

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**RESPONDENT L**

A Member of the State Bar

No. 90-O-12262

Filed June 24, 1993

**SUMMARY**

Shortly before trial in a disciplinary proceeding, counsel for respondent, asserting that respondent was unable to assist in his own defense, moved to have his client placed on inactive status under Business and Professions Code section 6007(b)(3), which permits the State Bar to seek the involuntary inactive enrollment of attorneys on the basis of mental infirmity or illness. The Office of Trials did not oppose respondent's inactive enrollment, but opposed any abatement of the disciplinary proceeding. Based on respondent's claimed inability to assist counsel in his defense, the hearing judge ordered respondent enrolled inactive under Business and Professions Code section 6007(b)(1), which requires the involuntary inactive enrollment of an attorney who asserts a claim of insanity or mental incompetence and alleges inability to understand a proceeding or assist counsel. Without further evidence or hearing, the hearing judge also abated the underlying disciplinary proceeding. (Hon. Ellen R. Peck, Hearing Judge.)

The Office of Trials sought review, arguing that inactive enrollment under section 6007(b)(1) requires a greater showing than a mere claim of inability to assist counsel and that respondent should be required to produce some quantum of proof in support of the claim. It also argued that the competing interests of respondent's due process rights and the strong public interest in prosecution of State Bar matters should require the evidence as a whole to establish respondent's incompetence prior to abatement of the proceeding.

The review department held that an attorney must be enrolled inactive under section 6007(b)(1) upon the attorney's assertion of a claim in any pending proceeding that the attorney is unable to understand the nature of the proceeding or to assist counsel, and that no affirmative showing of mental illness beyond the making of the statutory claim is required. However, the issue of abatement of the disciplinary hearing is a separate determination. To justify abatement, the respondent must demonstrate by a preponderance of the evidence that he or she is unable by reason of mental incompetence to assist counsel in defense of the proceeding.

In this matter, where the expert evidence was inadequate and respondent's counsel's declaration regarding his client's incompetence was inconsistent with his earlier declaration attesting to respondent's ability to perform paralegal work in a superior manner, the review department concluded that the hearing judge had not properly exercised her discretion when she abated the disciplinary proceeding without holding a

hearing allowing for the presentation and resolution of conflicting evidence regarding respondent's claimed inability to assist counsel. Accordingly, the review department remanded the matter solely on the issue of abating the underlying disciplinary proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Alison R. Platt, Victoria Molloy

For Respondent: No appearance

HEADNOTES

- [1]      **130      Procedure—Procedure on Review**  
         **139      Procedure—Miscellaneous**  
         **199      General Issues—Miscellaneous**  
         **2051.90 Section 6007(b)(1) Proceedings—Other Procedural Issues**  
         **2119      Section 6007(b)(3) Proceedings—Other Procedural Issues**  
Because hearings and records regarding inactive enrollment under Business and Professions Code section 6007(b) are confidential, respondent was not identified in review department's opinion regarding issues raised by such inactive enrollment. However, where such issues arose during a disciplinary proceeding, the record in that proceeding remained public, subject to the hearing judge's discretion to seal specific portions of the record where proper grounds appeared.
- [2]      **135      Procedure—Rules of Procedure**  
         **166      Independent Review of Record**  
         **2051.90 Section 6007(b)(1) Proceedings—Other Procedural Issues**  
         **2119      Section 6007(b)(3) Proceedings—Other Procedural Issues**  
Orders for inactive enrollment under section 6007(b)(1), like those under section 6007(b)(3), are subject to independent review pursuant to rule 450 of the Transitional Rules of Procedure.
- [3 a, b] **167      Abuse of Discretion**  
         **2051.50 Section 6007(b)(1) Proceedings—Burden of Proof**  
A member of the State Bar is required by statute to be enrolled inactive upon the assertion of a claim of insanity or mental incompetence made in any pending proceeding, alleging inability to understand the proceeding's nature or to assist counsel. Where the member intentionally asserts such a claim, no further showing is required and the State Bar Court has no discretion not to enroll the member inactive.
- [4]      **111      Procedure—Abatement**  
         **199      General Issues—Miscellaneous**  
         **2051.50 Section 6007(b)(1) Proceedings—Burden of Proof**  
         **2051.60 Section 6007(b)(1) Proceedings—Abatement**  
Given the severe consequences of inactive enrollment, public protection supports inactive enrollment of an attorney who intentionally makes a claim of mental incompetence, even if the attorney was actually rational and was misguidedly making the claim as a strategy to impede disciplinary prosecution. Any issue of bad faith may be addressed in the context of the requested abatement of the disciplinary case. The mere enrollment of the attorney inactive does not dictate abatement of the underlying disciplinary proceeding.

