STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GARTH FARR HEINER

A Member of the State Bar

[Nos. 84-O-14336, 88-O-12250]

Filed December 31, 1990

SUMMARY

After consideration together of two matters consolidated on review, the review department reached the conclusion that both matters were tainted by improper findings which required further hearing. The matters were remanded for further consolidated proceedings consistent with the guidelines set forth in the review department's opinion.

The first matter involved respondent's request for review of the hearing referee's disbarment recommendation in an original disciplinary matter. (Hon. Lloyd S. Davis (retired), Hearing Referee.) The matter involved charges which had earlier resulted in respondent's transfer to involuntary inactive enrollment pursuant to Business and Professions Code section 6007 (c). The review department remanded the underlying disciplinary case, holding that: (1) preliminary findings prepared by the referee after the close of the State Bar's case, coupled with a more than year-long delay before the recommencement of the trial and presentation of respondent's defense case, gave the appearance that a decision had been reached as to basic facts before respondent had an opportunity to testify; (2) on remand the hearing judge should consider whether respondent's use of an ATM card to withdraw his share of funds from his client trust account was an aggravating factor and if so, what weight it should be afforded; (3) references in the referee's findings to Penal Code violations were improper since the criminal statutes were not charged in the notice to show cause; (4) evidence of marital difficulties could be raised by lay testimony and on remand, respondent should be afforded the opportunity to put on additional evidence in mitigation, and (5) the referee's recommendation as to discipline was to be disregarded and a new recommendation made after the issues remanded were resolved. The case was remanded for retrial of those counts that turned on the credibility of conflicting testimony of witnesses, and for other proceedings consistent with the review department's opinion.

The second matter involved charges of unlawful practice stemming from respondent's appearance in court after the effective date of his involuntary inactive enrollment. The review department sustained the referee's findings of culpability as to sections 6068 (a), 6125 and 6126 of the Business and Professions Code (Joe Nick Bavaro, Hearing Referee), but declined to find culpability as to additional charges. Specifically, the review department held that the section 6103 charge was redundant; that respondent's single court appearance while evidently unaware of his inactive status did not establish that respondent acted with moral turpitude or with intent to deceive the court; and that rule 3-101(B) was not designed to apply to unauthorized appearances

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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.

in California state courts, but rather unauthorized appearances in courts other than California state courts. The review department further held that neither the section 6007 (c) proceeding nor any of the unproven charges underlying it should have been relied upon as aggravation. The proceeding was remanded for a recommendation as to the appropriate discipline for both matters combined.

Lastly, the review department held that whether the discipline recommendation on remand was suspension or disbarment, respondent should be given credit for the time served on involuntary inactive enrollment.

COUNSEL FOR PARTIES

For Office of Trials: Erica Tabachnick, Geri Von Freymann

For Respondent: Kenneth C. Kocourek

HEADNOTES

[1] **116 Procedure—Requirement of Expedited Proceeding**
139 Procedure—Miscellaneous
2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
Where lapse of time between sessions of hearing in disciplinary matter resulted from respondent's own actions, and respondent never complained about delay, respondent waived right to speedy determination of charges underlying involuntary inactive enrollment.

[2] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous
Where document was marked as exhibit at hearing and clearly related to central issue in case, and both parties referred to it in briefs on review, review department had it made part of official court file despite offering party's failure to move it into evidence.

[3] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
Rule 232 of the California Rules of Court contemplates preparation of a tentative decision after the completion of the trial, not in midstream, as a preliminary stage in the procedure for requesting a statement of decision. Therefore, rule 232 does not support the legitimacy of issuing a tentative decision when only one side has presented evidence.

[4 a-d] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
Duty of trial judge differs from that of juror with respect to expressing opinions on aspects of case before its submission, and there is nothing wrong with preparing tentative findings after culpability phase of hearing. However, where referee prepared preliminary findings before defense had put on its case, and lengthy delay ensued which referee indicated had affected the fact-finding process, this gave the appearance that a decision had been reached as to the basic facts at issue before respondent testified. When tentative findings were prepared and presented to the parties after only one side had presented evidence, it gave the appearance that the judge did not truly retain an open mind. Thus, certain of referee's findings were improperly reached.

[5] **103 Procedure—Disqualification/Bias of Judge**
Cases holding judges to have acted prejudicially are generally ones in which judges have refused to hear evidence at all on a certain point, or have indicated that they will not grant certain relief even if the party requesting it is legally and factually entitled to it.

[6 a, b] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
Although referee indicated that he had not reached a final decision despite preparation of draft findings, he appeared to have placed a greater burden of proof on the respondent than permitted by law. If a trier of fact imposes the wrong burden of proof, that itself can constitute reversible error.

[7] **162.11 Proof—State Bar's Burden—Clear and Convincing**
State Bar must prevail by clear and convincing evidence; if it is equally likely that respondent is telling the truth about controverted facts, State Bar has not met its burden.

[8] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
It is the duty of the review department to conduct an independent review of the record. The review department is therefore able to make its own findings on issues that turn on documentary evidence or are undisputed. However, as to issues where conflicting testimony requires credibility determinations which were not made by the hearing department, such issues must be remanded for resolution.

[9 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
Practice of keeping minimal amounts of attorney's personal funds in "dormant" client trust accounts violates rule against commingling personal funds in trust accounts, regardless of rationale for so doing. Exception to this rule permitting trust accounts to contain non-client funds to extent necessary to pay bank charges has been strictly construed.

[10] **142 Evidence—Hearsay**
Where complaining witness was in prison and deposition could not be arranged, hearing referee properly excluded witness's declaration on hearsay grounds.

[11] **221.00 State Bar Act—Section 6106**
The knowing issuance of a check drawn on insufficient funds is a proper basis for finding an act of moral turpitude. Where such check was immediately negotiable on its face, respondent was culpable regardless of whether or not respondent orally instructed recipient to delay cashing it.

[12 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
192 Due Process/Procedural Rights
563.10 Aggravation—Uncharged Violations—Found but Discounted
Aggravating factors are not required to be separately charged. However, facts that could have formed the basis for an additional charge omitted from the notice to show cause cannot be relied on in aggravation in a default matter, because respondent is not fairly put on notice that such facts will be relied on.

[13 a-c] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation

An attorney who repeatedly withdraws small amounts of cash for personal use from his or her trust account strongly indicates by such conduct that the attorney is improperly treating the trust account as a personal or general office account, and either allowing the attorney's own funds to remain in the trust account longer than they should (thus violating the rule against commingling), or misappropriating funds that properly belong to his or her clients. This is true regardless of the means by which the withdrawals are accomplished. Use of an ATM card for this purpose may slightly increase the risk of inadequate recordkeeping, but is not itself improper. Use of ATM cards to transfer funds from client trust accounts is not precluded by the Rules of Professional Conduct provided that the transfer is proper and adequate records are kept.

[14] **280.00 Rule 4-100(A) [former 8-101(A)]**
691 Aggravation—Other—Found

If respondent displayed a reckless or indifferent attitude toward his recordkeeping duties with regard to client trust funds, by using an ATM card to make repeated cash withdrawals of personal funds from his client trust account, this could constitute a factor in aggravation of commingling charges.

[15] **199 General Issues—Miscellaneous**
695 Aggravation—Other—Declined to Find

Respondent's withdrawal of his resignation with charges pending should not have been relied on as an aggravating factor. Respondents should be permitted to submit their resignations without fear that if a resignation is subsequently withdrawn, the respondent will be penalized by the court's reliance on that fact as an aggravating factor.

