidence. They also permit the Office of Trial Counsel to stipulate that the respondent meets conditions which are not in doubt. (Cf. *Snyder* v. *State Bar*,

19. The conditions were that the respondent comply with the State Bar Act and the Rules of Professional Conduct; certify this compliance quarterly to the State Bar Court; maintain current office address with State Bar Court; respond to State Bar Court inquiries concerning compliance with conditions of probation; cooperate with and report to probation monitor; take and pass the Professional Responsibility Examination during actual suspension; and comply with rule 955 of the California Rules of Court.

supra, 49 Cal.3d at p. 1312 [respondent's general learning in the law not placed in issue].) We also note that the proposed new rules would guarantee respondent an opportunity, well in advance of the end of the two-year period of actual suspension, to initiate the proceeding in order to obtain a decision of the hearing department before the two years expire. The proposed rules further provide for expedited review of the hearing judge's decision by this review department. These proposed new rules for the conduct of standard 1.4(c)(ii) hearings appear to answer the concerns raised by the Supreme Court in *Silva-Vidor* v. *State Bar*, *supra*, 49 Cal.3d at p. 1080, fn. 6 and will presumably be in effect prior to the time the Supreme Court makes its order in this case.

Even if respondent makes a satisfactory showing at the standard 1.4(c)(ii) hearing, we still recommend that the term of probation extend three years beyond the termination of two years actual suspension. **[23]** In the probation conditions, we have included a specific safeguard against the recurrence of the particular problem that occurred in the two matters now before us. Since we cannot rely on respondent's change in employment from private to public as permanent,[20] we recommend an additional State Bar Court standard condition of probation requiring that if respondent does come into possession or control of client trust funds, that he submit certificates from an accountant with respect to the proper maintenance of his trust account. (See Bus. & Prof. Code, § 6093 (a) [State Bar Court may impose any probation condition reasonably serving purposes of probation]; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 668 [imposing probation condition requiring attorney to submit semiannual audits of his client trust fund compiled by an accountant].)

Effect on Business and Professions Code Section 6007 (c) Order of Inactive Enrollment

[24] Finally, we address the fact that in an ancillary proceeding below respondent was placed on involuntary inactive enrollment following upon the referee's disbarment recommendation. We recommend that the period of involuntary inactive enrollment already served by respondent since October 27, 1989, and any additional period served hereafter be credited towards the period of actual suspension ordered in this case. (Cf. *In re Lamb* (1989) 49 Cal.3d 239, 248-249 [attorney stipulated to involuntary inactive enrollment following initial recommendation of disbarment, and ultimately was disbarred; period of inactive enrollment credited towards waiting period to apply for reinstatement].)

Another issue arises as a consequence of our decision herein that must also be addressed. The record supporting the order of involuntary inactive enrollment is not before us. However, since the section 6007 (c) proceeding was instituted at the referee's request it may well have been predicated solely on the referee's recommendation of disbarment which is now superseded by our recommendation of suspension. The disbarment recommendation of the referee created a rebuttable presumption under Business and Professions Code section 6007 (c)(4) that the factors justifying an order of inactive enrollment were met. That presumption, affecting the burden of proof, no longer exists.[21]

The State Bar Court has power to issue an order of inactive enrollment pending final adjudication of the merits of the underlying proceeding by the Supreme Court, if the requisite elements of section

20. As we have noted above, respondent is now inactively enrolled. However, subsequent to the charged misconduct and until his inactive enrollment in October of 1989, respondent apparently terminated his private practice and notified the State Bar that he had joined the Los Angeles Public Defender's office. (R.T. p. 22; exh. 7.) As a public defender, at least temporarily, respondent presumably removed himself from the responsibility for handling of any client trust funds.

21. The referee, in the section of his amended decision entitled Recommendation, followed the disbarment recommendation with a paragraph noting that "Evidence exists that substantial risk of harm exists to Respondent's clients and the general public and, therefore, immediate action is recommended to be taken to enroll Respondent in inactive status as an attorney." (Amended decision, p. 5.) Since this statement does not appear in the findings of fact and no evidence was adduced regarding any current clients at the Public Defender's office, we construe the statement as merely a recitation of the effect of the rebuttable presumption created by the disbarment recommendation.