[5]      **111      Procedure—Abatement**  
           **167      Abuse of Discretion**

An abatement order is a procedural matter, for which the standard of review is one of abuse of discretion.

[6 a-d]    **111      Procedure—Abatement**  
           **147      Evidence—Presumptions**  
           **162.90    Quantum of Proof—Miscellaneous**  
           **194      Statutes Outside State Bar Act**  
           **2051.60   Section 6007(b)(1) Proceedings—Abatement**  
           **2116      Section 6007(b)(3) Proceedings—Abatement**

A determination whether a disciplinary proceeding should be abated on the ground of inability of the respondent to assist in the defense resembles a competency hearing in a criminal matter. In the law of attorney discipline, the respondent is presumed competent. Inability to assist in the defense of a disciplinary proceeding suggests a more serious form or degree of mental illness than inability to practice competently without endangering clients or the public. Therefore, facts sufficient to institute inactive status proceedings under section 6007(b) may not be sufficient to support abatement of a disciplinary proceeding. The appropriate standard for abatement is proof by a preponderance of the evidence that the attorney is incompetent to assist in the defense.

[7 a, b]    **111      Procedure—Abatement**  
           **192      Due Process/Procedural Rights**  
           **802.30    Standards—Purposes of Sanctions**  
           **2051.60   Section 6007(b)(1) Proceedings—Abatement**

The respondent in a disciplinary proceeding has a right to a fair hearing. The State Bar's interest in protecting the public and maintaining integrity and public confidence in the legal profession would not be served by disciplining an attorney who is mentally incompetent to the degree that she or he cannot assist in a defense against disciplinary charges. Therefore, if an attorney is unable to assist in his or her own defense, due process requires that the disciplinary proceeding be abated.

[8]        **162.11    Proof—State Bar's Burden—Clear and Convincing**  
           **2115      Section 6007(b)(3) Proceedings—Burden of Proof**  
           **2210.90   Section 6007(c)(2) Proceedings—Other Procedural Issues**

Ordinarily, the standard of proof in disciplinary proceedings is by clear and convincing evidence, and that standard has been applied in involuntary inactive enrollment proceedings under both section 6007(c) and section 6007(b)(3).

[9]        **111      Procedure—Abatement**  
           **159      Evidence—Miscellaneous**  
           **162.20    Proof—Respondent's Burden**  
           **2051.60   Section 6007(b)(1) Proceedings—Abatement**

A motion supported by written submissions, including a detailed psychiatric report, could, if unopposed, be sufficient evidence to warrant abating a disciplinary proceeding due to the respondent's inability to assist in the defense. However, where the adequacy of the respondent's showing is questioned, the respondent's evidence may be weighed in the context of the whole record in the disciplinary proceeding. Any proffered medical submission regarding the respondent's mental competency should address the nature of the medical examination or tests conducted; the attorney's symptoms; the diagnosis and cause of the condition, and any past or proposed treatment. The report should note whether the illness raises doubts about the respondent's ability to assist in the defense, and should relate the respondent's condition to a recognized legal definition of competency.

- [10]      **139      Procedure—Miscellaneous**  
          **159      Evidence—Miscellaneous**  
          **162.20   Proof—Respondent’s Burden**  
          **2051.60 Section 6007(b)(1) Proceedings—Abatement**

Medical evidence regarding an attorney’s competency to assist in the defense of a disciplinary proceeding should be submitted to the State Bar Court at the hearing level. The reliability of evidence concerning a person’s mental state is virtually impossible to test in the absence of cross-examination.

- [11 a, b] **111      Procedure—Abatement**  
          **159      Evidence—Miscellaneous**  
          **167      Abuse of Discretion**  
          **2051.60 Section 6007(b)(1) Proceedings—Abatement**

Where it was unclear what evidence hearing judge considered in deciding to abate disciplinary proceeding due to respondent’s claimed inability to assist counsel, and where respondent’s medical evidence lacked important elements and was conclusory, and respondent’s counsel’s declaration was undermined by contrast with earlier declaration regarding respondent’s superior performance of paralegal tasks, review department concluded that hearing judge failed to exercise her discretion properly in abating proceeding without holding hearing to allow presentation and resolution of conflicting evidence.

