

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DOUGLAS WAYNE TROUSIL

A Member of the State Bar

[No. 85-O-13574]

Filed November 20, 1990

SUMMARY

Respondent was found culpable on a single charge of practicing law while he was suspended from practice, first for nonpayment of State Bar dues, and later as a result of disciplinary action. Respondent had been disciplined on three prior occasions. All of respondent's disciplinary proceedings involved misconduct which occurred before respondent was, for the first time, accurately diagnosed and adequately treated for a long-standing mental disorder, causing dramatic improvement in his condition. Respondent had committed no misconduct since that date. His third prior disciplinary proceeding, which was resolved after his diagnosis and treatment, had resulted in a stipulation, approved by the Supreme Court, in which the State Bar agreed to discipline that did not include any actual suspension, despite misconduct seemingly more serious than that involved in this matter. In this matter, the hearing department recommended a three-year stayed suspension, three years probation with continued treatment, and three months actual suspension. (C. Thorne Corse, Hearing Referee.)

The State Bar sought review, contending that the recommended discipline was inadequate, and that disbarment should be recommended pursuant to standard 1.7(b). Because compelling mitigating circumstances clearly predominated, the review department held that under standard 1.7(b), disbarment would be inappropriate. Concluding that due to his recovery respondent did not pose a continuing threat of harm to the public, the review department reduced the recommended discipline to two years stayed suspension, two years probation with continued treatment, and one month actual suspension.

With respect to the specific charges of which respondent was found culpable based on his practicing law while suspended, the review department held that: (1) respondent was properly charged with and found culpable of violating sections 6068(a), 6125 and 6126 of the Business and Professions Code; (2) as a matter of law, respondent's unauthorized practice did not violate section 6127; (3) the charge of violating section 6103 was redundant, and (4) under all of the circumstances, respondent's unauthorized practice did not involve moral turpitude, in that it occurred with his client's knowledge and at the client's request. The review department also rejected the State Bar's contention that respondent violated sections 6068(a), 6103, and 6106 and former Rule of Professional Conduct 8-101(B)(4) by retaining, with his client's consent, fees earned for services rendered while respondent was suspended from practice. Respondent could not be found culpable of violating rule 2-107 because this violation had not been charged.

COUNSEL FOR PARTIES

For Office of Trials: Loren McQueen

For Respondent: David A. Clare

HEADNOTES

- [1] **166 Independent Review of Record**
Review department conducts de novo review of hearing department decisions, similar to that conducted by Supreme Court, based on the record established in the hearing department.
- [2] **130 Procedure—Procedure on Review**
169 Standard of Proof or Review—Miscellaneous
Party seeking review is expected to set forth challenged finding, conclusion, or ruling below and point out wherein error lies.
- [3] **130 Procedure—Procedure on Review**
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous
Issues must be addressed on de novo review despite lack of appropriate briefing.
- [4] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Sections 6125 and 6126 together, when coupled with a section 6068(a) charge, create a basis for discipline for unlawful practice of law by a member of the State Bar.
- [5] **231.50 State Bar Act—Section 6127**
Section 6127 does not authorize discipline for unauthorized practice of law that constitutes contempt of federal court.
- [6 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
220.00 State Bar Act—Section 6103, clause 1
Where sole court order violated by attorney was order suspending attorney from practice, and attorney was found culpable of unauthorized practice under other statutes, charge of violating section 6103 was superfluous.
- [7 a, b] **213.10 State Bar Act—Section 6068(a)**
220.10 State Bar Act—Section 6103, clause 2
Accepting fees for services rendered while suspended from practice does not violate sections 6068(a) or 6103.
- [8] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
290.00 Rule 4-200 [former 2-107]
Client who has consented to attorney's retention of illegal fees may properly demand return of such fees.