6007 (c) are met. (*Conway* v. *State Bar* (1989) 47 Cal.3d 1107.) The State Bar Court also has the power to retransfer the respondent to active status if the conditions on which the order was premised no longer exist. (Rules Proc. of State Bar, rule 799.) Although the respondent may petition for such an order, a petition is not the only means of achieving retransfer to active status.

Pursuant to rule 799 of the Rules of Procedure of the State Bar, "the Office of Trial Counsel, through its examiners, may stipulate to the termination of a member's inactive enrollment upon a showing that the attorney's conduct no longer poses a threat of substantial harm to clients or the public. Such a stipulation shall include statements of fact sufficient to warrant a termination .... Such a stipulation shall be reviewed by the assigned referee ...."

We express no opinion on the propriety of the order of inactive enrollment if predicated on evidence other than the presumption flowing from the superseded disbarment recommendation. **[25]** On the other hand, if the order of inactive enrollment was predicated solely on the disbarment recommendation, a stipulation under the provision quoted above may be entered into to permit respondent's retransfer to active status pending the finality of these proceedings. Respondent also retains the option of stipulating to his continued inactive enrollment. We recommend that any such stipulated period of inactive enrollment be included in any credit given towards the period of actual suspension ordered in this case. (*In re Lamb*, *supra*, 49 Cal.3d 239 at pp. 248-249.)

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for five years; that execution of such order be stayed; and that respondent be placed on probation for five years on the following conditions:

1. That during the first two years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

6. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

7. That, except to the extent prohibited by the attorney client privilege and the privilege against self incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; but that the period of time between the effective date of respondent's inactive enrollment under Business and Professions Code section 6007 (c) and the earlier of either an order terminating that enrollment or the effective date of the Supreme Court's order shall be credited towards the period of actual suspension prescribed in condition 1; and

9. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be directed to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order herein, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

Finally, we recommend that respondent be required to take and pass the Professional Responsibility Examination prior to the expiration of his actual suspension and furnish proof of such to the Probation Department of the State Bar Court.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND E. MAPPS

A Member of the State Bar

[Nos. 87-O-12533, 87-O-11669]

Opinion on Motion for Reconsideration—Filed May 22, 1990

SUMMARY

The State Bar examiner requested that the review department reconsider its conclusion that no violation of Business and Professions Code sections 6068 (a) or 6103 was proved in connection with the respondent's misappropriation. The request for reconsideration was denied.

The examiner asserted for the first time in his request for reconsideration that the misappropriation constituted embezzlement pursuant to Penal Code section 506 and, therefore, amounted to a violation of the attorney's oath and duty to support the law. However, no violation of the Penal Code had been alleged in the notice to show cause, and the review department concluded that discipline could not be imposed for any violation not alleged in the notice.

The examiner also contended that the Office of Trial Counsel was not given notice of the review department's intention to delete the findings of violations of the subject statutes, and cited Government Code 68081 as requiring that the parties be afforded an opportunity to brief the issues. The review department concluded that the Office of Trial Counsel was bound by recent Supreme Court precedent rejecting findings of violations of the subject statutes in connection with other alleged statutory or rule violations. The review department further concluded that reliance on Government Code section 68081 was misplaced as that statute does not apply to the review department of the State Bar Court, and that, in any event, the State Bar Court's rules of procedure provide the parties with opportunities for supplemental briefing parallel to those afforded by section 68081.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: No appearance (default)

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

HEADNOTES

[1 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights

Where the examiner asserted for the first time in his request for reconsideration of the review department's decision that the respondent's misappropriation of client trust funds constituted an act of embezzlement within the meaning of Penal Code section 506, and, as such, constituted a wilful violation of the attorney's oath and duty to support the laws of this state, the review department concluded that the belated attempt to prove culpability through an uncharged violation of another statute was improper. The State Bar cannot impose discipline for any violation not alleged in the notice to show cause.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2

Where the notice to show cause did not allege a violation of the Penal Code, the alleged violations of sections 6068 (a) and 6103 could not be construed as putting the attorney on notice of a possible Penal Code violation.