**ADDITIONAL ANALYSIS**

**Other**

- 2052.10 Section 6007(b)(1) Proceedings—Inactive Enrollment Ordered

## OPINION

## I. PROCEDURAL HISTORY

STOVITZ, J.:

This opinion addresses first-impression questions concerning inactive enrollment under section 6007 (b)(1), Business and Professions Code<sup>1</sup> and the abatement of pending disciplinary proceedings if the subject attorney is enrolled inactive under that section. (See § 6007 (f).)<sup>2</sup>

During an original disciplinary proceeding, respondent L,<sup>3</sup> [1 - see fn. 3] represented by counsel, moved that he be enrolled as an inactive member of the State Bar under section 6007 (b)(3).<sup>4</sup> He asserted that he was unable to assist in his own defense in the disciplinary proceeding. The deputy trial counsel and hearing judge correctly construed respondent's motion as made under section 6007 (b)(1). Although the deputy trial counsel claimed that respondent's showing was inadequate for inactive enrollment, she did not oppose his enrollment under section 6007 (b)(3) if the disciplinary proceedings would not be abated. The judge ordered respondent enrolled as an inactive member under section 6007 (b)(1) and abated the underlying disciplinary proceeding. The Office of Trials seeks our review.

We conclude that the hearing judge properly ordered respondent enrolled as an inactive member, but that the record does not show that she exercised the required discretion before abating the disciplinary proceeding. We will therefore remand this proceeding to the hearing judge to reconsider the abatement of the underlying disciplinary proceeding in light of our opinion.

Respondent was admitted to practice law in California in September 1979. The official membership records of the State Bar show that he has been suspended continuously since July 3, 1990, for non-payment of State Bar membership fees. (See § 6143.) On October 23, 1991, the Office of Trials filed the underlying disciplinary proceeding by means of a 10-count notice to show cause ("notice"). Respondent retained counsel and filed his answer to the notice on February 6, 1992. Appended to his answer was a declaration of his counsel dated February 4, 1992, stating that although respondent had considerable physical, psychological and financial problems and had been receiving treatment for them, he had nevertheless been working for the past 10 months in counsel's office in a non-lawyer capacity doing "research, pleadings, motions, summons and complaints." According to respondent's counsel, the quality of his work was superior and his attention to detail was exemplary. Counsel observed also that respondent showed a deep concern for client problems and was extremely aware of time constraints for client matters. Counsel intended to urge respondent to pay his State Bar fees and return to good standing, as counsel believed that respondent would be an asset to the practice of law, in need of experienced lawyers "who are also mindful of their ethical obligations."

The State Bar filed an amended notice on April 20, 1992, and respondent answered on May 8, 1992. The amended notice charged respondent with misconduct over a two-year period, from early 1988 through November 1990, including misappropriating settlement and other client funds totaling in

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code. Section 6007 (b)(1) was added effective January 1, 1984, and reads as follows: "The board shall also enroll a member of the State Bar as an inactive member in each of the following cases: [¶] (1) A member asserts a claim of insanity or mental incompetence in any pending action or proceeding, alleging his or her inability to understand the nature of the action or proceeding or inability to assist counsel in representation of the member."

2. Section 6007 (f) provides that "The pendency or determination of a proceeding or investigation provided for by this section shall not abate or terminate a disciplinary investigation or proceeding except as required by the facts and law in a particular case."

3. [1] Because of the confidentiality of hearings and records under section 6007 (b), we do not identify the respondent. (See § 6086.1 (a)(2)(A); *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424.) The record in the disciplinary proceeding is, and remains, public, subject to the hearing judge's discretion to seal specific portions of the record where proper grounds appear.

4. Section 6007 (b)(3) provides for inactive enrollment upon a decision by the State Bar Court that due to mental infirmity or illness or because of habitual use of intoxicants or drugs, the attorney is unable to practice law practice law competently or without substantial threat of harm to the interests of clients or the public.

excess of \$50,000 from clients in four matters; settling three cases without the knowledge and consent of clients; misleading clients about the status of three cases which had been settled or dismissed; issuing two checks with insufficient funds in his bank account to cover them; not communicating significant developments to clients and failing to cooperate with the State Bar in its investigation. Counsel engaged in two settlement conferences and several prehearing conferences with a hearing judge.<sup>5</sup> On May 22, 1992, respondent's counsel stated that he intended to move that his client be placed on a "medical inactive status." Motion papers, accompanied by a declaration by respondent's counsel and a letter from a psychiatrist who had examined respondent,<sup>6</sup> were filed with the court on June 11, 1992. The declaration of respondent's counsel asserted that he had not received the assistance necessary from respondent to prepare for the disciplinary hearing and that in his view, respondent's medical condition, including psychiatric problems, were the cause.