- [9 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
290.00 Rule 4-200 [former 2-107]
Discipline cannot be imposed for violations not charged; where attorney was charged only with retaining client funds as fees without client consent, and referee found client had consented, attorney could not be disciplined on ground that fee was illegal.
- [10 a, b] **221.00 State Bar Act—Section 6106**
Unauthorized practice of law may or may not constitute moral turpitude. It did not constitute moral turpitude for attorney to continue to render, and accept fees for, legal services which, at client's insistence and with client's knowledge and consent, were rendered during attorney's suspension from practice.
- [11] **582.39 Aggravation—Harm to Client—Found but Discounted**
586.31 Aggravation—Harm to Administration of Justice—Found but Discounted
588.32 Aggravation—Harm—Generally—Found but Discounted
720.30 Mitigation—Lack of Harm—Found but Discounted
Harm to public and to administration of justice, and risk of harm to client, is inherent in unauthorized practice of law.
- [12] **102.10 Procedure—Improper Prosecutorial Conduct—Reopening**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
755.52 Mitigation—Prejudicial Delay—Declined to Find
Evidence provided by State Bar demonstrated that closure and reopening of investigation of disciplinary matter was in compliance with applicable rules and did not bar disciplinary proceedings; respondent had not been prejudiced by delay.
- [13] **801.30 Standards—Effect as Guidelines**
Standards operate as a guideline and do not require any outcome.
- [14 a, b] **513.90 Aggravation—Prior Record—Found but Discounted**
806.51 Standards—Disbarment After Two Priors
Disbarment based on presence of multiple prior disciplinary matters is appropriate upon demonstration of common thread among disciplinary matters, pattern of misconduct, or increasing severity, but was not appropriate in matter where those factors were not present and compelling mitigating circumstances clearly predominated.
- [15] **750.10 Mitigation—Rehabilitation—Found**
802.30 Standards—Purposes of Sanctions
806.51 Standards—Disbarment After Two Priors
863.10 Standards—Standard 2.6—Suspension
863.20 Standards—Standard 2.6—Suspension
863.30 Standards—Standard 2.6—Suspension
Where attorney found culpable of practicing while suspended no longer posed threat of harm to public, 30-day actual suspension was nonetheless appropriate to protect integrity of profession and courts.

- [16] **172.40 Discipline—Prescribed Medication**
172.50 Discipline—Psychological Treatment
725.12 Mitigation—Disability/Illness—Found
 Blood testing and continuing psychological treatment were appropriate probation conditions where mitigating evidence included showing that mental condition responsible for attorney's misconduct had been successfully alleviated by ongoing medication and treatment.
- [17] **174 Discipline—Office Management/Trust Account Auditing**
 Probation condition requiring detailed reporting on current client matters was excessively burdensome and not required for public protection in matter where respondent had not been found culpable of client neglect.
- [18] **175 Discipline—Rule 955**
 Requirement to comply with rule 955 of the California Rules of Court became inappropriate where length of recommended actual suspension was reduced to thirty (30) days.
- [19] **173 Discipline—Ethics Exam/Ethics School**
 Requirement to take and pass professional responsibility examination was not appropriate where attorney had successfully completed examination in connection with previous discipline.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
- 230.01 Section 6125
- 231.01 Section 6126

Not Found

- 213.15 Section 6068(a)
- 213.95 Section 6068(i)
- 220.05 Section 6103, clause 1
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 231.55 Section 6127
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 290.05 Rule 4-200 [former 2-107]

Aggravation

Declined to Find

- 625.20 Lack of Remorse

Mitigation

Found

- 735.10 Candor—Bar

Standards

- 822.51 Misappropriation—Declined to Apply
- 835.10 Moral Turpitude—Declined to Apply

Discipline

- 1013.08 Stayed Suspension—2 Years
- 1015.01 Actual Suspension—1 Month
- 1017.08 Probation—2 Years

Probation Conditions

- 1022.10 Probation Monitor Appointed
- 1023.30 Testing/Treatment—Prescription Drugs
- 1023.40 Testing/Treatment—Psychological

OPINION

PEARLMAN, P.J.:

The essential facts involved in this matter are simple and not in dispute. Respondent was admitted to practice in June of 1977. He was found culpable on a single charge that while suspended for nonpayment of dues during 1983, respondent took on a consumer bankruptcy case, and continued to work on it after a subsequent disciplinary suspension went into effect, thus practicing law while suspended. Respondent admitted representing the bankruptcy client while suspended, although he had sought to remove himself from all pending cases and to substitute other counsel which this particular client refused to permit. No actual harm was found to have occurred to respondent's client.