[3] **130 Procedure—Procedure on Review**
191 Effect/Relationship of Other Proceedings
199 General Issues—Miscellaneous

The State Bar Office of Trial Counsel was bound by the ruling of the Supreme Court in a matter in which its counsel, the State Bar Office of General Counsel, did not request a rehearing before the Supreme Court.

[4] **220.10 State Bar Act—Section 6103, clause 2**

The Supreme Court has unequivocally rejected section 6103 as a basis for culpability.

[5] **213.10 State Bar Act—Section 6068(a)**

The Supreme Court has held that section 6068 (a) is inapplicable to alleged violations of the State Bar Act or the Rules of Professional Conduct.

[6 a, b] **130 Procedure—Procedure on Review**
166 Independent Review of Record
194 Statutes Outside State Bar Act

Government Code section 68081 does not apply to the review department of the State Bar Court, which has a different standard of review than that of a court of appeal. However, opportunities are afforded to the parties under State Bar Court procedure which parallel those provided by Government Code section 68081.

[7] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record

Proceedings before the review department are governed by rule 453 of the [Transitional] Rules of Procedure, which provides that the review department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department and may take action as to an issue whether or not that issue was raised in the request for review or briefs of any party.

[8] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice

While the review department is not required to afford the parties an opportunity to brief additional issues raised by it on review, it is the preference of the review department to have issues thoroughly briefed, and rule 1311(a) of the [Provisional] Rules of Practice expressly allows for deferral of submission of cases after oral argument to permit supplementary briefs when considered appropriate.

[9] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure

Where the review department addresses an issue in its opinion which was not previously addressed by the parties in their briefs or at oral argument, rule 455 of the [Transitional] Rules of Procedure permits a motion for reconsideration affording the parties an opportunity to brief such issues.

ADDITIONAL ANALYSIS

Culpability

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

OPINION AND ORDER DENYING REQUEST FOR RECONSIDERATION

PEARLMAN, P.J.:

In accordance with rule 455 of the Transitional Rules of Procedure of the State Bar ("Rules of Procedure"), the examiner requests reconsideration of the review department's decision filed March 27, 1990 in this matter.[1]

The only aspect of the decision which the examiner asks us to reconsider is the review department's conclusion that no violation of Business and Professions Code sections 6068 (a)[2] and 6103[3] was proved in the misappropriation of trust fund charges brought against respondent Mapps. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1.)[4] Such conclusion was reached based on the controlling Supreme Court decision in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815, rejecting charged violations of 6068 (a) and 6103 in upholding violations of section 6106 and former rule 8-101 in a trust fund misappropriation case.

[1a] The examiner asserts for the first time in his request for reconsideration that "Respondent's misappropriation of trust funds as found in this case would constitute an embezzlement within the meaning of Penal Code section 506 and, as such, constitutes a wilful violation of Respondent's oath and duty to support the laws of this state."[5] No violation of Penal Code section 506 was alleged in either notice to show cause involved in this proceeding and no offer of proof of such was ever made. **[2]** The allegation of violations of sections 6068 (a) and 6103 cannot be construed as putting respondent on notice of a possible Penal Code violation. The belated attempt to prove culpability through an uncharged violation of another statute is improper. **[1b]** The State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929.) Rather, the charged violations must stand, or, in this case, fall on their own merits.

The examiner also contends that "the Office of Trial Counsel was not given any indication of the Review Department's intention to alter the findings of the Hearing Panel in regard to sections 6068 (a) and 6103 and was not given the opportunity to argue the Office of Trial Counsel's position on these issues." (Request for Reconsideration, p. 3.) He cites Government Code section 68081 as requiring the court to afford the parties an opportunity to present their views on the matter through supplemental briefing. The examiner's claim of lack of notice is untenable and his reliance on Government Code section 68081 is misplaced.