On June 15, 1992, the Office of Trials opposed respondent's motion. The deputy trial counsel's objection to placing respondent on inactive status appeared to focus on abatement of the proceedings. She contended that the evidence, including the psychiatrist's report respondent furnished, did not support the showing required to abate the pending disciplinary proceedings. She suggested that since respondent raised his mental condition, that the court issue an order for a mental examination as the least intrusive means of determining respondent's mental condition. (See *In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at p. 432.)

On June 19, 1992, the hearing judge conducted a status conference at which she allowed argument

from the parties on respondent's motion for inactive enrollment. The deputy trial counsel offered to stipulate to respondent's inactive enrollment under section 6007 (b)(3), but assumed that the disciplinary trial would proceed. The judge stated her intent not only to enroll respondent inactive under section 6007 (b)(1), but also to abate the disciplinary proceeding.

On June 22, 1992, the hearing judge filed an order finding that the State Bar had adequate notice of section 6007 (b)(1) as an alternative basis for placing respondent on inactive status. The judge ruled that although respondent's motion stated that it requested relief pursuant to section 6007 (b)(3), respondent's counsel's assertion of respondent's inability to assist counsel fell more appropriately within the ambit of section 6007 (b)(1).

The hearing judge also concluded that the plain language of section 6007 (b)(1) did not require any showing by respondent in order to be placed on inactive status beyond an assertion that respondent's mental state was such that he was unable to assist his counsel in the disciplinary matter. Rejecting any standard of proof, the hearing judge reasoned that if a showing of good cause or a hearing was required, the statute would reflect it and it did not. She also rejected any claimed inconsistent procedure set forth in the Transitional Rules of Procedure of the State Bar as being "irrelevant" because in resolving any conflict, section 6007 (b)(1) would control.

In addition, the hearing judge found that, even assuming that section 6007 (b)(1) required some showing by respondent of evidence that he was unable to assist his counsel, respondent had met that burden. She relied on the June 3, 1992, psychiatrist's report as well as on respondent's counsel's evaluation. (See *ante*.)

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5. The examiner's pre-trial statement filed May 22, 1992, included the statement that if the State Bar Court found respondent culpable of the charges, the Office of Trials would seek disbarment.

6. The psychiatrist's letter stated that the doctor observed respondent on June 3, 1992, and reviewed medical records which respondent brought with him. The psychiatrist summarized respondent's family, educational and medical history and concluded that respondent was in a psychotic depression

resulting in a serious incapacity. The psychiatrist expressed the belief that respondent was unable to practice law at the time or to assist in his own defense. In the doctor's view, respondent was unable to focus his attention on matters dealing with "objective delineation of a judicial nature" and was preoccupied by self-hate and despair. The doctor's report did not state the length of his observation of respondent, whether he had administered any tests to him, whether he had observed any examples of his performance in the practice of law or what information or evidence led to his conclusions.

The hearing judge distinguished two cases relied upon by the deputy trial counsel who argued that there was an insufficient showing of mental incapacity by respondent. Those cases were *Slaten v. State Bar* (1988) 46 Cal.3d 48 and *Ballard v. State Bar* (1983) 35 Cal.3d 274, 284-287. She found those cases dealt with section 6007 (b)(3), not section 6007 (b)(1), that *Ballard* specifically involved a prior version of section 6007 (b), and that any language in it addressing the assertion of inability to assist counsel was not applicable to the statute in its current form. She concluded that respondent's showing was adequate under the statute to enroll him inactive. Without any further discussion, she abated the disciplinary proceedings. She permitted the deputy trial counsel to perpetuate testimony in the disciplinary case in order that no evidence would be lost.