[16] **106.20 Procedure—Pleadings—Notice of Charges**
194 Statutes Outside State Bar Act
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
420.00 Misappropriation

In finding respondent culpable of misappropriating trust funds and of knowingly issuing a check drawn on insufficient funds, the referee's statement that respondent's acts constituted crimes involving moral turpitude was improper since the criminal statutes were not charged in the notice to show cause.

[17] **760.12 Mitigation—Personal/Financial Problems—Found**

Supreme Court precedent has not laid down a per se rule that serious marital difficulties cannot be raised in mitigation without the aid of expert testimony. The Supreme Court has often accepted lay testimony regarding marital difficulties as appropriate mitigation.

[18] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
162.19 Proof—State Bar's Burden—Other/General

In a default matter, the well-pleaded allegations in the notice to show cause must be deemed admitted even if the State Bar did not so request. (Rules Proc. of State Bar, rule 552.1(d)(iii).)

[19] **107 Procedure—Default/Relief from Default**
162.90 Quantum of Proof—Miscellaneous
204.90 Culpability—General Substantive Issues
In a default matter, to the extent that evidence negates allegations of notice to show cause, it is evidence and not allegations that controls findings of fact.

[20] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Respondent's violation of statutes prohibiting unauthorized practice of law was established by unanswered charges and uncontroverted evidence showing that respondent appeared in court after the effective date of his involuntary inactive enrollment.

[21] **220.00 State Bar Act—Section 6103, clause 1**
Where respondent was found culpable of violating statutes prohibiting unauthorized practice of law, charge of violating statute requiring obedience to court orders was redundant.

[22] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Appearing in court while suspended or enrolled inactive does not inherently involve moral turpitude; nor does it necessarily involve deception of the court, if the attorney is unaware of his or her inactive status. Evidence that an attorney made a single court appearance while ignorant of his or her inactive status is insufficient to establish clearly and convincingly that the attorney acted with moral turpitude or intent to deceive the court.

[23] **252.10 Rule 1-300(B) [former 3-101(B)]**
(Former) rule 3-101(B) of the Rules of Professional Conduct, by its terms, appears to have been designed to permit the California State Bar to discipline its members for making unauthorized appearances in courts other than California state courts, and is not a proper basis for disciplining members for appearing in California state courts while suspended or inactive.

[24] **515 Aggravation—Prior Record—Declined to Find**
565 Aggravation—Uncharged Violations—Declined to Find
695 Aggravation—Other—Declined to Find
2290 Section 6007(c)(2) Proceedings—Miscellaneous
Neither a respondent's section 6007(c) inactive enrollment itself nor the unproven charges underlying it should be relied upon as aggravation in a subsequent disciplinary proceeding.

[25] **139 Procedure—Miscellaneous**
179 Discipline Conditions—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues
Where respondent had been placed on involuntary inactive enrollment pursuant to section 6007(c) prior to hearing on underlying charges, and after review, proceeding on underlying charges was remanded for partial rehearing and new discipline recommendation, review department directed that on remand, whether suspension or disbarment was recommended, respondent should receive credit for time spent on inactive enrollment.

[26] **135 Procedure—Rules of Procedure**
139 Procedure—Miscellaneous
2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
Upon respondent's application for retransfer to active status from involuntary inactive enrollment under section 6007(c), based on delay in processing of disciplinary proceeding on underlying charges, hearing judge must determine to what extent respondent or respondent's counsel was responsible for such delays, and whether circumstances otherwise justified any delays. (Trans. Rules Proc. of State Bar, rules 799, 799.7, 799.8.)

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
231.01 Section 6126
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

213.15 Section 6068(a)
213.95 Section 6068(i)
214.35 Section 6068(m)
220.05 Section 6103, clause 1
220.15 Section 6103, clause 2
221.50 Section 6106
252.15 Rule 1-300(B) [former 3-101(B)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
320.05 Rule 5-200 [former 7-105(1)]

Other

2221 Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered

OPINION

PEARLMAN, P.J.:

This proceeding involves two matters consolidated on review. Respondent was placed on involuntary inactive enrollment effective May 14, 1988, under Business and Professions Code section 6007 (c). Case number 84-O-14336 ("the underlying case") came before the review department on respondent's request for review of the original disciplinary matter involving the charges underlying the involuntary inactive enrollment. After respondent's involuntary inactive enrollment became effective, he appeared in a marital dissolution case which he was attempting to settle. Case number 88-O-12250 ("the unlawful practice case") is the disciplinary proceeding arising out of respondent's unlawful practice of law on that occasion.

Respondent defaulted in the unlawful practice case and it originally reached the review department for ex parte review under rule 452(a) of the Transitional Rules of Procedure of the State Bar. We set that matter for briefing and oral argument on our own motion under rule 452(b) because of concerns about the reliance by the referee on the section 6007 (c) order as prior discipline and his resulting recommendation of disbarment.[1] In the interim, the decision on the merits of the underlying case was issued and respondent requested review. We have considered both matters together and have reached the conclusion that both recommendations were tainted by improper findings which require further hearing. We therefore remand the two consolidated cases for further consolidated proceedings consistent with our rulings as set forth in this opinion.

DISCUSSION

I. The Underlying Case (No. 84-O-14336)

The underlying case involved 13 counts. Respondent was found culpable on 10 counts,[2] 9 of which were also included among the 13 complaints that had been relied on to support the section 6007 (c) inactive enrollment ("the 6007 (c) case").[3] Respondent was also found culpable in the underlying case of one count (count three) that was not relied on in the 6007 (c) case.[4] In addition, the decision in the underlying case relies on the decision in the unlawful practice case as prior discipline, while the unlawful practice case in turn used some of the same counts in the underlying proceeding as aggravating factors in arriving at the recommended discipline therein.

The referee's factual findings and legal conclusions as to culpability on the 10 counts are all challenged on review, based on respondent's contention that the referee improperly prejudged respondent

1. The clerk's office, at the instructions of the review department, invited the examiner to submit "a brief on the following issues: [¶] 1. What was the factual basis for the referee's finding in aggravation that 'Respondent has previously been discipline[d] by the Supreme Court'? [¶] 2. Was the referee's use of Respondent's involuntary inactive enrollment as an aggravating factor appropriate in light of (1) the fact that inactive enrollment is a necessary element of the underlying offense of practicing law while inactively enrolled, and (2) the opinion of the California Supreme Court in *Conway* v. *State Bar* (1989) 47 Cal.3d 1107 (*see id.* at 1119)? [¶] 3. If the aggravating circumstances relied on by the referee and the allegations relied on in support of Respondent's involuntary inactive enrollment are disregarded, what is the appropriate degree of discipline in this matter?"

2. Count six was dismissed on the examiner's motion. The examiner has not requested review of the referee's findings of no culpability on counts nine and thirteen. We see no reason to disturb them.

3. The complaints relied on in the 6007 (c) case on which respondent was not found culpable in the underlying case were as follows. First, the 6007 (c) case involved three separate complaints alleging that respondent had aided the unauthorized practice of law by one Riley F. Williams (investigation matters 86-O-12317, 86-O-14644, and 86-O-14791). In the underlying case, what was left of these complaints was all subsumed into count six of the notice to show cause, and this count was dismissed on the examiner's motion. Second, respondent was found not culpable in the underlying case on count nine of the notice to show cause, which was equivalent to the Moore matter (investigation matter 87-O-11140) presented in the 6007 (c) case.

