

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

**RICHARD JUDE MORONE**

A Member of the State Bar

[No. 85-O-14944]

Filed November 8, 1990

**SUMMARY**

Upon ex parte review of a recommendation of disbarment by the hearing department of the former, volunteer State Bar Court (Charles J. Greaves, Hearing Referee), the review department held that the denial of the respondent's motion to set aside his default (Stephen H. Hough, Assistant Presiding Referee) had been an abuse of discretion, and remanded the matter for further proceedings.

As an independent ground for remanding the matter, the review department held that the record revealed a series of procedural problems. Specifically: (1) it was error for the State Bar to propound discovery requests after the entry of the default; (2) it was error for the hearing department to deem facts admitted based on respondent's failure to respond to the post-default discovery requests; (3) the notice to show cause was amended substantively without notice to respondent, and (4) the hearing department's findings went beyond the original substantive charges.

**COUNSEL FOR PARTIES**

For Office of Trials: Geri Von Freymann

For Respondent: No appearance (default)

**HEADNOTES**

- [1]      **107      Procedure—Default/Relief from Default**  
         **135      Procedure—Rules of Procedure**

Legal effect of entry of default in disciplinary proceeding is to admit allegations in notice to show cause and to preclude respondent attorney's further participation in proceeding unless default is set aside.

- [2]      **575.10    Aggravation—Refusal/Inability to Account—Declined to Find**  
         **595.10    Aggravation—Indifference—Declined to Find**  
         **745.31    Mitigation—Remorse/Restitution—Found but Discounted**

Timing of restitution is a factor which may affect the degree of discipline.

- [3]      **107      Procedure—Default/Relief from Default**  
Granting motion to set aside default would not have prejudiced State Bar where State Bar relied only on documentary evidence and did not present live witnesses.
- [4]      **107      Procedure—Default/Relief from Default**  
**135      Procedure—Rules of Procedure**  
**169      Standard of Proof or Review—Miscellaneous**  
**194      Statutes Outside State Bar Act**  
In ruling on a motion to set aside default under Rule of Procedure 555.1(a), State Bar Court interprets and applies terms “mistake, inadvertence, surprise or excusable neglect” in same manner as in civil cases under section 473 of the Code of Civil Procedure.
- [5 a, b] **107      Procedure—Default/Relief from Default**  
**167      Abuse of Discretion**  
In reviewing an order on a motion to set aside default, the standard of review is abuse of discretion. However, because law strongly favors resolution of matters on the merits, doubts are to be resolved in favor of the defaulted party, and orders denying relief are scrutinized more closely than orders permitting trial on the merits.
- [6]      **107      Procedure—Default/Relief from Default**  
**162.20   Proof—Respondent’s Burden**  
Party requesting relief from default has burden of proving excusable neglect by a preponderance of the evidence.
- [7]      **107      Procedure—Default/Relief from Default**  
**135      Procedure—Rules of Procedure**  
Rule of Procedure 555 does not require that motion to set aside default be made within a reasonable time, but only that it be made within 75 days. Motion to set aside default filed 75 days after entry of default was timely, and also was filed within a reasonable time, where it was filed approximately one month after respondent learned true status after receiving conflicting notices, less than two weeks after seeking a continuance for that purpose, and less than one week after obtaining counsel.
- [8 a, b] **107      Procedure—Default/Relief from Default**  
**167      Abuse of Discretion**  
**194      Statutes Outside State Bar Act**  
Respondent’s fear, panic, or aversion to formal charges alone would not show abuse of discretion in failure to grant relief from default, but specific showing regarding preoccupation with mother’s serious illness raised doubts as to proper exercise of discretion, which review department resolved in respondent’s favor.
- [9]      **107      Procedure—Default/Relief from Default**  
**113      Procedure—Discovery**  
State Bar had no right to propound and rely on discovery requests after entry of respondent’s default; if discovery was required in order to prove charges, default should not have been taken until after discovery responses were due and State Bar should not have opposed motion to set aside default.