The Office of Trials sought review on a number of grounds.<sup>7</sup> It argues that section 6007 (b)(1) required more than the claim or assertion of the inability to assist counsel. It relies on language from *Ballard v. State Bar, supra*, 35 Cal.3d at p. 286, quoted with approval in *Slaten v. State Bar, supra*, 46 Cal.3d at p. 54, that the inability to assist in the defense is a more serious form or degree of mental illness than the inability to represent clients competently. Therefore, given the seriousness of the mental disease professed by respondent, the Office of Trials urges that respondent must be required to produce some quantum of proof in support of his claim before being placed on inactive status and the underlying disciplinary proceeding abated. Moreover, the Office of Trials claims that the competing interests of due process rights of respondent on one side against the strong public interest in the prosecution of State Bar matters on the other should require the evidence as a whole to establish respondent's mental incompetence prior to the abatement of the disciplinary proceeding. In the deputy trial counsel's view, the evidence presented to establish respondent's mental competency is inadequate.

## II. DISCUSSION

The analysis on review of a hearing judge's order of inactive enrollment under section 6007 (b)(1) is fundamentally different from that of an order of abatement of disciplinary proceedings under section 6007 (f). We discuss these issues separately.

### A. Inactive enrollment under section 6007 (b)(1).

[2] For the reasons we gave in *In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at p. 430, fn. 6, in analyzing proceedings to enroll attorneys inactive under section 6007 (b)(3), we hold that the hearing judge's order of inactive enrollment under section 6007 (b)(1) is subject to independent review pursuant to rule 450 of the Transitional Rules of Procedure of the State Bar.

[3a] To the extent that the Office of Trials contends that a substantive showing is required to support inactive enrollment under section 6007 (b)(1) beyond the claim required by statute, we must reject that contention. The Legislature has determined that a member of the State Bar is to be enrolled inactive upon the assertion of a claim of insanity or mental incompetence made in any pending proceeding, alleging inability to understand the proceeding's nature or alleging inability to assist counsel. That is exactly what respondent alleged. Neither the Legislature nor the Board of Governors of the State Bar have required any affirmative showing of mental illness beyond the making of the statutory claim.

The absence of a requirement to support a mental illness claim with additional, substantive evidence is not limited to section 6007 (b)(1). For example, under section 6007 (a), an attorney is to be enrolled inactive merely upon receiving defined inpatient treatment, or upon other judicial determinations of mental incapacity. Under section 6007 (b)(2), an

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7. Neither respondent nor his counsel filed a brief in response to the examiner's request for review and thus respondent did not participate at oral argument.

attorney is to be enrolled inactive merely upon the entry of a court order assuming jurisdiction over the attorney's law practice. In contrast, when the foregoing conditions have not occurred, but the State Bar nonetheless believes that a member's continued practice poses a substantial threat of harm to clients or the public, the Office of Trials may move for inactive enrollment. To safeguard the member's rights, the Legislature has required a certain affirmative showing to be made in those proceedings. (See §§ 6007 (b)(3), 6007 (c)(1); see also *Conway v. State Bar* (1989) 47 Cal.3d 1107.) [3b] However, where the member intentionally asserts the claim of mental incompetence, in a pending proceeding, alleging inability to understand the proceeding or assist in counsel in defending the charges, as respondent did, no further showing is required and the hearing judge has been given no discretion not to enroll the member inactive under section 6007 (b)(1).

[4] The Office of Trials raises the issue whether a claim of insanity or mental incompetence might also be made by a perfectly rational attorney as a strategic device. Given the severe consequences to the member of inactive enrollment (see, e.g., §§ 6125-6126), public protection goals would still support the inactive enrollment merely upon the making of the claim where intended, even if misguidedly made as a strategic device to impede the prosecution of the disciplinary proceeding. The issue of bad faith could then be appropriately addressed in the context of the requested abatement of the disciplinary proceeding. As we shall now discuss, the mere enrollment of the attorney inactive does not dictate abatement of the underlying disciplinary proceeding.

#### B. Abatement of disciplinary proceeding.

[5] The hearing judge's order on the issue of abatement is a procedural matter, with the standard of review being one of abuse of discretion. (See *Ballard v. State Bar*, *supra*, 35 Cal.3d at p. 286, fn. 22; *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 276; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214.)

The hearing judge ordered the disciplinary case to be abated simply upon respondent's motion papers and her order of inactive enrollment under section 6007 (b)(1), without further inquiry into the facts and circumstances that might sustain or refute the conclusion that abatement was required and without the articulation of criteria for abatement and weighing the record against those criteria. Since section 6007 (f) provides that an inactive enrollment shall not abate a disciplinary proceeding "except as required by the facts or law in a particular case," we invited the deputy trial counsel to file a supplemental brief on the issue of what showing is required under section 6007 (f) to abate the proceeding after respondent's inactive enrollment. The deputy trial counsel argues that the decision to abate a pending disciplinary matter because of the inactive enrollment here must be based on a finding that respondent was actually incompetent to assist in his defense, citing *Slaten v. State Bar*, *supra*, 46 Cal.3d at p. 54. In her opening brief, the deputy trial counsel drew a comparison to criminal procedure. As we shall discuss, in this area of abatement arising from inactive enrollment under section 6007 (b), the principles found in cases such as *Slaten* and analogies to criminal procedure are each apt.