4. There was one additional count (count 13) in the underlying case that was not involved in the 6007 (c) case. This count charged respondent with repeatedly accepting employment when he did not have the time, resources, and/or experience to perform competently. Respondent was found not culpable on this count.

culpable and issued a preliminary decision to that effect before the respondent put on any evidence. After considerable delay, the remainder of the hearing was held (some 14 months later) and the referee then modified his preliminary decision and issued it as his decision.

II. Respondent's Contentions On Review

Respondent's contentions on review fall into five categories: (1) the referee was prejudiced against him and denied him a fair trial; (2) the referee relied on improper aggravating factors; (3) the referee's findings on culpability make improper references to Penal Code violations; (4) the referee gave inadequate weight to respondent's evidence in mitigation, and (5) the recommended discipline (disbarment) is excessive, and in any event, respondent should get credit for the time he has spent on inactive status (since May 14, 1988).

A. Denial of Fair Trial.

Respondent's claim that the referee was prejudiced, and denied him a fair trial, is based on the following facts. After the State Bar completed the presentation of nearly all of its evidence in October 1988, there was a significant lapse of time before the proceedings recommenced in December 1989.[5] **[1 - see fn. 5]** When the proceedings recommenced, the referee presented the parties with a set of preliminary findings and conclusions prepared in October of 1988 based on the evidence presented up to that point.[6] **[2 - see fn. 6]**

Respondent promptly made a motion for mistrial based on the preliminary findings and argues on review that the preparation of this document demonstrated prejudicial misconduct, because it indicated that the referee had prejudged the case before hearing the defense evidence, and had improperly shifted the burden of proof to the defense.[7] Respondent asks the review department to rule that his motion for a mistrial based on the preparation of the preliminary findings should have been granted.

The examiner argues that preparation of tentative decisions is countenanced by California court rules and case law, and that the referee made clear that the findings were only tentative and his mind was still open and could be changed by defense evidence.

The examiner's position is not supported by the authorities cited. **[3]** Rule 232 of the California Rules of Court contemplates preparation of a tentative decision *after the completion of the trial*, not in midstream, as a preliminary stage in the procedure for requesting a statement of decision. (See generally 7 Witkin, California Procedure (3d ed. 1985) Trial §§ 394, 395, pp. 401-403; *id.* (1989 supp.) pp. 57-60.) It

5. **[1]** This lapse of time resulted largely from (1) respondent's request for a continuance to put on his defense case, and (2) respondent's subsequent aborted resignation. Respondent never complained about any of the periods of delay. On the contrary, he requested additional continuances which were not granted. Respondent therefore appears to have invited much, if not all, of the delay in the hearing department prior to the completion of his hearing and to the extent he or his counsel caused such delay, respondent waived his right to a speedier determination on the merits of the charges underlying his involuntary inactive enrollment. (See *Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1120-1122.)

6. **[2]** Respondent's counsel had this document marked as exhibit C, discussed it with the referee, and moved for a mistrial based on it. (12/12/89 R.T. pp. 3-6.) However, he never moved it into evidence. We have requested the clerk to make it part of the official court file nevertheless, since it clearly relates to a central issue in the case, and both parties have referred to it in their briefs.

7. At the hearing on December 12, 1989, when respondent's new counsel moved for a mistrial based on the judge's preliminary decision as a prejudgment of culpability, the judge stated that: "My practice here is, when I receive a file, I'll set up a skeleton findings on my computer. And then, as I hear the evidence, I check off matters *as to whether they've been found true or not*, or whether there's evidence to support them." (12/12/89 R.T. p. 4 (emphasis supplied).) He further stated that count seven "was still open". He acknowledged that respondent had not yet put on his defense on any count, and that the other findings would be open to change but would remain his findings "unless they're rebutted." The referee subsequently stated "Well, what do you anticipate putting on in the way of a defense here? I mean, we heard these charges way back in October of 1988. *The time to put on the defense was at that time while everything was still fresh.*" (12/12/89 R.T. pp. 11-12 (emphasis supplied).)

therefore does not support the legitimacy of issuing a tentative decision when only one side has presented evidence.

United Pacific Ins. Co. v. *Hanover Ins. Co.* (1990) 217 Cal.App.3d 925 also provides no support for the action taken here because in that case the tentative decision was issued after all the evidence was in. (*Id.* at p. 932.) The issue addressed by the Court of Appeal was the extent to which the wording of the tentative decision could be relied on in determining the validity of the judgment, and it was in that context that the court stated that the tentative decision may not be used to impugn later findings or the judgment. (*Id.* at pp. 932, 934.)

The other case cited on this point by the examiner is a superior court appellate department decision which refers in passing, without addressing the propriety of the procedure, to the fact that the appellate department had issued a tentative decision on the merits of the appeal before it, but had then raised sua sponte an issue regarding its jurisdiction to hear the appeal. (*People* v. *Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33, 37 [disapproved on another point in *In re Geer* (1980) 108 Cal.App.3d 1002, 1004-1006, 1010-1011].)

Respondent is incorrect, however, in relying on Code of Civil Procedure section 611 and equating the referee's duty with that of a juror. **[4a]** "The duty of a trial judge differs from that of a juror with respect to expressing an opinion on any subject of the case before its submission." (*Gary* v. *Avery* (1960) 178 Cal.App.2d 574, 579.) **[5]** Generally, the cases holding judges to have acted prejudicially are ones in which judges have refused to hear evidence at all on a certain point, or have indicated that they will not grant certain relief even if the party requesting it is legally and factually entitled to it. (See 7 Witkin, California Procedure (3d ed. 1985) Trial § 228, and cases cited therein.) Nothing of that sort occurred in this case. **[4b]** Nevertheless, the preliminary findings give the appearance that a decision had been reached as to the basic facts at issue before respondent testified. This is compounded by the lengthy delay which the referee indicated affected the fact finding process. (See *ante*, fn. 7.)

[4c] While there is nothing inherently wrong with a judicial officer preparing tentative findings after the culpability phase, it is extremely problematic when tentative findings have been prepared and presented to the parties after only one side has presented evidence. It gives the appearance that the officer does not truly retain an open mind. **[6a]** The referee in this matter did state that he had not reached a final decision on any of the issues, notwithstanding the preparation of the draft findings, but he appears to have placed a greater burden on the respondent than the law permits (see *ante*, fn. 7)[8] **[6b - see fn. 8]** and failed to resolve a number of conflicts in the testimony. **[7]** It is the State Bar which must prevail by clear and convincing evidence. If respondent made it equally likely that he was telling the truth, the State Bar would not have met its burden. Thus, even though the examiner points out the preliminary decision in fact *was* modified in some respects to reflect evidence presented by the defense, it did not evaluate respondent's testimony, but often just recited it while leaving the preliminary adverse findings intact.

[4d] While we conclude that certain findings were improperly reached, we do not require that all counts be retried. **[8]** It is our duty to conduct an independent review of the record. As respondent concedes, we can therefore make findings of our own on issues that turn on documentary evidence or are undisputed without regard to the assessment of the credibility of conflicting testimony of witnesses. As a consequence, we have been able to determine that certain findings and conclusions by the referee are established by clear and convincing evidence. Conflict in the testimony on other issues makes it difficult for us to resolve those issues on the basis of the record before us because it turns on the credibility of witnesses we have not had the opportunity to observe. Such issues are remanded with directions.

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8. **[6b]** If a trier of fact imposes the wrong burden of proof, that itself can constitute reversible error. (7 Witkin, California Procedure (3d ed. 1985) Trial § 281, and cases cited therein.)