Respondent was also charged, in connection with the same matter, with retaining fees without the client's permission out of money the client had given him to pay creditors, thus misappropriating client funds.¹ The referee dismissed this charge, finding in favor of respondent that the client had agreed to the retention of the funds for fees.

The central issue before us is the effect of respondent's prior discipline ("priors"). Respondent has three priors. All of the misconduct involved in the priors, as well as the initial misconduct in this matter, occurred before February 1984, when in the course of treatment following a second suicide attempt, respondent was diagnosed for the first time as having had bipolar mood disorder (manic depressive syndrome) for most of his life. Since February of 1984, respondent has been receiving ongoing treatment, including medication. His condition has improved dramatically and the record before us indicates that he has committed no new misconduct.

Based on the conclusion that compelling mitigating circumstances clearly predominated, the referee recommended a three-year stayed suspension, three years probation including a condition that re-

spondent continue to undergo psychological treatment, and three months actual suspension. The examiner requested review on the ground that the hearing panel's recommendation of discipline is insufficient in light of the record. She argues, among other things, that, in view of the priors, standard 1.7(b) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V; hereafter "standard(s)") requires disbarment. No mention was made in her brief of the order of the Supreme Court in connection with respondent's third prior which imposed *no* actual suspension pursuant to *the stipulation of the Office of Trial Counsel*, approved by a referee and recommended to the Supreme Court by our predecessor review department, on seemingly more serious conduct than the present record, based on the diagnosis of respondent's psychological disorder placing a new perspective on all of his prior misconduct. (Exh. 42, stipulation as to facts and discipline pursuant to rules 405-408 of the Rules of Procedure, p. 10, ¶ 5.) Moreover, standard 1.7(b) expressly indicates that disbarment is clearly *not* warranted where, as here, there is a finding of the most compelling mitigating evidence. Comparable Supreme Court precedent and respondent's lengthy period of subsequent freedom from misconduct lead us to recommend two years stayed suspension, two years probation including continued psychological treatment, and one month actual suspension as the appropriate level of discipline.

COUNT ONE

Respondent was admitted to the practice of law in California on June 28, 1977. In count one, respondent was charged with accepting representation of Dominic Castanon in August of 1983 in a bankruptcy matter while suspended and making appearances in the United States Bankruptcy Court through August 1984 without being an active member of the State Bar. The referee found that from June 28, 1982, through February 23, 1984, respondent was suspended from the practice of law for non-payment of State Bar dues. In August of 1983, during this suspension, respondent was retained by Dominic

1. A third count, for failure to cooperate in the investigation of the first two counts, was dropped by the examiner at the

hearing when she learned that an answer to the investigator's letter had in fact been sent. (R.T. pp. 70-71.)

Castanon to handle a bankruptcy matter. (Exhs. 1, 2, 3; R.T. pp. 10-12, 71.) Respondent represented Castanon in the bankruptcy during that suspension (exhs. 2-11; R.T. pp. 13-18) as well as after respondent paid his dues and was reinstated in February of 1984. (Exhs. 12-17; R.T. pp. 19-23.)

From April 13, 1984, through October 15, 1984, respondent was again suspended from the practice of law, this time by reason of a disciplinary proceeding. Respondent arranged with another attorney, Harriet Goldfarb, to take over his cases for him during this suspension.² However, Castanon refused to accept Goldfarb as his counsel, and insisted that respondent continue to represent him. (Finding of fact 8; R.T. pp. 60-63, 66-67, 74, 106.) Accordingly, respondent continued to handle the bankruptcy matter for Castanon during his disciplinary suspension, until the termination of their relationship in August 1984. (Exhs. 18-33; R.T. pp. 23-34.) Disbelieving Castanon's testimony that he was unaware of either of respondent's suspensions, the referee found, based on the testimony of respondent and Goldfarb, that Castanon was well aware of both of them. Citing "his demeanor on the witness stand, internal inconsistencies in his testimony and his obvious bias against [r]espondent," the referee found Castanon unworthy of belief. (Finding of fact 7, fn. 3.) On review, the examiner does not challenge the referee's credibility determination. We adopt the referee's findings as modified in his ruling on request for reconsideration dated October 23, 1989.