- [10 a, b] 107      **Procedure—Default/Relief from Default**  
113      **Procedure—Discovery**  
192      **Due Process/Procedural Rights**  
Service of discovery requests after entry of default is inconsistent with fundamental fairness and due process, and does not serve purposes of modern discovery procedures such as exchanging information, informing parties of merits of case, and facilitate settlement or resolution of matter.
- [11]      107      **Procedure—Default/Relief from Default**  
113      **Procedure—Discovery**  
Failure by party in default to respond to requests for admissions propounded after default cannot serve as basis for propounding party to seek order deeming admission of truth of facts or genuineness of documents.
- [12 a-e] 106.20 **Procedure—Pleadings—Notice of Charges**  
107      **Procedure—Default/Relief from Default**  
165      **Adequacy of Hearing Decision**  
192      **Due Process/Procedural Rights**  
In default matter, hearing referee erred in basing findings of culpability partly on facts deemed admitted by failure to respond to improper post-default discovery, and in finding culpability on charges broader than those set forth in notice to show cause.
- [13]      106.40 **Procedure—Pleadings—Amendment**  
107      **Procedure—Default/Relief from Default**  
Motions to amend notice to show cause to correct typographical errors or modify facts which do not alter the charges in the original notice are permissible after entry of default.
- [14]      106.20 **Procedure—Pleadings—Notice of Charges**  
106.40 **Procedure—Pleadings—Amendment**  
107      **Procedure—Default/Relief from Default**  
135      **Procedure—Rules of Procedure**  
192      **Due Process/Procedural Rights**  
Rule of Procedure 557, permitting amendment of notice to show cause to conform to proof without requiring additional time to prepare answer and defense, assumes respondent attorney's presence at disciplinary proceeding. Where respondent is not present due to entry of default, respondent does not have an opportunity to defend against charges.

ADDITIONAL ANALYSIS

[None.]

## OPINION

STOVITZ, J.:

A hearing referee of the former, volunteer State Bar Court has recommended that Richard Jude Morone ("respondent"), a member of the State Bar since 1979<sup>1</sup> and with no prior record of discipline, be disbarred. Respondent did not answer the formal charges, his default was entered but his timely motion to set it aside was denied. (Rules Proc. of State Bar, rules 552.1, et seq.)<sup>2</sup>

The State Bar examiner ("examiner") did not seek review and respondent was unable to do so because of his default. Nevertheless, the procedural rules governing review of State Bar Court decisions rendered under former Business and Professions Code section 6079.1 required that we review the hearing referee's decision *ex parte*. Upon that review, a number of issues surfaced including: the propriety of the examiner propounding requests for admission after the entry of respondent's default and the hearing referee's having deemed those requests admitted when respondent unsurprisingly failed to answer; the appropriate standard of review of the assistant presiding referee's decision declining to set aside respondent's default; and the appropriateness of this review department adopting any changed findings necessary because of the hearing referee's reliance on discovery after default entry. Accordingly, we exercised our power to set this matter for oral argument before us, inviting the examiner to address the foregoing issues.

Upon our independent review of the record, we conclude that the assistant presiding referee exceeded his discretion in denying the motion to set aside the default. We accordingly remand for a hearing *de novo* before a judge of the State Bar Court with respondent to be given an opportunity to answer the present or an amended notice to show cause.

Our review of the record has also revealed a series of procedural problems concerning the default hearing and the referee's findings. Specifically, we have concluded that it was error for the State Bar examiner to propound and the hearing referee to deem admitted requests for admissions and genuineness of documents after the entry of respondent's default, that the notice to show cause was amended substantively without notice to respondent and that the findings went beyond the original substantive charges. We conclude that these errors, taken together, would have likely warranted remand for a new hearing even if we were to have concluded that the assistant presiding referee had not exceeded his discretion in refusing to set aside respondent's default.

## I. THE PROCEEDINGS BELOW

## A. Notice to Show Cause.

On April 24, 1989, this formal disciplinary proceeding against respondent was started in the State Bar Court by the filing of a notice to show cause (rule 550). In its four counts, the notice to show cause charged respondent with serious multiple acts of misconduct over the period from approximately September of 1984 until January of 1988.

Count one charged that in July of 1986 respondent was hired to defend one Kenneth Mimura in a criminal misdemeanor matter. At that time, Mimura gave respondent \$2,500 as advanced attorney fees. Respondent agreed that \$1,000 of the sum advanced was for his fee at an upcoming arraignment. If the matter went to trial, he would earn the remaining \$1,500 of the advance fee. The criminal charges against Mimura were disposed of without trial. Mimura made numerous requests for return of the \$1,500 in attorney fees but respondent allegedly failed to refund those fees or to render an appropriate accounting to Mimura.

1. The hearing referee's decision recites respondent's admission date as December 19, 1974. However, State Bar records show that respondent was admitted to practice law in this state on July 19, 1979. (Exh. 1.)