The following summary of the current record is set forth for the guidance of the parties and the hearing judge on remand. If the parties are able to stipulate to additional facts which are not truly in controversy, the hearing should proceed much more expeditiously on the remaining disputed issues as to each count.

Frierson Matter (Count One). Judith Frierson hired respondent in October 1983 to represent her in asserting her rights under a lease. (10/18/88 R.T. p. 110; 12/20/89 R.T. pp. 5-6.) She paid him $700 as an advance fee; any additional compensation was to be on a contingency basis. (10/18/88 R.T. pp. 111-114; 12/20/89 R.T. p. 6.) There is a conflict in the evidence as to whether the arrangement had been confirmed by letter. However, there is no dispute that respondent wrote a letter to Frierson's landlord and discussed the case with her. Subsequently, however, Frierson testified that she had great difficulty reaching respondent to discuss the status of her case. (10/18/88 R.T. pp. 116-124, 128, 131; exh. 6-8; 12/20/89 R.T. pp. 6-7.) The referee did not expressly determine her credibility, but merely summarized her testimony. Ultimately, in April 1984, Frierson wrote to respondent and demanded that he either file the complaint or send her money back. (Exh. 9.) The referee found that respondent did draft a complaint but it was not filed because by then Frierson had terminated his services. (Hearing dept. decision in Case No. 84-O-14336 [hereafter "decision"], p. 3, ¶5; 12/20/89 R.T. pp. 7-8; exh. D.)

Frierson initiated fee arbitration proceedings under the auspices of the Los Angeles County Bar Association.[9] Respondent failed to appear, and Frierson was awarded $700. Respondent did not pay the award, which was not reduced to judgment. (10/18/88 R.T. pp. 124-125, 133; 12/20/89 R.T. pp. 13-14.)

The testimony below was in unresolved conflict regarding whether respondent had performed enough work to earn the advance fee. Respondent stipulated that the arbitration occurred, that an award was made and the examiner then chose not to introduce the arbitration file as an exhibit. (10/18/88 R.T. pp. 125, 133.) As a result, there is no evidence regarding whether the award was properly served on respondent pursuant to the requirements of Business and Professions Code section 6203 (a).[10] We cannot defer to the referee on resolution of issues of fact disputed by respondent's testimony and therefore order count one to be retried on the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the former Rules of Professional Conduct.[11]

Porsch Matters (Counts Two and Three). The facts we find established regarding count two are as follows. In January 1984, respondent was retained by the grandmother of Thomas Porsch to represent Porsch and his three brothers in obtaining a share of their mother's estate. (10/18/88 R.T. pp. 135-137; 12/20/89 R.T. pp. 16-17.) Respondent obtained a settlement, and the four brothers went to respondent's office to sign the settlement agreement on November 8, 1984. (10/18/88 R.T. pp. 140-142; exh. 10.)

Respondent had received the $4,961.45 settlement check (exh. 12), along with the settlement papers, sometime between October 30, 1984, when they were sent to him from North Carolina, and November 6, 1984. (10/18/88 R.T. pp. 166, 186, 193; 12/20/89 R.T. p. 19; exh. 11.) He deposited the check in his trust account on November 6 (exh. 17), but did not disburse the funds to Porsch and his brothers until

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9. The referee's decision states that Frierson contacted the State Bar and was advised to initiate arbitration. (Decision, p. 3.) Whether or not Frierson contacted the State Bar first, however, the testimony makes clear that the actual arbitration was conducted by the local bar in Los Angeles. (10/18/88 R.T. pp. 124-125, 133; 12/20/89 R.T. p. 11.)

10. Respondent attempted to justify or explain his failure to pay the award on several grounds including that respondent had spent ten to fifteen hours on the matter and felt that he had earned the $700 fee. (12/20/89 R.T. pp. 8, 14-16.) He also testified that he had severe financial problems at the time. (12/20/89 R.T. pp. 14-16.)

11. We reject culpability under sections 6068 (a) and 6103 of the Business and Professions Code charged under all counts on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562.

own testimony, the issuance of the $250 check as a "loan" to Porsch drawn on a different client trust account than the one in which the settlement proceeds had been deposited was in clear violation of the rule. Respondent testified that the account on which the check was drawn was not in fact being used as a client trust account and did not contain any funds belonging to clients. (12/20/89 R.T. p. 27.) **[9a]** He explained that he had a practice of keeping minimal amounts of his own funds in "dormant" client trust accounts, just to keep the accounts available for use when needed. (See 12/20/89 R.T. p. 27.) This practice constituted a violation of rule 8-101(A)'s prohibition against attorneys maintaining any personal funds in a client trust account, regardless of their rationale for so doing. (See *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 145 & fn. 7 [maintenance of "buffer" funds in client trust account to prevent checks being returned for insufficient funds constituted prohibited commingling].)[18] **[9b - see fn. 18]**

Moreover, the evidence in support of count two, which was incorporated by reference in count three, established that the settlement funds were already available for distribution at the time the "loan" was requested and thus that Porsch should have been paid out of the trust account in which the settlement had been deposited. These facts, taken together, demonstrate a violation of the strict separation between personal and client funds which is required by rule 8-101(A). We therefore uphold culpability under rule 8-101(A). However, as with count two, we remand count three for redetermination of the charge of violating section 6106.

Gilliland Matter (Count Four). In July 1983, respondent was hired by Warren Gilliland to represent him in attempting to recover funds he had lent based on a defective financial statement furnished by a loan broker. (10/20/88 R.T. pp. 26-32.) Gilliland paid respondent a total of $1,266. (10/20/88 R.T. pp. 34-35, 37; exh. 33, 34.)

Respondent did some work on the case and filed a complaint,[19] but the testimony is thereafter in conflict as to respondent's alleged subsequent abandonment of the matter, except that Gilliland unsuccessfully requested the return of his fees (10/20/88 R.T. pp. 42, 62-65) and later hired another attorney to take over the case. Respondent testified that at the agreed-upon rate of $95 per hour, he had earned what Gilliland had paid him, and more. (12/20/89 R.T. pp. 32, 36-37.) The notice to show cause did not charge respondent with failing to return an unearned advance fee or with violating rule 2-111(A)(3). Thus, no findings can be entered against respondent on this issue absent an amendment of the charges. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.)

We remand for a retrial on the charged violations of rules 2-111(A)(2) and 6-101(A)(2).[20] Consideration of any motion to amend the notice to show cause we leave to the sound discretion of the hearing judge.

Gardner Matter (Count Five). Larry Gardner consulted respondent in July 1984 regarding a problem Gardner was having getting an insurance

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18. **[9b]** Rule 8-101(A)(1) permits trust accounts to contain non-client funds *only* to the extent necessary to pay bank charges. This exception has been strictly construed. (See *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 145 & fn. 7.)

19. The referee's finding that respondent "failed to make reasonable efforts to serve a defendant" (decision, p. 7) is ambiguous. If it means that respondent did not serve *any* defendants, it is inconsistent with respondent's uncontroverted testimony that at least some of the defendants were served, after much difficulty. (12/20/89 R.T. pp. 32-33.) If it means that there was one particular defendant whom respondent did not make adequate efforts to serve, it is not supported by any evidence in the record. This finding does not appear essential to the culpability findings, in any event, and the facts can be clarified on remand.