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1. The request for reconsideration was not required to be served on the respondent due to the prior entry of his default. (Rule 552.1(d)(i), Rules Proc. of State Bar.)

2. Section 6068 provides, in pertinent part: "It is the duty of an attorney to do all of the following: [¶] (a) To support the Constitution and laws of the United States and of this state."

3. Section 6103 provides as follows: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

4. Mapps was charged in 87-O-12533 (count one) with a single count of misappropriation, failure to honor a medical lien and failure to make payments agreed upon in a promissory note. Mapps was charged in 87-O-11669 (count two) with a single count of misappropriation, failure to pay funds promptly and issuance of a check drawn on insufficient funds. Both counts alleged that his conduct was "in wilful violation of your oath and duties as an attorney and in particular, California Business and Professions Code Sections 6068(a), 6103 and 6106." In count one he was also charged with a violation of Rules of Professional Conduct, rule 8-101(B)(4), and in count two with a violation of Rules of Professional Conduct, rules 8-101(A), 8-101(B)(3) and 8-101(B)(4). He was found culpable only of violating section 6106 of the Business and Professions Code and rule 8-101(B)(4) of the Rules of Professional Conduct as to both counts, and rule 8-101(A) as to count two only. (*In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 11.)

5. The examiner does not contend that if the court were to find a violation of section 6068 (a) or 6103 in this case that any different discipline should result than recommended in the decision, nor do we consider these statutes to play an integral role in the charges brought against the respondent herein or the discipline recommended to be imposed.

First, on the question of lack of notice to the Office of Trial Counsel, the Supreme Court issued its decision in *Baker* on November 20, 1989, and denied Baker's request for rehearing on January 18, 1990. The Office of Trial Counsel was represented in that proceeding by the General Counsel of the State Bar. *Baker* involved, among other alleged misconduct, alleged misappropriation of trust funds, similar to the misappropriation charges brought against respondent Mapps in the instant case. The Supreme Court held that none of the misconduct charged against Baker constituted a violation of either section 6103 or any provision of section 6068 including section 6068 (a). It expressly held with respect to section 6103 that "Since this section does not define a duty or obligation of an attorney, but provides only that violation of his oath or duties defined elsewhere is a ground for discipline, petitioner did not violate this section." (*Baker, supra*, 49 Cal.3d at p. 815.) **[3]** The Office of General Counsel did not request a rehearing before the Supreme Court in *Baker*, leaving its client, the Office of Trial Counsel, bound by such ruling.

In early January, the review department received a brief from an examiner in the Office of Trial Counsel inviting us to strike a section 6103 violation in a referee's decision in another default matter under our review as erroneous in light of the *Baker* ruling. (Examiner's Review Department "Statement" in *In the Matter of Conroy* (No. 87-O-15117) filed January 2, 1990, p. 20, fn. 5.) This review department thereafter issued a number of decisions on ex parte review[6] prior to *Mapps*, in matters in which the Office of Trial Counsel represented the State Bar, where *Baker* was construed to preclude culpability for charged violations of section 6068 (a), section 6103, or both. (See, e.g, *In the Matter of Behrendt* (No. 86-O-10031) Notice of Intent to Reject Stipulation filed January 10, 1990; *In the Matter of Warheit* (No. 88-O-12186) Decision On Review filed January 12, 1990; *In the Matter of Jennings* (No. 86-O-16216) Decision on Review filed February 20, 1990; *In the Matter of Dolard* (No. 86-O-11758) Decision on Review filed February 2, 1990; *In the Matter of Babero* (No. 86-O-12763) Decision on Review filed February 27, 1990.) No request for reconsideration was filed by the Office of Trial Counsel with respect to any of these decisions.