2. The Rules of Procedure of the State Bar in effect prior to September 1, 1989, govern the proceedings held before the hearing referee because evidence had been offered into the record before that date. (Trans. Rules Proc. of State Bar, rule 109.) Unless otherwise noted, all references to rules are to the pre-September 1, 1989 Rules of Procedure of the State Bar.

Count two charged that in November of 1983, respondent was hired by James Ginelli to represent him in a negligence action. In December of 1983, respondent signed a lien agreement between himself and Ginelli in favor of a physical therapist. In August of 1984, the physical therapist who had treated Ginelli agreed to respondent's request to reduce his fee to \$2,000. The next month, respondent settled the case and a few days later deposited the settlement funds into his trust account. Respondent allegedly did not promptly pay the physical therapist until January of 1986 and he misappropriated those funds to his own use.

Count three charged that in September of 1985, respondent was hired by Youssef Sadek to represent him in seeking judicial review of a State Personnel Board decision. Sadek paid respondent \$7,500 as advanced fees. Thereafter, respondent failed: to advise Sadek of the status of his case despite his many attempts to contact respondent; to perform the legal services for which Sadek hired him; and to return the unearned fees. In about September of 1987, respondent allegedly misrepresented to Sadek that he had filed Sadek's petition when he knew that he had not done so.

Finally, count four charged that in May of 1985, respondent was hired to represent Howard Lusk in a personal injury matter. Two years later, respondent received \$25,000 to settle Lusk's claim. He deposited the settlement funds into his client trust account but allegedly failed to promptly pay Lusk's share, and misappropriated the funds to his own use.

As to all four counts, the notice charged respondent with having wilfully violated his oath and duties as an attorney (Bus. & Prof. Code, §§ 6068 (a) and 6103). In counts two, three and four, the notice charged respondent with having violated Business and Professions Code section 6106 (proscribing an act of moral turpitude, dishonesty or corruption). In count three the notice charged respondent with having wilfully violated Business and Professions Code section 6068 (m) (failing to respond promptly to reasonable client status inquiries and failing to keep clients reasonably informed). Finally, each of the four counts charged respondent with having wilfully violated individual provisions of the Rules of Professional Conduct of the State Bar, in effect prior to May

27, 1989: counts one and three charged wilful violations of rule 2-111(A)(3) (failing to promptly pay unearned fees upon withdrawal from employment); count one additionally charged that respondent wilfully violated 2-111(A)(2) of those rules (failing to avoid foreseeable prejudice upon withdrawal from employment); and counts two and four charged respondent with having wilfully violated rule 8-101(B)(4) of those rules (failure to promptly pay to the client as requested funds or property which the client is entitled to receive).

**B. After Respondent's Default Was Entered for Failing to Answer the Notice to Show Cause, Discovery Was Propounded on Him by the State Bar Examiner.**

On April 6, 1989, prior to the issuance of the notice to show cause, the respondent and the examiner met and discussed the allegations in the notice (see rule 509(b)) but were unable to reach a settlement. As noted *ante*, the notice to show cause was filed on April 24, 1989, and it was served on respondent by certified mail on April 26, 1989. The notice warned respondent that if he failed to file an answer within 20 days of service, that his default would be entered. Respondent filed no answer within the 20-day period and on June 2, 1989, the examiner served on respondent an application for entry of default. (Rule 552.1.) It too warned respondent that his default would be entered if no answer were filed within an additional 20 days. Respondent filed no answer and on June 28, 1989, the clerk of the State Bar Court entered respondent's default. (Rule 552.1(c).)

[1] The legal effect of the entry of respondent's default was to admit the allegations set forth in the notice to show cause. (Bus. & Prof. Code, § 6088; rules 552.1(c), 552.1(d)(iii).) Moreover, respondent was not entitled to participate further unless his default was set aside. (Rule 552(c).) Nevertheless, starting on the day his default was entered and continuing for about three weeks later, the examiner propounded several forms of discovery on respondent. On June 28, 1989, the examiner filed with the State Bar Court her first set of written interrogatories to respondent. This document posed a total of 27 questions to respondent concerning all four of the charged matters. On July 10, 1989, the examiner served on respondent a demand to produce and

permit inspection and copying of documents specified in twelve different categories. The record does not reveal that the examiner pursued either her interrogatories or inspection demand, but on July 21, 1989, she did file and serve on respondent a request for 39 admissions, and a request as to genuineness of 43 documents. (Exh. 16.) This document requested that respondent admit the truth of the matters requested within 30 days after service. Since the examiner's request for admissions and genuineness of documents was served on respondent by United States mail, State Bar Court procedure permitted him a total of 35 days after service to respond to the request. Thus, his response to the requests for admissions would have been due on August 25, 1989, if not for the fact, as noted, *ante*, that since respondent's default was entered, he had no right to file a response.