20. The other charges pleaded in count four need not be retried. With respect to sections 6068 (a) and 6103, see footnote 11, *ante*. With respect to predecessor rule 6-101(2) of the Rules of Professional Conduct, there does not appear to be any basis in the record before us for charging a violation of this rule, which was superseded effective October 23, 1983. It appears that Gilliland hired respondent in July 1983, and that any abandonment which may have occurred did not take place until sometime in early 1984. However, if there is evidence to support this charge, it may be introduced on retrial.

company to pay for injuries he had suffered on a friend's property, which Gardner believed should have been covered by the friend's homeowner's policy. (10/19/88 R.T. pp. 99-100.) Gardner suggested that respondent handle the matter on a contingent fee basis. (10/19/88 R.T. pp. 100-101, 123-124.)

The testimony as to whether respondent failed to provide services or advise Gardner unambiguously that he was not accepting the case was in conflict. We remand for a retrial on the charged violation of rules 2-111(A)(2) and 6-101(A)(2).[21]

Terry Matter (Count Seven).[22] **[10 - see fn. 22]** Respondent was retained to defend Willie Terry in a murder case, and was paid the sum of $5,000 by Terry's family. The case was a difficult one, because defendant had confessed to having killed his wife intentionally. (12/20/89 R.T. pp. 52, 54.) Respondent testified, without contradiction, that he had put in approximately 100 hours of work on the case, including successful motions to reduce bail and to obtain the services of a court-appointed forensic expert. (12/20/89 R.T. pp. 53-55.)

Respondent was charged with failing to render the services for which he was retained; missing court appearances in the matter, and failing to refund the unearned portion of his advance fee when he was discharged. (Notice to show cause, pp. 6-7.) While the referee did not decide count seven in advance of the respondent's testimony, his finding of culpability again turns on the credibility of the respondent which the referee did not resolve. He just summarized respondent's testimony, including an erroneous characterization that respondent admitted missing a number of scheduled hearings. (Decision, p. 9.) The current record does not support a finding by clear and convincing evidence of failure to render services competently and abandonment.

Respondent testified that he put in over 100 hours of work on the case; this testimony was uncontroverted, and was not inconsistent with his description of what he did. However, we cannot resolve on this record the question whether respondent was culpable of failing to return the unearned portion of an advance fee. This issue is closely intertwined with that of the adequacy of respondent's representation of Terry, and cannot be resolved independently.

Accordingly, we remand for new trial the charges that respondent violated rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).[23]

Martel Matter (Count Eight). Kim Martel hired respondent on September 19, 1984, to represent her in a marital dissolution. (10/18/88 R.T. p. 8; 12/20/89 R.T. p. 59.) She paid him a total of $1,000 in fees, plus an unstated amount for service of process costs. (10/18/88 R.T. pp. 15, 42-44; exh. 1, 2; 12/20/89 R.T. p. 59.)[24] Respondent performed some work on

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21. None of the other charged violations will be at issue on retrial. As to sections 6068 (a) and 6103, see *ante*, fn. 11. The predecessor rule 6-101(2) violation was not properly charged, as a matter of law, since Gardner did not even consult respondent until July 1984, over eight months after the effective date of the revised version of the rule. (See *ante*, fn. 20.)

22. The only evidence put on on this count by the State Bar was a copy of the court file in the underlying criminal matter. (Exh. 37.) **[10]** The complaining witness, Willie Terry, was in prison, and his deposition could not be arranged. (See 10/20/88 R.T. pp. 77-82.) The examiner offered Terry's declaration, but the referee properly refused to admit it on hearsay grounds. (12/12/89 R.T. pp. 18-19; 12/20/89 R.T. p. 4.) Nevertheless, the court file provided evidence to support the charges of failing to make court appearances, so respondent proceeded to testify about this count during the presentation of his defense. (12/20/89 R.T. pp. 51-58.) On remand, if Terry can be located and subpoenaed to testify and/or deposed, the State Bar will have another opportunity to present his testimony regarding this count.

23. The section 6068 (a) and 6103 violations charged in this count are not to be retried. (See *ante*, fn. 11.) Respondent was also charged on this count with a violation of section 6068 (i), but no proof of this charge was offered by the examiner and the referee did not address it at all in his decision. The same was also true for counts 8, 11 and 12 (discussed *post*). The State Bar did not establish culpability on the 6068 (i) charge on any of these counts. Accordingly, we dismiss the section 6068 (i) charges as to counts 7, 8, 11, and 12.

24. The basis for the referee's finding that Martel paid $25 for costs (decision, p. 10) is unclear, though she did testify she paid a small sum for the service of the summons, in addition to the $1,000. (10/18/88 R.T. pp. 15, 42.) Respondent admitted receiving the $1,000, but said that some $500 of it went for the cost of Martel's husband's deposition. (12/20/89 R.T. p. 59.) The referee appears to have disregarded this testimony. Respondent did not produce any documentation regarding the cost of the deposition and there was no evidence that he had obtained a transcript.

the matter; he filed the dissolution petition, had settlement discussions, and took the husband's deposition. (10/18/88 R.T. pp. 37, 43, 64-65.)

Meanwhile, respondent became increasingly difficult to reach, failed to keep appointments to meet with Martel, and failed to take action in the proceeding as she directed. (10/18/88 R.T. pp. 38-39, 44-50.) In October and November 1986, Martel wrote respondent to express her frustration and demand that he take further action to move the matter along. (Exh. 3, 4.) Eventually, respondent moved his office without giving Martel his new address and telephone number, and after December of 1986, she did not hear from him again. (10/18/88 R.T. pp. 52-53.) In December 1987 or January 1988, respondent called Martel to tell her the case was set for trial in a week, but by then Martel had decided to hire another attorney to take over the matter. (10/18/88 R.T. pp. 53-54; 12/20/89 R.T. p. 69.)

Respondent testified that the delays in the case were due to a deliberate strategy of waiting to see what happened to certain community assets that might significantly increase in value. (12/20/89 R.T. pp. 60-61.) To some extent, Martel corroborated this testimony; she admitted that there was a change of strategy during the course of the case, that it became more litigious, and that her husband eventually hired a lawyer. (10/18/88 R.T. p. 73.) Nonetheless, respondent's own testimony demonstrated his abandonment of the case. He admitted that after he failed to file an order to show cause in October 1986 as Martel had insisted, and especially in light of Martel's complaint to the State Bar, he *assumed* she had replaced him, even though he had not received a substitution of counsel form and had not moved to withdraw. (12/20/89 R.T. pp. 63-64, 69-72.)

The referee concluded that the facts of the Martel matter established violations of rule 6-101(A)(2) and of sections 6068 (a), 6068 (m), and 6103. (Decision, pp. 11, 20.)[25] The rule 6-101(A)(2) conclusion appears supported by clear and convincing evidence that he failed to file an order to show cause as Martel had insisted. We further find a violation of rule 2-111(A)(2) on this count, as charged in the notice to show cause and supported by clear and convincing evidence. The section 6068 (m) violation is sustained on the basis of a failure to communicate which extended past the effective date of that statute. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.) We therefore adopt the findings of culpability of rule 6-101(A)(2) and section 6068 (m) and add a finding of a rule 2-111(A)(2) violation.[26]

Jackson Matter (Count Ten). In June 1985, Gwendolyn Jackson hired respondent to file a bankruptcy on her behalf, for which she paid him a $500 fee. (10/19/88 R.T. pp. 86-87; 12/20/89 R.T. pp. 79-80.)