Criminal procedure halts proceedings upon a showing of substantial evidence, such as a sworn statement of a mental health professional, that a defendant cannot understand the criminal proceeding or assist counsel in his or her defense. (Pen. Code, § 1368; *People v. Gallego* (1990) 52 Cal.3d 115, 162.) Once doubt arises as to the competency of the defendant, the criminal court is required to defer the criminal matter pending resolution of the competency issue. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56; *People v. Hale* (1988) 44 Cal.3d 531, 540-541.) Thereafter, a competency proceeding is held to determine if a preponderance of the evidence establishes the defendant's mental capacity to understand the proceeding or assist counsel, a higher standard of proof than necessary to interrupt the criminal process initially. (Pen. Code, § 1369.) The competency hearing is a special proceeding, not a criminal action, and is governed by the rules for civil, rather than criminal, proceedings. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 455; 5 Witkin & Epstein,

Cal. Criminal Law (2d ed. 1989) Trial, § 2989, p. 3667.)<sup>8</sup> At the hearing, the defendant must rebut the presumption of mental competence. (*People v. Medina* (1990) 51 Cal.3d 870, 882; Pen. Code, § 1369, subd. (f).) The defendant is subject to examination by psychiatrists or psychologists appointed by the court.<sup>9</sup> (Pen. Code, § 1369, subd. (a).) If the defendant is found to be mentally competent by a preponderance of evidence, then the criminal prosecution resumes. (Pen. Code, § 1370.)

Although attorney disciplinary matters are sui generis (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302), the deputy trial counsel argues that there is sufficient similarity between the policy interests underlying the criminal competency standards and the interests at stake in determining competence in an attorney disciplinary setting such that comparable standards should be adopted to ensure administrative due process and the protection of the public interest. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226 [application of criminal or civil rules to State Bar disciplinary matters to assure administrative due process determined by facts and policy interests presented]; see also *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929-930.)

[6a] In the law of attorney discipline, the respondent is presumed competent. (*In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at p. 438.) [7a] Respondent has a right to a fair hearing in this disciplinary proceeding. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1115-1116.) This interest may not be as great for an attorney with a license at stake as for a criminal defendant who faces the loss of liberty or whose life is in the balance. (See *Black v. State Bar* (1972) 7 Cal.3d 676, 687-688.) The State Bar's interest is in protecting the public, safeguard-

ing the integrity of the legal profession and the courts and maintaining high standards and public confidence in the legal profession, not in punishing the individual attorney. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.) However, these important prophylactic aims are not served by disciplining an attorney who is mentally incompetent to the degree that he or she cannot assist in a defense against the disciplinary charges.

[7b] If the attorney is unable to assist in his own defense, due process requires that the proceeding be abated. (*Ballard v. State Bar, supra*, 35 Cal.3d at p. 286, fn. 22; see *Slaten v. State Bar, supra*, 46 Cal.3d at p. 55.) In weighing whether one attorney's evidence of mental illness, allegedly resulting in his inability to assist counsel, was sufficient to warrant abatement of the proceedings, the Supreme Court concluded that he had failed to relate his alleged mental illness to "any recognized legal definition of competency (e.g., Pen. Code, § 1367)." (*Slaten v. State Bar, supra*, 46 Cal.3d at p. 56.) [6b] In our view, it is the abatement determination—whether the discipline matter goes forward or is abated until the attorney is able to again understand the discipline case or assist in its defense—which most closely resembles the competency hearing under Penal Code section 1369.