C. After His Default Was Entered,  
Respondent Tried Unsuccessfully to Appear  
at Trial of These Proceedings.

Prior to the entry of respondent's default, the State Bar Court had set a mandatory settlement conference for August 7, 1989. On August 7, 1989, respondent telephoned the examiner to discuss the time and place of that settlement conference. (Motion for order to set aside default, declaration of Richard J. Morone, p. 9, ¶ 15; examiner's opposition to motion, declaration of Geri Von Freymann, p. 4.) The next day, the examiner wrote to the respondent stating that he was in default and that a hearing was set for August 23, 1989. The examiner told respondent he must move expeditiously to file a motion to set aside the default and told him about the State Bar's policy to oppose any such motion. She advised respondent to retain counsel or seek advice from someone qualified to assist him in this matter. Respondent appeared at the August 23, 1989 trial hearing, and requested a continuance to prepare and file his petition to set aside the default. His request was denied.

Under the rules of procedure governing this matter before the volunteer State Bar Court, motions for relief from default were determined not by the hearing referee, but by the presiding referee or designee. (Rule 555.1(d).) Under practice followed by the volunteer State Bar Court and to achieve consistency in rulings in motions to set aside defaults, the presiding referee usually designated the assistant presiding referee in charge of the hearing department to rule on such motions. That was done in this case. At the August 23, 1989 hearing, the State Bar presented no live witness testimony, but did present several declarations under penalty of perjury and other documents concerning the charges. At that hearing, the State Bar offered for admission into evidence the requests for admissions and genuineness of documents. The referee accepted them into evidence and deemed the respondent's failure to deny the requests for admissions "within the time allowed" to cause the matters to be admitted. (R.T. pp. 7-8.)<sup>3</sup>

D. After Taking the Matter Under Submission,  
the Hearing Referee Filed His Decision,  
Which Significantly Exceeded the Notice to Show  
Cause in Several Substantive Areas.

At the August 23 trial hearing, the State Bar examiner presented evidence that in the Ginelli matter charged in count two, respondent failed to pay funds due a Dr. Grant under a second lien. No charging allegations supported the introduction of such evidence. At the request of the examiner the referee ordered the notice as to that count amended to "conform to proof" pursuant to rule 557. (R.T. pp. 11-12.)

On September 20, 1989, the referee filed his decision in which he deemed admitted the requests for admissions and genuineness of documents. (Decision, p. 2.) Throughout his decision he incorporated by reference the specific facts set forth in the requests

3. As noted *ante*, respondent purportedly had until August 25, 1989, two days after the trial hearing, to file answers to the requests for admissions and genuineness of documents.

for admissions as they pertained to each of the four counts. (See findings of fact 11, 17, 21, 25 and 32.) Moreover, in two respects, findings of fact were made based on admitted requests which appeared to expand the scope of the charges.

In the Mimura matter, the referee adopted as part of finding of fact 11, requested admission 13, that respondent did not earn the fee paid to him on July 2, 1986, by Mimura. At best, the effect of this admission was to create a conflict with other admitted facts or charges which showed that respondent did represent Mimura at the arraignment for which his fee was \$1,000. Moreover, the admission was ambiguous as to what amount of the \$2,500 advanced fee respondent did earn. In the Ginelli matter, the hearing referee's findings 15 and 17 were based in part on requested admission 22, which stated that respondent did not pay the physical therapist the amount of his lien until after being contacted by the State Bar. [2] While this added fact would not by itself affect culpability, it is well settled that timing of restitution is a factor which may affect the degree of discipline. (See, e.g., *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 708-709; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 798-800.)