In October 1986, Jackson filed an action in small claims court to recover her $500. (10/19/88 R.T. p. 89; Exh. 26.) There is a dispute as to whether Jackson served respondent by certified mail. (12/20/89 R.T. pp. 82-83.) Jackson admitted respondent had never been served with the judgment. (10/19/88 R.T. pp. 92-93.)

Respondent testified that he had prepared a bankruptcy petition, but that he had advised the client not to file it because he had managed to put off her creditors and the bankruptcy was unnecessary and would adversely affect her credit rating. (12/20/89 R.T. pp. 81-82.) Respondent also testified that he had done enough work to earn the $500 fee. (12/20/89 R.T. p. 83.)

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25. In his conclusions of law, the referee referred to a failure to return unearned fees that is not referenced in the findings of fact. (Compare decision, pp. 10-11 with *id.*, p. 20.) Based on respondent's description of the services he rendered, there is no clear and convincing evidence that any portion of what Martel paid him remained unearned when their relationship ended. On the contrary, Martel's November 1986 letter reflects an agreement that additional fees would be due for further work. (Exh. 4.) This implies that the advanced fees had already been exhausted by the work up to that point. In any event, the referee's reference to unreturned unearned fees is not accompanied by a conclusion that respondent violated former rule 2-111(A)(3). We decline to find that there were any unreturned unearned fees, and we find respondent not culpable on the rule 2-111(A)(3) charge pleaded in this count.

26. We do not adopt the findings of section 6068 (a) and 6103 violations. (See *ante*, fn. 11.)

We cannot resolve the conflicts in the evidence to conclude on review of the current record that respondent failed to provide the services for which he was paid and/or to return unearned advance fees. We remand for determination of whether respondent violated rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2). On remand, the examiner may also introduce evidence and argue culpability as to the section 6106 charge since the referee's findings and conclusions as to the section 6106 charge were inconclusive. (Compare decision, p. 13 with *id.*, p. 21.) However, the section 6068 (a) and 6103 charges are not to be retried. (See *ante*, fn. 11.)

Williams/Rego Matter (Count Eleven). This matter involves a single insufficient funds check for $5,430, issued on respondent's personal account for reasons unrelated to his law practice. (12/20/89 R.T. p. 85; see exh. 19, 25.) The check was presented by its payee, Wilford Williams, at a commercial check cashing facility in Highland, east of San Bernardino. (10/19/88 R.T. pp. 25-26.) The complaining witness, Alfred Rego, the owner of the check cashing business, called respondent before cashing the check to verify the genuineness of the check and the identity of the payee, which respondent confirmed. (10/19/88 R.T. pp. 26-27, 36-37.)

Respondent admittedly knew there were insufficient funds in the account to cover the check at the time it was presented, but there was a conflict in the testimony as to whether he instructed Rego to delay in cashing it. (12/20/89 R.T. pp. 87-88.)[27]

It is undisputed that Rego cashed the check, and it was later returned for insufficient funds. (10/19/88 R.T. pp. 26-27.) Rego called respondent about the matter, and sent him a demand letter. (10/19/88 R.T. pp. 28-29; exh. 20.) Respondent agreed to pay off the amount of the check in monthly payments of $1,000, but failed to do so. Instead, he sent one payment for $100, and a second $100 payment in the form of a check drawn on insufficient funds (which he later replaced with $100 in cash). (10/19/88 R.T. pp. 30-34; exh. 21; see 12/20/89 R.T. pp. 86-87.) Respondent made further promises of payment, but none were kept. (10/19/88 R.T. pp. 32-35.) Respondent testified at the hearing that he recognized the debt, and still intended to pay the rest of the money, but was unable to do so due to his lack of funds. (12/20/89 R.T. p. 88.)

[11] The knowing issuance of a check drawn on insufficient funds is a proper basis for finding a section 6106 violation. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816; *Jones* v. *State Bar* (1989) 49 Cal.3d 273, 278, 280-281, 285-286, 289.) We therefore do not need to remand for determination of the conflict in testimony on this count. The fact that respondent knowingly issued the check to Williams, which on its face was immediately negotiable, itself supports his culpability of violating section 6106 regardless of what respondent instructed Rego.[28]

Floyd Matter (Count Twelve). In April 1987, Louise Floyd hired respondent to represent her in a custody matter. She dropped the custody matter shortly thereafter, but requested that respondent take over her defense in a criminal case[29] and apply the fees paid for the custody matter to the criminal matter, to which respondent agreed. (10/19/88 R.T. pp. 7-10; 12/20/89 R.T. pp. 89-91.)[30] Floyd ultimately paid respondent a total of $1,000. (10/19/88 R.T. pp. 8-10, 14-15; 12/20/89 R.T. pp. 90-91.)

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27. The referee found, based on Rego's testimony, that respondent did not reveal the lack of sufficient funds when he called. (Decision, p. 13; see 10/19/88 R.T. p. 36 [according to Rego, respondent did not affirmatively state that the check *was* covered].) Respondent vehemently denied this. (12/20/89 R.T. p. 87.) Again, it is not our role to resolve the credibility conflict which the referee preliminarily resolved in Rego's favor *before* respondent testified. (Exh. C [preliminary decision], p. 11.)

28. We do not find respondent culpable on this count of violating sections 6068 (a), 6068 (i), or 6103. (See *ante*, fns. 11 & 23.)

29. Floyd was charged with a felony for allegedly violating Penal Code section 4573.6, arising out of her allegedly having removed marijuana from official custody while employed by the Police Department. (See 12/20/89 R.T. p. 89; 10/19/88 R.T. p. 10; exh. 18.)

30. This account differs from the referee's findings, but is based on the consistent testimony of both Floyd and respondent. The difference is not material, in any event.

During the months of June and July 1987 respondent missed two court appearances in Floyd's case, and showed up late on two other occasions. (10/19/88 R.T. pp. 11-15.) Respondent admitted missing the two appearances, but stated that he had the flu on one occasion and car trouble on the other. (12/20/89 R.T. pp. 91-92.) However, respondent apparently did not inform the court or his client of his inability to appear, or the reasons for it. Respondent also admitted that he had been fined for arriving in court late. (12/20/89 R.T. p. 93.) Eventually, respondent failed to appear for Floyd's trial, and a public defender was appointed. (10/19/88 R.T. pp. 16, 23.)

Respondent did not return any of the fees Floyd had paid him. (10/19/88 R.T. pp. 16-17.) Respondent testified, without contradiction, that he had done 16 hours of work on Floyd's case, and made three court appearances, and Floyd admitted that respondent had represented her at the preliminary hearing. (12/20/89 R.T. pp. 91-92; 10/19/88 R.T. pp. 20-22.) Respondent testified that the $1,000 Floyd paid him was only part of the $1,500 he was supposed to receive for services through the preliminary hearing. (*Id.*)

The referee found respondent culpable of failing to provide services he had agreed to provide, of failing to advise the court of his inability to appear, and of failing to return unearned fees. (Decision, pp. 15, 21.) The latter finding, and the corresponding conclusion that respondent violated rule 2-111(A)(3), are not supported by clear and convincing evidence; respondent appears to have earned the $1,000 he received. The conclusions that respondent violated rule 2-111(A)(2) and 6-101(A)(2) are appropriate, based on his failure to appear for trial and to call the court when he was unable to make other court appearances.[31]

B. Aggravating Factors.

We also provide guidance to the parties and the hearing judge on remand on two issues in aggravation. The referee relied in aggravation on (1) respondent's use of an ATM card in making frequent, undocumented withdrawals from client trust accounts, and (2) respondent's submission and then withdrawal of a resignation from the State Bar. Respondent argues that these factors were improperly relied on.