[6c] The Supreme Court's statement in *Slaten* is significant on this point. The Court said: "Inability to assist in the defense should be distinguished from inability to practice competently and without endangering clients or the public. *The former suggests a more serious form or degree of mental illness than the latter.* Accordingly, facts sufficient to support a finding of probable cause to institute inactive status

8. In contrast to the preponderance of the evidence standard used in a criminal proceeding, the establishment of a conservatorship under the Probate Code requires clear and convincing proof. (*Conservatorship of Sanderson* (1980) 106 Cal. App.3d 611; see also *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [requiring proof beyond a reasonable doubt for conservatorship under the grave disability provisions of the Lanterman-Petris-Short Act].) The conservatorship standards of proof are influenced by the stigma and adverse consequences flowing from such an involuntary proceeding. The discretionary decision whether to abate disciplinary proceedings does not involve comparable concerns. We note however,

in a related context, that the Transitional Rules of Procedure of the State Bar require automatic abatement of proceedings against "a member who has been judicially declared to be of unsound mind or, on account of mental condition, incapable of managing his or her own affairs until a judicial determination has been made to the contrary." (Rule 351, Trans. Rules Proc. of State Bar.)

9. Two doctors are chosen, one by each side, if the defendant believes he is competent to stand trial. (Pen. Code, § 1369, subd. (a).)

*proceedings under section 6007, subdivision (b) may not be sufficient to support abatement of a disciplinary proceeding.*” (*Slaten v. State Bar, supra*, 46 Cal.3d at p. 54, quoting *Ballard v. State Bar, supra*, 35 Cal.3d at p. 286, fn. 22, emphasis added.)

In two reported cases, the Supreme Court considered assertions that abatement of the disciplinary proceedings was appropriate because the attorneys involved suffered from a mental condition which rendered them unable to assist in their defense of the disciplinary cases. Neither offered a detailed analysis. In *Newton v. State Bar* (1983) 33 Cal.3d 480, the Court ordered a pending disciplinary case abated until proceedings had been concluded under the predecessor to the present section 6007 (b)(3). Both the volunteer hearing referee and the former review department found insufficient evidence to conclude that the attorney was unable to practice law without endangering clients, but did recommend the attorney seek psychiatric help. (*Id.* at p. 483.) The Court’s review of the record, augmented by the pro se attorney’s written submissions and oral argument before the Court, raised sufficiently serious questions regarding the attorney’s mental condition for the Court to order the abatement. (*Id.* at p. 484.)

In *Slaten v. State Bar, supra*, 46 Cal.3d 48, the Court rejected an attorney’s assertion that it was an abuse of discretion for the State Bar not to abate his disciplinary case while he allegedly was so impaired by mental illness as to be unable to assist counsel or conduct his own defense. (*Id.* at p. 56.) The Court stated that it was the attorney’s burden to establish grounds for the abatement. (*Id.* at p. 54.) It viewed the attorney’s evidence in the context of the record of the disciplinary proceeding and characterized it as “very weak” (*id.* at p. 57), noting that none of the attorney’s pleadings or other written communications with the State Bar provided an indication of the attorney’s impaired condition, in contrast to the attorney in *Newton v. State Bar, supra*, 33 Cal.3d 480. The medical evidence submitted by Slaten, consisting of three letters, was scrutinized as well and found to be vague and deficient because it lacked the data or reasoning upon which the doctor based his diagnosis and opinion and did not provide notice of a specific condition which could be held to impair the attorney’s ability to assist in his own defense. They indicated only that the attorney could not represent himself. The attorney’s own actions in securing these medical

opinions was proof to the Court that the attorney could take purposeful acts to assist in his own defense. (*Slaten, supra*, 46 Cal.3d at p. 56.)

Although the present Transitional Rules of Procedure of the State Bar do not specify a formal procedure for considering how or when a disciplinary proceeding should be abated incident to a section 6007 inactive enrollment, we believe that the *Slaten* case provides important guidance as to the showing required for an abatement.

We must examine what standard of proof is warranted to abate the pending matters “as required by the facts and law in a particular case.” (Bus. & Prof. Code, § 6007 (f).) [8] Ordinarily, unless provided elsewhere, the standard of proof in disciplinary matters is by clear and convincing evidence. In both section 6007 (c) and section 6007 (b)(3) proceedings, that standard has been applied. (*In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at p. 431.) However, in contrasting the procedural safeguards accorded attorneys in section 6007 (b)(3) cases with those under 6007 (c), the Supreme Court has acknowledged that differing risks to the public posed by attorneys faced with inactive enrollment under one or the other section may justify different procedures. (*Conway v. State Bar, supra*, 47 Cal.3d at pp. 1117-1118.)