In addition to circumstances in which requests for admissions broader than the charges of the notice to show cause became part of the substantive findings of the referee, those findings contain additional defects. Finding 10 in the Mimura matter, findings 19 through 21 in the Ginelli matter and findings 28 and 30 in the Lusk matter all find facts beyond the scope of the notice to show cause. Moreover, conclusions 18, 33, 40 and 42 pertaining respectively to the Ginelli and Lusk matters purport to find respondent culpable of a wilful violation of rule 8-101(A), Rules of Professional Conduct, although respondent was never charged with such a violation. Respondent was charged with misappropriation of funds in each of those two matters, but ironically, the referee failed to make specific findings or conclusions that respondent had misappropriated trust funds. Finally, in finding 35 (concerning aggravation), the referee found that respondent's conduct in the Lusk matter

involved bad faith, dishonesty and concealment, although no such acts were charged in the notice to show cause to which respondent defaulted.

E. Promptly After the August 23, 1989 Trial, Respondent Retained Counsel and Filed a Timely Motion to Set Aside Default.

Respondent was required to present to the State Bar Court within 75 days of entry of default any motion seeking relief. (Rule 555.1(b).) On the 75th day, September 11, 1989, respondent presented his motion together with points and authorities, his declaration and a proposed verified answer. This motion and its attachments stated that after he was unsuccessful in seeking a continuance of the August 23, 1989 hearing, and on September 8, 1989, respondent retained counsel. In his supporting declaration, respondent stated that he received the notice to show cause when it was served but "was so alarmed" that he read it only briefly and did not notice the warning that his default might be taken. When he learned that his default had been entered, he recalled thinking that, as with civil defaults, the presumption would be in favor of setting aside the default and determining the matter on the merits.

At about the same time that he learned that the State Bar would pursue the matters that became the subjects of the notice to show cause, respondent stated in his declaration that his life had been greatly upset by the fact that his mother had suffered a serious heart condition and had undergone three operations for cancer. Her condition seemed to be gravely worsening, and respondent had been traveling about three times a week to San Diego, where she lived. Respondent alleged that because of his mother's situation and his regular visits with her he had been very preoccupied and upset and that significantly contributed to his failure to properly handle defense of the State Bar matter. At the same time, he stated that the State Bar examiner never misled him to believe that merely attempting to appear at the August 23 hearing would be successful. Respondent fully acknowledged his sole responsibility for determining the proper procedures to follow.

Respondent knew of no prejudice that would be caused to the State Bar were his default to be set aside;<sup>4</sup> [3 - see fn. 4] and if he were relieved from default, he proposed to answer the notice as follows: In the Mimura matter, that Mimura was satisfied enough with the favorable outcome in the criminal proceeding and he authorized respondent to keep the remaining \$1,500 in advanced fees. In the Ginelli matter, he would show that he promptly prepared to disburse monies to pay the physical therapist for his services, but the disbursement was misplaced in his office. Because he believed that the amounts were actually sent to the therapist, he mistakenly transferred to himself the remaining amount in his trust account. He did not discover this mistake until the end of December, 1985, and promptly sent the amount due to the therapist. As to the Sadek matter, he acknowledged receiving a \$7,500 fee and claimed he timely prepared a petition for judicial review but that due to a mix-up with the amount of the filing fee and the handling of the filing by respondent's attorney service, the filing was not completed on the last day allowed for the filing. Respondent admitted that he did not fully inform the client of the exact status of his matter but he never told Sadek that his petition had been properly filed. Respondent did not recall whether Sadek ever requested a refund of fees but respondent did state that no fees have ever been returned to Sadek. As to the Lusk matter, respondent admitted that he used the trust funds owed the Lusks for his own purposes but repaid those funds with interest five months later.

On September 15, 1989, the State Bar examiner filed opposition to respondent's motion to set aside the entry of his default. In her supporting declaration she set forth the number of contacts that she had with respondent before the notice to show cause issued in arguing that under case law interpreting Code of Civil Procedure section 473 respondent had not sustained his burden of showing that his default was excused. On September 28, 1989, the assistant presiding referee in charge of the hearing department denied respondent's request for a hearing on the

motion for relief from default and denied respondent's motion for relief from default by simple order reciting that "no good cause exist[ed]."

## II. DISCUSSION

### A. The Assistant Presiding Referee Exceeded His Discretion in Denying Respondent's Motion to Set Aside His Default.

[4, 5a] We begin by repeating the discussion in our recent opinion in *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198: "The rule we must interpret here is rule 555.1(a) . . . . It provides that in ruling on a motion for relief from default, this court interprets and applies the terms 'mistake, inadvertence, surprise or excusable neglect' in the same manner as those terms are interpreted and applied in civil cases in motions brought pursuant to section 473 of the Code of Civil Procedure. Appellate review under section 473 is for abuse of discretion, the test being 'whether the trial court exceeded the bounds of reason.' (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings. (See, e.g., *Slaten v. State Bar* (1988) 46 Cal.3d 48, 54-55, 57; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 453; *Frazer v. State Bar* (1987) 43 Cal.3d 564, 567-568.)" (Fns. omitted.)