1. Use of ATM card. Respondent testified that he used his automatic teller machine ("ATM") card to withdraw from the trust account the share of the settlement that represented his attorney's fees. This evidence was not controverted. Respondent's argument is largely that the use of the ATM card is an improper finding in aggravation because it was not charged in the notice to show cause. However, the referee did not find the use of the ATM card itself to be an aggravating factor, but found that its use coupled with the failure to produce any accounts or ledger sheets showing deposits or withdrawals on behalf of his clients demonstrated respondent's apparent lack of appreciation of his obligation to maintain careful accounts and not to commingle client funds with his own.

[12a] Aggravating factors are not required to be separately charged.[32] **[12b - see fn. 32]** In any event, we consider the evidence that respondent used an ATM card to make cash withdrawals from his trust account to be fairly encompassed within the issues

31. We do not find respondent culpable on this count of violating sections 6068 (a), 6068 (i), or 6103. (See *ante*, fns. 11 & 23.) We also decline to find culpability, or to remand, on the section 6068 (m) violation charged in this count. The referee did not address this charge in his decision. Based on the record before us, there is no basis to find respondent culpable of failing to communicate with his client. Floyd's own testimony indicates that she apparently was able to contact respondent reasonably quickly at all times. (See 10/19/88 R.T. pp. 6-17.)

32. **[12b]** However, facts that could have formed the basis for an additional, different charge which was omitted from the notice to show cause cannot be relied on in aggravation in a default matter, because in such a case the respondent is not fairly put on notice that the additional uncharged facts will be used against him. (See *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207.) In the present matter, on the other hand, respondent appeared and contested the charges, and had an adequate opportunity to respond to the evidence regarding his accounting practices and ATM use (which evidence became part of the record in part through his own testimony).

raised by the charges (in count two) that respondent "failed to maintain [the Porsch client funds] in trust pending distribution to [the Porsch brothers]," "misappropriated said funds" and "failed to provide an accounting to [his] clients."

We thus consider whether respondent's use of an ATM card may properly be viewed as an aggravating factor in conjunction with the violations charged in count two of which we have already concluded that respondent was culpable. **[13a]** An attorney who repeatedly withdraws small amounts of cash for personal use from his or her trust account strongly indicates by such conduct that the attorney is improperly treating the trust account as a personal or general office account, and either allowing the attorney's own funds to remain in the trust account longer than they should (thus violating rule 8-101(A)), or misappropriating funds that properly belong to his or her clients. This is true regardless of the means by which the withdrawals are accomplished—check, ATM card, withdrawal slip, or other means.

[13b] While use of an ATM card may slightly increase the risk that proper records of the transaction will not be kept, **[14]** the factor in aggravation is not the use of the card per se, but whether the respondent thereby displayed a reckless or indifferent attitude toward his recordkeeping duties with regard to client trust funds. Accordingly, on remand the hearing judge may consider, as did the referee below, whether respondent's use of an ATM card to make repeated cash withdrawals from his trust account was, under the circumstances, an aggravating factor and, if so what weight it should be given apart from the inherent blameworthiness of the underlying misconduct.[33] **[13c - see fn. 33]**

2. *Withdrawal of resignation.* **[15]** The examiner concedes that respondent's withdrawal of his resignation should not have been treated as an aggravating factor.In California, voluntary resignations from membership in the State Bar with charges pending have been allowed for many years. While they entail immediate transfer to inactive status and, if accepted by the Supreme Court, operate to relinquish membership in the State Bar, they do not admit the truth of any pending charges. (See Cal. Rules of Court, rule 960.) In a discipline case which might result in disbarment, a member may well choose to submit his or her resignation, rather than incur the time, expense and uncertainty of proceeding to hearing. To encourage such an option, respondents should be permitted to submit their resignations without fear that if a resignation is subsequently withdrawn, the respondent will be penalized by the court's subsequent reliance on that fact as an aggravating factor.

C. Improper References to Penal Code Violations.

[16] In finding respondent culpable on two counts of misappropriating trust funds and one count of knowingly issuing a check drawn on insufficient funds, the referee also stated that respondent's acts constituted crimes involving moral turpitude. (See decision, pp. 5, 6, 14 (counts two, three, eleven).) Respondent argues that the references to his acts as crimes and the citations to Penal Code sections are improper.

The examiner concedes that such findings should be deleted and we have not adopted them in making our limited determinations of culpability herein since the criminal statutes were not charged in the notice to show cause. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.)

D. Inadequate Consideration of Mitigation.

In case number 84-O-14336, respondent will have a second opportunity to put on evidence in mitigation so we need not deal with the issues he has raised as to the showing made on the current record.

The examiner raises another issue regarding mitigation. Respondent did not present any expert testimony regarding the emotional problems he was having at the time of his misconduct, nor regarding

33. **[13c]** In addition, we emphasize that our holding does not imply that all use of ATM cards in connection with client trust accounts is inherently improper or even suspect. For example, we do not read the Rules of Professional Conduct to preclude the use of an ATM card to accomplish a transfer of funds from a client trust account to a general office account otherwise proper under rule 8-101 (now rule 4-100), provided that adequate records are kept.

his subsequent recovery from those problems. (See Standards for Attorney Sanctions for Professional Misconduct ["standards"], Trans. Rules Proc. of State Bar, div. V; standard 1.2(e)(iv).) The examiner argues that lay testimony on such matters is inadequate to establish mitigation, relying on *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116.

Bercovich was disbarred for violating rule 955 of the California Rules of Court. His physical/emotional disability defense was rejected as untimely presented, inadequately supported, and inconsistent with some of his other testimony and arguments. (*Bercovich*, *supra*, 50 Cal.3d at pp. 125-129.) **[17]** However, the Supreme Court in *Bercovich* did not lay down a per se rule that the oft-relied on "serious marital difficulties" factor cannot be raised in mitigation without the aid of expert testimony. On the contrary, notwithstanding standard 1.2(e)(iv), the Supreme Court has often accepted lay testimony regarding marital difficulties as appropriate mitigation. (See, e.g., *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1364.)

On remand, respondent should be given a fair opportunity to put on evidence in mitigation, including the extent of his prior practice without incident and evidence in support of his claim that his misconduct was the result of unusual stress which he has since recognized and overcome. (Cf. *Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1220-1221; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667.) We express no opinion as to the effect or weight to be given whatever mitigating evidence may be offered on remand.

E. Appropriate Discipline.

Because so much of this matter remains unresolved pending retrial, the referee's recommendation as to discipline must be disregarded and a new recommendation must be made by the judge on remand after the remaining issues are resolved.

III. The Unlawful Practice Case

In the unlawful practice case, respondent defaulted and his motion to set aside the default was properly denied for lack of a showing of good cause.[34] The State Bar did not request review of the referee's ruling and respondent was precluded from doing so by virtue of his default. However, as part of the transition to the new State Bar Court system, this review department must independently review the record of State Bar proceedings in matters such as this which were tried before former referees of the State Bar Court, but assigned to this department after September 1, 1989. (Trans. Rules Proc. of State Bar, rules 109 and 452(a).)

Upon our initial review of the record, we had a number of concerns regarding the referee's decision (see *ante*, fn. 1) which we deemed substantial within the meaning of rule 452(b) of the Transitional Rules of Procedure of the State Bar. We therefore set the matter for hearing on our own motion together with respondent's request for review of the referee's decision in case number 84-O-14336.