COUNT TWO

Count two charged respondent with retaining \$500 of client funds for his attorney fees without his client's consent. The referee found the facts to be otherwise. On July 2, 1984, Castanon delivered to Goldfarb a check for \$1,000 and \$880 in cash. The referee found that these funds were intended for delivery to respondent to be applied by him to amounts owing to Castanon's creditors. (Finding of fact 10; R.T. pp. 26-28, 58.) Goldfarb delivered the

funds to respondent. (Finding of fact 10.) The check proved to be uncollectible. (Finding of fact 10; R.T. p. 78.) As a result, on or about August 1, 1984, Castanon gave respondent \$1,900, in a money order and cash, for the same purpose, but the creditor refused to accept this payment because of Castanon's earlier delinquencies. (Finding of fact 10; exhs. 23, 24, 26, 27.) On August 1, 1984, respondent returned the \$1,900 and the \$1,000 bad check to Castanon; on August 6, 1984, respondent returned \$380 of the \$880 received in cash to Castanon. Respondent retained the remaining \$500 as fees for his services in dealing with the consequences of Castanon's having written the uncollectible check, and in defending the most recent adversary proceeding brought against Castanon by one of his creditors. (Finding of fact 11; exhs. 28, 29.)

Respondent testified that between August 1 and August 6, 1984, Castanon gave respondent his approval of the retention of \$500 out of the \$880 for fees. (R.T. p. 79.) The referee credited this testimony over that of Castanon, and determined that the \$500 was retained with Castanon's consent. (Finding of fact 13.) This credibility determination is also not challenged by the examiner on review.

DISCUSSION

[1] It is our duty on review of a disciplinary recommendation of a former referee of the State Bar Court to conduct a similar de novo review to that which the Supreme Court conducts—to examine the record, reweigh the evidence and pass on its sufficiency. (See, e.g., *Farnham v. State Bar* (1988) 47 Cal.3d 429, 433.) While the review department undertakes de novo review, it does so based on the record established in the hearing department. The review department may adopt findings, conclusions and a decision at variance with the hearing department (rule 453, Trans. Rules Proc. of State Bar), but [2] the party seeking review is expected to set forth the challenged finding or conclusion of law or other ruling below and point out wherein the error lies.

2. As the referee noted, "[t]here is no claim by the State Bar, nor is there any evidence tending to show, that [r]espondent represented anyone other than Castanon or otherwise engaged

in the practice of law during either period of suspension." (Finding of fact 9.)

Having conducted de novo review in the instant case, we find that the charge of practicing law while suspended is clearly established by the evidence. Indeed, respondent admits it. On this charge, the referee found respondent culpable of violating not only Business and Professions Code section 6125, which prohibits the unlicensed practice of law, but also Business and Professions Code sections 6068 (a) and 6103.³

The referee rejected culpability under sections 6126 (misdemeanor) and 6127 (civil contempt) as beyond his jurisdiction and, in any event, found that the substantive offenses set out in both sections are made culpable by section 6125. [3] It is unclear whether the examiner intended to challenge this ruling. It was not listed as a ground for review in her request for review. (See rule 450(a)(iii), Trans. Rules Proc. of State Bar.) It is mentioned in the introductory paragraph of her brief but is not supported by any argument in the body of the brief nor is it mentioned in the conclusion of the brief as a requested culpability determination. As a consequence, the issues are not addressed in respondent's brief either. Nevertheless, upon our *de novo* review of the record we must address this question despite the lack of appropriate briefing.

In *Chasteen v. State Bar* (1985) 40 Cal.3d 586, 591, the hearing referee found the respondent to have violated sections 6126 and 6127 by the unauthorized practice of law without active membership in the State Bar. There, the respondent did not challenge culpability under sections 6126 and 6127 and the Supreme Court did not indicate whether it found culpability under either provision or whether the referee exceeded his jurisdiction in so finding. Subsequently, in *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218 the respondent was found culpable of violating section 6125 without any finding of culpability under either section 6126 or section 6127. The *Ainsworth* opinion does not indicate whether a violation of either of these provisions was charged. On the other hand, most recently in *Morgan v. State Bar* (1990) 51 Cal.3d 598, 604, the Court concluded that the peti-

tioner had violated both sections 6125 and 6126 by his unauthorized practice of law while suspended.