In applying section 473, we believe the key issue is, whether respondent's neglect in not timely filing an answer to the notice to show cause was "excusable"; for inexcusable neglect prevents relief. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895.) [6] The party asking for relief (here, respondent) has the burden of proving excusable neglect by a preponderance of the evidence. (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528, and cases cited.)

[5b] Despite the burden placed on the party seeking relief from default, it is clear from the numerous cases construing section 473 that the law

4. [3] The granting of respondent's motion would not have significantly prejudiced the State Bar, as the examiner presented no live witnesses at the August 23 hearing, relying

solely on documentary evidence. (Contrast *Frazer v. State Bar, supra*, 43 Cal.3d 564, 567.)

strongly favors resolution of matters on the merits and the resolution of doubts in applying section 473 in favor of the defaulted party. In 1985, our Supreme Court discussed these principles in *Elston v. City of Turlock* (1985) 38 Cal.3d 227. There, the Supreme Court noted that “[w]here . . . the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court’s exercise of discretion.” (*Id.* at p. 235.) “[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. . . . [A] trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.” (*Id.* at p. 233, citing *Brill v. Fox* (1931) 211 Cal. 739, 743-744 and *Flores v. Board of Supervisors* (1970) 13 Cal.App.3d 480, 483.) The court went on to state that “[r]eversal of an order denying relief is appropriate where the effect of the order is to ‘defeat, rather than to advance the ends of justice.’” (*Elston, supra*, 38 Cal.3d at p. 236, quoting *Mitchell v. California etc. S.S. Co.* (1909) 156 Cal. 576, 580.)

The lone dissent by Chief Justice Lucas in *Elston* opined that the affidavit was lacking in sufficient factual detail to establish excusable neglect. (*Elston, supra*, 38 Cal.3d at pp. 240, 241 (dis. opn. of Lucas, C.J.)) The showing in *Elston* essentially turned on understaffing of the attorney’s office. Here, whether we apply the analysis of the majority or the dissent in *Elston*, we have determined that respondent’s burden was met. [7] Respondent filed a timely motion approximately one month after learning his true status after receiving conflicting notices from the examiner, the first precluding him from further participation, and others purportedly requiring him to participate *further* in discovery preparatory for trial. His motion was made only two weeks after seeking a continuance for that purpose and less than one week after obtaining counsel. Rule 555 does not contain the requirement found in section 473 that a motion to seek relief must be “made within a reasonable time”, but instead requires only that the motion be made within 75 days. We conclude that respondent acted timely within rule 555 and also acted within a reasonable time.

[8a] If the only ground respondent cited for setting aside his default was his fear, panic or aversion to the formal charges, we could not conclude that the assistant presiding referee exceeded his discretion in declining to set aside respondent’s default. Under decisional law, the party who wishes to participate in a judicial matter must take adequate and timely steps to defend the action and must act with the same “reasonable diligence as a man of ordinary prudence usually bestows upon important business.” (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513.) Respondent’s unwillingness or inability to deal with the charges because of panic or emotional discomfort brought on by those charges would not meet court tests for relief due to “excusable neglect.”

[8b] However, we conclude that the specifics set forth by respondent concerning the extent to which he was preoccupied with his mother’s illness have at least raised doubts as to the referee’s exercise of discretion. Again, applying *Elston v. City of Turlock, supra*, we must exercise those doubts in respondent’s favor.

We have located two cases construing section 473 involving inexcusable neglect claims due to attention paid to sick relatives. We believe that both cases, which upheld decisions of trial judges declining to grant default relief, can be distinguished as involving weaker showings than offered by respondent. In *Davis v. Thayer* (1980) 113 Cal.App.3d 892, also cited by the examiner, one of the litigants asserted that she was unable to file a timely answer to a civil complaint because she was in poor health and caring for her elderly mother and dying husband. The court found her conduct to be inexcusable neglect in that she failed to elucidate the details of her illness, including the amount of time she devoted to her relations’ care, or the extent to which their condition rendered her “too distraught to think of plaintiff’s claim.” (*Id.* at p. 909.) In the more recent decision of *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, the defaulting party claimed that he had forgotten about the summons served upon him in November 1981 because of the business pressures from Christmas sales orders, and that the death of his mother 16 months prior and the serious illness of his father during that winter were “very trying” experiences

which affected his ability to answer the summons. (*Id.* at p. 1038.) The two-to-one majority rejected these factors as constituting excusable neglect, again finding insufficient evidence in the record that these events occupied all Bellia's time and thoughts to warrant relief from the default.