Indeed, since *Baker* was issued, the Office of Trial Counsel was represented by the Office of General Counsel in two other cases in which the Supreme Court again rejected the asserted violation of the oath and duties of an attorney to support the law within the meaning of sections 6068 (a) and 6103 in connection with alleged rule violations and violation of section 6106. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931 [citing *Baker* for the proposition that section 6103 "defines no duties"]; *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; but see *Layton* v. *State Bar*[7] (1990) 51 Cal.3d 889.) **[4, 5]** *Baker* is unequivocal in rejecting section 6103 as a basis for culpability and *Sands* reinforces the holding in *Baker* that section 6068 (a) is inapplicable to alleged violations of the State Bar Act or the Rules of Professional Conduct adopted by the Supreme Court pursuant thereto.

The examiner cites two other Supreme Court cases subsequent to *Baker* and *Sands* as asserted authority for reconsideration of the viability of the violations of 6068 (a) and 6103 charged against respondent Mapps. The cited cases are *Phillips* v. *State Bar* (1989) 49 Cal.3d 944 and *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071. Neither case addressed the issue of whether, and if so, under what circumstances, a respondent may properly be charged

6. These "By the Department" decisions were all issued without oral argument pursuant to rule 452 of the Rules of Procedure because no request for review was filed. The modifications made by the review department in the referee's decisions in such cases did not affect the recommended discipline and were deemed insubstantial.

7. In *Layton*, the Supreme Court upheld culpability under section 6103 on the facts before it (misconduct violating former rules 6-101(2) and 6-101(A)(2)) without any reference to the Court's recent holdings in *Baker*, *Sands*, and *Friedman*. It is not apparent from the opinion whether the respondent objected to a determination of culpability under section 6103. Also, the determination of his culpability under that section, in addition to the charged rule violations, does not appear to have affected the degree of discipline imposed.

with a violation of section 6068 (a) or 6103. They merely recited in passing that the respondent in each case had stipulated to violations of sections 6068 (a) and 6103 as well as other statutory and rule violations. Such stipulations were commonplace prior to *Baker* since the Office of Trial Counsel routinely charged respondents with violation of both provisions while also charging other more specific statutory and rule violations. The examiner has raised no cogent argument for reconsideration of our conclusion in *Mapps* that *Baker* required us to reject culpability under sections 6068 (a) and 6103.

The examiner's assertion that Government Code section 68081 requires a rehearing is likewise without merit.[8] **[6a]** That statute does not apply to the review department of the State Bar Court which has a different standard of review than that of a court of appeal. **[7]** Proceedings before the review department are governed by rule 453 of the Rules of Procedure adopted by the State Bar Board of Governors effective September 1, 1989. It provides in pertinent part: "(a) In all matters before the review department, that department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. The review department may take action as to an issue whether or not that issue was raised in the request for review or briefs of any party."

[8] While the review department is not required to afford the parties an opportunity to brief additional issues, it is the preference of the court to have issues thoroughly briefed and our rules expressly allow for deferral of submission of cases after oral argument to permit supplementary briefs when considered appropriate. (Rules of Practice of the State Bar Court, rule 1311(a).) **[9]** In the event, as here, that an issue is addressed in the opinion which was not previously addressed by the parties in their briefs or at oral argument, the Rules of Procedure permit a motion for reconsideration affording the parties an opportunity to brief such issues. (Rule 455, Rules Proc. of State Bar.) **[6b]** Thus, opportunities are afforded the parties under our rules of procedure that parallel those provided by Government Code section 68081.

The Office of Trial Counsel having availed itself of the opportunity to file a request for reconsideration and to present its views through supplemental briefing, and such request having been considered by the review department, it is hereby DENIED. In serving this order on the parties, the clerk is hereby also directed to serve the examiner's request for reconsideration on respondent Mapps.

We concur:

NORIAN, J.
STOVITZ, J.

8. Government Code section 68081, enacted in 1986, provides, in pertinent part: "Before . . . a court of appeal, or the appellate department of a superior court renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." Even if that statute were applicable, it is extremely tenuous to argue that it should be construed to require a rehearing on the striking of surplusage not affecting the outcome of the case, particularly when such is done pursuant to the unequivocal mandate of the Supreme Court.