At the default hearing before the referee below, the State Bar did not request that the allegations of the notice to show cause be deemed admitted. **[18]** Nonetheless, well-pleaded allegations must be deemed admitted and "no further proof shall be required . . . ." (See rule 552.1(d)(iii), Rules Proc. of State Bar.) In any event, the examiner introduced documentary evidence in support of the allegations, including the declaration of the opposing counsel in the matter in which respondent appeared improperly. (Exh. 6.) **[19]** To the extent that the evidence negates allegations of the notice to show cause, it is the evidence and not the allegations that controls the findings of fact. (*Remainders, Inc.* v. *Bartlett* (1963) 215 Cal.App.2d 295.)

The evidence established, and the referee found, that after the effective date of respondent's involuntary inactive enrollment (May 14, 1988), respondent appeared in superior court in one domestic relations matter on two occasions, June 9, 1988, and July 7, 1988. After June 9, respondent's opposing counsel in the matter read in a legal newspaper that respondent had been placed on involuntary inactive enrollment. The opposing counsel contacted the judge and respondent, and at the next hearing date in the matter,

34. Accordingly, in analyzing the evidence on this count we have not considered the facts put forward by respondent in connection with his unsuccessful motion to set aside his default.

July 7, 1988, respondent was substituted out and his client was substituted in propria persona. The opposing counsel stated that when he discussed the inactive enrollment with respondent, evidently sometime after the June 9 appearance, respondent "disavowed knowledge of his inactive enrollment."

Based on this evidence, the referee found respondent culpable of violating all of the statutes and rules charged in count one of the notice to show cause,[35] to wit, sections 6068 (a), 6103, 6106, 6125, and 6126, and rules 3-101(B) and 7-105.

[20] We sustain respondent's culpability as to sections 6068 (a), 6125, and 6126; culpability on these charges is established by the unanswered charges and the uncontroverted evidence that respondent appeared in court after the effective date of his involuntary inactive enrollment. (See *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 604; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.)

However, we do not find respondent culpable of violating sections 6103 or 6106, or rules 3-101(B) or 7-105.[36] **[21]** The section 6103 charge is redundant. (*In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. at p. 237.) **[22]** As to the section 6106 and rule 7-105 charges, appearing while suspended or enrolled inactive does not inherently involve moral turpitude. (*Id.* at p. 239.) Nor does it necessarily involve deception of the court, if the attorney is unaware of his or her inactive status. Since involuntary inactive enrollment orders do not have to be served by personal service, it is not impossible that an attorney may practice while inactive without being aware of that fact. Evidence that an attorney made a single court appearance while ignorant of his or her inactive status is insufficient to establish clearly and convincingly that the attorney acted with moral turpitude (section 6106) or intent to deceive the court (rule 7-105).

In the present matter, there is no charge in the notice to show cause or any evidence regarding respondent's state of mind at the time of his June 9 court appearance. The record contains the opposing counsel's statement that respondent later contended he had *not* been aware, at the time of that appearance, of the fact that his involuntary inactive enrollment had been ordered. (Exh. 6.) As for the July 7 appearance, the record reflects that respondent was substituted out on that occasion, and there is no evidence that he resisted the substitution or denied his inactive enrollment at that time. Accordingly, the record does not establish by clear and convincing evidence that respondent violated section 6106 or rule 7-105.[37]

[23] Rule 3-101(B) states that members of the State Bar shall not practice law in jurisdictions in which they are not entitled to do so under the regulations of that jurisdiction. By its terms, the rule appears to have been designed to permit the California State Bar to discipline its members for making unauthorized appearances in courts other than California state courts. We are not aware of any decision of the California Supreme Court holding that rule 3-101(B) may be used as a basis for disciplining members of the California State Bar who appear in California state courts while suspended or inactive. Moreover, rule 3-101(B) is superfluous when used for this purpose, since it is redundant of sections 6125 and 6126. Accordingly, we decline to find respondent culpable of violating rule 3-101(B). We thus find respondent culpable in case number 88-O-12250 only of violating sections 6068 (a), 6125 and 6126.

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35. A second count charged respondent with violating section 6068 (i) by failing to cooperate with the State Bar's investigation of his unlawful appearance. This count was properly dismissed by the referee because there was no admissible evidence establishing that an investigator's letter had been sent to respondent.

36. Since these issues were not called to the examiner's attention in the clerk's letter (fn. 1, *ante*), if the examiner considers that the review department overlooked relevant authority to the contrary in reaching its conclusion on these issues, a motion for reconsideration under rule 455 can be brought for such purpose.

37. Because of the absence of proof of violation of section 6106 and rule 7-105, we do not need to address the sufficiency of notice of factual allegations supporting such charges and to support the findings upon respondent's default. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929; *In the Matter of Morone, supra*, 1 Cal. State Bar Ct. Rptr. at p. 217.)

The only issues remaining on review of the unlawful practice case are the appropriateness of relying on the section 6007 (c) proceeding as aggravation and the appropriate degree of discipline. **[24]** In her brief on review, the examiner has acknowledged that neither the section 6007 (c) inactive enrollment itself nor the unproven charges underlying it should have been relied on in aggravation, and we concur. We therefore omit any disciplinary recommendation at this time and by consolidating this proceeding with the underlying case, permit the hearing judge to assess the appropriate aggregate discipline for both cases. Because it would not be feasible or serve the interests of justice to attempt to do otherwise, on remand we permit respondent to participate fully in the discipline share of these consolidated cases while being limited to addressing culpability only as to those issues in case number 84-O-14336, which have been remanded for further proceedings.

IV. Credit For Time On Inactive Enrollment

[25] Respondent argues that "whatever discipline is imposed" he should get credit for time on inactive enrollment by analogy to *In re Young* (1989) 49 Cal.3d 257. In *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, opn. filed on den. rehg., 1 Cal. State Bar Ct. Rptr. 19, recommended discipline adopted, Nov. 29, 1990 (S016265), we recommended to the Supreme Court that time on inactive status under 6007 (c) should be credited to Mapps's two-year actual suspension. We similarly conclude that, whether suspension or disbarment is recommended by the judge on remand, credit should be accorded respondent for time spent on inactive enrollment. **[26]** Respondent also has the right under rule 799.8 of the Transitional Rules of Procedure of the State Bar of California, adopted effective March 3, 1990, to apply for retransfer to active status. At oral argument in this proceeding, his counsel indicated that such an application might be made upon remand. It will therefore be for the hearing judge on remand to determine to what extent respondent or his counsel was responsible for delays in processing of this case beyond the deadlines imposed by rule 799.7 (see *ante*, fn. 5), and whether circumstances otherwise justified any delays. In this regard, we observe that neither respondent nor his counsel caused delay on review in the handling of these consolidated proceedings. We express no opinion about the other issues which the judge to be assigned on remand must consider under rules 799.8 and/or 799.

DISPOSITION

To summarize, we remand case number 84-O-14336 for a further hearing de novo on culpability before a judge appointed under section 6079.1 of the Business and Professions Code, with respect to the following charges: count one, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2); counts two and three, the charge of violating section 6106; count four, the charges of violating rules 2-111(A)(2) and 6-101(A)(2); count five, the charges of violating rules 2-111(A)(2) and 6-101(A)(2); count seven, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-102(A)(2); and count ten, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) and section 6106. We also remand both case number 84-O-14336 and case number 88-O-12250 for recommendation of appropriate discipline in these consolidated cases and for any other proceedings not inconsistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.