[6d] As we have noted, *ante*, procedures in criminal matters to test competency to stand trial are special proceedings akin to civil proceedings with the standard of proof being a preponderance of the evidence. In *Slaten v. State Bar, supra*, quoting again from the *Ballard* case, the Court stated that “substantial indications that an attorney is incompetent to assist in the defense of the [disciplinary] proceeding” might require abatement consistent with due process. (*Slaten v. State Bar, supra*, 46 Cal.3d at p. 55, quoting *Ballard v. State Bar, supra*, 35 Cal.3d at p. 286, fn. 22, emphasis added.) Accordingly, we conclude that the preponderance of the evidence standard used in criminal competency proceedings is the appropriate standard for abatement of underlying disciplinary charges upon an inactive enrollment under section 6007 (b).

[9] A motion with supporting written submissions, including a detailed psychiatric report passing muster under *Slaten* could, if unopposed, in many

instances, be sufficient to provide the hearing judge with competent evidence upon which to ground a decision to abate. However, where as here, the adequacy of respondent's showing is questioned, the Supreme Court has provided additional guidance. In the *Slaten* case, it did not limit itself to the evidence proffered by the attorney, but weighed such evidence in the context of the whole record of the disciplinary proceedings. (*Slaten v. State Bar, supra*, 46 Cal.3d at p. 56.) The Court outlined the substantive issues that should be addressed in any proffered medical submission on a respondent's competency. These include the nature of the medical examination; the tests, if any, conducted by the expert; the symptoms of the respondent's condition; the diagnosis and cause, if determined, of the condition, and any past or proposed treatment. (*Id.* at pp. 55-56.) The report should note if the illness is of sufficient seriousness as to raise doubts about the attorney's ability to assist in his own defense. Finally, it should relate the respondent's condition to a recognized legal definition of competency. (*Ibid.*) [10] The Court indicated a preference for the medical evidence to be submitted to the State Bar Court at the hearing level and noted that the reliability of evidence concerning a person's mental state is virtually impossible to test in the absence of cross-examination. (*Ibid.*)

[11a] Applying these tests to respondent's showing of incapacity in the absence of a hearing, the issue ultimately is whether the hearing judge abused her discretion in abating this matter. It is not clear from the hearing judge's decision either what evidence, if any, she specifically considered in support of her decision to abate or what tests she applied to evaluate the eligibility of this case for abatement. In her alternate basis for inactive enrollment under section 6007 (b)(1), the hearing judge indicated her reliance on the two June 1992 submissions by respondent's counsel. The letter from the psychiatrist who met with respondent once lacked some important requirements contemplated by *Slaten*. While very detailed in reciting respondent's prior medical history, it did not indicate the nature of the doctor's examination of respondent, whether any tests were given respondent, or whether symptoms manifested by respondent related to his condition beyond obesity, and it was virtually conclusory that respondent suffers from a serious depression which undermined his ability to assist his own counsel. While the doctor did indicate

that respondent was unable to focus on judicial considerations, his report was again conclusory in linking respondent's condition to the Penal Code's definition of legal competency. (Pen. Code, § 1367, subd. (a).)

[11b] The judge may have given weight to the June 1992 declaration of respondent's counsel. Yet that declaration is seriously undermined when contrasted with the same counsel's February 4, 1992, declaration in which counsel stated that he had observed respondent for the past 10 months and respondent was performing paralegal-type tasks in a superior manner and displaying very high ability to focus on his responsibilities, despite his personal, financial and psychological problems. Counsel's changed opinion, coming on the eve of trial, with no explanation of counsel's laudatory assessment of respondent's mental state just a few months earlier, when coupled with the weaknesses of the psychiatrist's report we have discussed, provided no adequate basis for abatement. By abating the proceeding on this record, without holding a hearing allowing for the presentation and resolution of the conflicting evidence of respondent's claimed inability to assist counsel, we must conclude that the hearing judge failed to properly exercise the discretion vested in her. (Cf. *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 340; see *In the Matter of Morone, supra*, 1 Cal. State Bar Ct. Rptr. at p. 214.)

### III. CONCLUSION

For the reasons stated, we conclude that sufficient questions were raised by the deputy trial counsel regarding the adequacy of respondent's showing to require a hearing on the issue of abatement, submission of evidence, including the taking of live testimony if appropriate, specific findings of fact regarding the evidence, and conclusions of law as to respondent's showing of incompetency by a preponderance of evidence before ordering the underlying disciplinary proceeding abated. Solely as to the issue of abatement of the pending disciplinary proceeding, we remand this matter to the hearing department for further proceedings consistent with this opinion.

We concur:

PEARLMAN, P.J.  
NORIAN, J.