We believe that respondent's declaration, while not a model of specificity, was sufficiently more specific than was presented to the court either in the *Davis* or *Bellm* cases to invoke the policy in favor of trial on the merits.

[9] Apart from the denial of respondent's motion for relief from default, we note several other troublesome factors in this record. While respondent did not assign any confusion on his part to the examiner's propounding of discovery requests after entry of his default, it certainly sent mixed signals to him. Under the circumstances, the examiner in fact had no right to serve and rely on "discovery." If she needed discovery to prove her case, she should not have taken respondent's default before the discovery was due and should not have opposed his attempt to set aside his default.

Thus, if, on remand, respondent chooses to participate below, the examiner could propound again the same or similar discovery. Further, the examiner might be able to rely upon some of the same bank records and other documents in support of the notice to show cause. While live testimony may be necessary in lieu of declarations, it is merely a consequence of the right to cross-examine which lies at the heart of the policy favoring trial on the merits as opposed to trial by default. Possibly the need for live testimony can be reduced if some of the alleged facts are the subject of a pretrial stipulation.

Finally, we observe that the burden placed on a respondent seeking to set aside the default was somewhat more difficult under procedures followed by the former, volunteer State Bar Court than today. Under the volunteer State Bar Court, as we noted earlier, only the presiding referee or designee, in this case the assistant presiding referee of the hearing department, could act on the motion to seek relief from default. Thus, this respondent could not expect to obtain relief from default merely by pressing his

case to the hearing referee on the day of trial. However, under the full-time judge State Bar Court, the assigned hearing judge decides motions such as those seeking relief from default (see State Bar Court Standing Order no. GEN 89-7, filed September 13, 1989), and that hearing judge can weigh in the balance any concerns by the State Bar of prejudice that would result if a continuance to be heard on the merits is granted. Such an efficient alternative, customary in all trial courts of record, was simply not available to the hearing referee under the governing rules of procedure of the State Bar.

Respondent's proffered defense, to the extent established, could affect the findings of culpability as well as the degree of discipline. We draw no conclusions as to either. As we set forth in our formal disposition, *post*, we shall now afford respondent an opportunity to participate in the formal disciplinary proceedings, should he wish to do so.

B. Even If We Were to Have Upheld the Assistant Presiding Referee's Order Declining to Set Aside Respondent's Default, We Would Have Grave Doubts About Whether the Decision of the Hearing Referee Could Stand.

Having independently concluded that the assistant presiding referee exceeded his discretion in declining to set aside respondent's default, we could simply remand the matter without further discussion. However, because of other very significant procedural errors we are compelled to conclude that even if we had not determined that the assistant presiding referee exceeded his discretion, we would have almost surely required a new hearing in any event.

On review, the examiner defended the use of discovery by the State Bar and the hearing referee after respondent's default was entered. However, at oral argument she conceded that certain of the findings by the hearing referee, not related to discovery, were in error. Accordingly, we deem it valuable to provide guidance for the retrial of this matter and the trial of other matters raising similar issues.

We first turn to the examiner's use of discovery propounded to respondent after default was entered. Presumably because discovery is universally recog-

nized as appropriate only when litigants are not in default, we have been unable to find any California case discussing the propriety of propounding requests for admissions after default. [10a] Service of discovery requests after the entry of default is clearly inconsistent with principles of fundamental fairness and due process which must be afforded attorneys in disciplinary proceedings. (*In re Ruffalo* (1968) 390 U.S. 544, 550-551; *Emslie v. State Bar* (1974) 11 Cal.3d 210, 229.) The defaulted respondent has no right to respond or recourse to the State Bar Court for protection from the discovery request unless and until the default is set aside.

