

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)

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 6103³ 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.

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 review⁶ 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 Stipula-

tion 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.