[10b] Modern discovery procedures are designed to assist in the search for truth and to remove the “sporting” aspects of litigation. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376; 2 Witkin, Cal. Evidence (3d ed. 1986) Discovery, § 1422, pp. 1401-1402.) Discovery is premised on, among other purposes, the exchange of relevant information by participating advocates to sharpen and simplify the issues in conflict, shorten and facilitate any trial and avoid surprise. (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 280-281; *Greyhound Corp. v. Superior Court*, *supra*, 56 Cal.2d at p. 376.) Requests for admissions of key facts or issues are a specific form of pretrial discovery designed to inform all parties of the merits of the case and lead to settlement or other speedy resolution of the matter. (*Billings v. Edwards* (1981) 120 Cal.App.3d 238, 244.) These purposes cannot be served when discovery is propounded on one whose default is entered and who cannot participate under the rules. [11] The ensuing failure to answer simply cannot serve as a basis for the requesting party to seek an order deeming admitted the genuineness of any documents or the truth of any matters specified in the requests. (See Code Civ. Proc., §§ 2024, subd. (a), 2033, subd. (k).)

[12a] Contrary to the examiner’s position on review, in both the Mimura and Ginelli matters, we believe that the referee’s findings took on a substantively broader ambit than set forth in the notice to show cause. Accordingly, we cannot conclude, as the examiner suggests, that use of the requests for admissions was harmless and merely amounted to an expedient way of dealing with proof consistent with the notice to show cause.

[12b] Several other instances in which the referee’s findings significantly exceed the scope of the charges also cause us great concern. As we noted, *ante*, at the hearing the examiner moved to amend the Ginelli charges to include respondent’s wilful failure to pay a second medical provider’s lien. We do not find this matter to be a proper amendment on due process grounds.

The California Supreme Court has determined that a “slight variance in the evidence that relates to the *noticed* charge does not, in itself, deprive [the attorney] of adequate notice.” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929, emphasis added.) In *Van Sloten*, the Court found that a four-month variance between the date specified in the notice and the date proved at the hearing did not unfairly deprive the attorney of adequate notice of the charges, nor did it prejudice his defense. [13] Thus, motions to correct typographical errors or modify facts in pleadings which do not alter the charges in the original notice would appear to be permissible after entry of a default.

[14] Rule 557 assumes the respondent attorney’s presence at the disciplinary proceeding by dispensing with the requirement of additional time to prepare an answer and defense when the amendment is one to conform to proof. In *Rose v. State Bar* (1989) 49 Cal.3d 646, the Court found that the State Bar could have amended its notice to conform to proof concerning an additional charge of wilful failure to communicate, “provided the attorney is given a reasonable opportunity to defend against the charge.” (*Id.* at p. 654, citing *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.) Where the respondent is not present at the hearing by operation of the default and thus is unaware of the additional evidence and charges offered at the proceeding, he does not have a reasonable opportunity to defend at the hearing, nor can any response be filed with the clerk’s office with the default in place.

[12c] In this case, the proposed amendment is more than a modification of the charges alleged in the notice in the Ginelli matter. A completely separate act of misappropriation and moral turpitude is charged in the amendment apart from that alleged in the original charge.

[12d] We also note the referee's conclusions in two of the counts that respondent wilfully violated rule 8-101(A) of the Rules of Professional Conduct, although he was not charged with such violation.

[12e] Finally, we note that in the most serious matter, the Lusk matter, the referee's findings include that respondent denied receiving an award and that he issued one insufficient funds check when he ultimately paid Lusk his share of the settlement. Neither of those matters were charged in the original notice.

Despite our power of independent review, the Supreme Court, the litigants and the public should be able to expect that decisions of the hearing department are free of the flaws found in this case. We are simply unable to enter the mind of the hearing referee and decide whether or to what extent any evidence or charges beyond the original charges led to the disbarment recommendation.

### III. DISPOSITION

Based on our conclusion that the assistant presiding referee exceeded his discretion in declining to set aside respondent's default, we set aside the hearing referee's findings of fact, conclusions and recommendation and remand this matter to the hearing department for a hearing de novo before a judge of the State Bar Court.

Within thirty (30) days of the effective date of this opinion, the Office of Trial Counsel shall serve upon respondent a notice to show cause as provided by rule 243 of the Transitional Rules of Procedure of the State Bar. The notice may be the original notice filed in this matter or an amended notice to show cause provided the Office of Trial Counsel has reasonable cause to believe such amendments warrant formal proceedings. Thereafter, all further proceedings shall be governed by the Rules of Procedure of the State Bar in effect at the time.

We concur:

PEARLMAN, P.J.  
NORIAN, J.