In none of these cases had the petitioner been convicted of a criminal misdemeanor pursuant to section 6126. Neither *Chasteen* nor *Morgan* holds that the petitioner therein was guilty of a misdemeanor for which he had never been criminally charged; nor would it be appropriate to do so, as the burden of proof in a disciplinary proceeding is not the same as would be required in a criminal proceeding. [4] Rather, we read *Morgan* as construing sections 6125 and 6126 together to make the unlawful practice of law a crime and to create a standard which can form the basis of professional discipline when coupled with a section 6068 (a) charge. (See discussion *post*.) We therefore conclude that respondent was properly charged with violation of sections 6125 and 6126 and was culpable of violating both.

[5] Section 6127 appears to present a different issue. It expressly states that "proceedings to adjudge a person in contempt of court under this section are to be taken in accordance with the provisions of title V of Part III of the Code of Civil Procedure [Contempts]." Not only does the Legislature appear not to have anticipated an original State Bar proceeding charging contempt of court under section 6127, but the alleged contempt here involved contempt of a federal bankruptcy court. Section 6127 does not address possible contempt of a federal court. We therefore agree with the referee's refusal to find respondent culpable of a section 6127 violation.

We now address the issue of respondent's culpability under sections 6068 (a) and 6103. In *Sands v. State Bar* (1989) 49 Cal.3d 919, 931, the Court rejected culpability under section 6068 (a) on three counts involving violation of section 6106 and numerous rule violations, but upheld culpability under section 6068 (a) on a fourth count where the underlying charge was bribery of a hearing officer who had already pleaded guilty to that felony offense. Similarly here, the violation of section 6068 (a) is predicated on respondent's violation of criminal

3. All statutory references hereafter are to the Business and Professions Code unless expressly indicated otherwise.

provisions of the Business and Professions Code. (Bus. & Prof. Code, §§ 6125 and 6126.) There is no express provision for professional discipline to be imposed directly as a consequence of a section 6125 or 6126 violation. Indeed, section 6125 may be violated by persons who are not lawyers and who are thus not subject to discipline. Charging a respondent with violation of section 6068 (a) by reason of alleged violation of sections 6125 and 6126 provides the basis for imposition of professional discipline for the crime of practicing law while suspended.⁴

Section 6103 poses a different question. The Supreme Court has repeatedly held that section 6103 “defines no duties.” (*Baker v. State Bar* (1989) 49 Cal.3d 804, 815; *Sands, supra*, 49 Cal.3d at p. 931; *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561.) Nonetheless, in all of the recent cases in which this issue was addressed the high court was focusing on the general language in section 6103 which states that “any violation of the oath taken by him, or of his duties as such attorney, constitute[s] cause[] for disbarment or suspension.” The Court has not specifically addressed the question whether any duty is defined by that part of section 6103 which refers to disobedience of court orders.

Section 6103 states, “A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession which he ought in good faith to do or forebear, . . . constitute[s] cause[] for disbarment or suspension.” Like an attorney’s oath and duties, obedience of court orders is covered elsewhere in the Business and Professions Code. Section 6068 (b) specifies that it is the duty of an attorney “To

maintain the respect due to the courts of justice and judicial officers.” The respect due to the courts includes compliance with applicable court orders absent a good faith belief in a legal right not to comply. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 954.)⁵ Thus, any wilful violation of a court order clearly could be charged as a violation of section 6068 (b) just as was done in *Maltaman*. It therefore appears unnecessary to seek to rely on section 6103 as “creating a duty” or otherwise stating an independent basis for culpability by articulating the consequences of disobedience of a court order. [6a] Nevertheless, we do not need to determine in this case whether section 6103 defines a duty not to disobey court orders. Any separate charge for wilful violation of a court order is redundant under the circumstances presented here. That is because the only court orders involved are the two orders of the Supreme Court effectuating respondent’s two suspensions.

A licensed member of the State Bar can only be suspended by order of the Supreme Court.⁶ [6b] Respondent’s violation of Business and Professions Code section 6125 for practicing while suspended necessarily encompassed violation of the two successive Supreme Court orders which removed him from practice for failure to pay dues and for discipline. Having found respondent culpable of violating section 6125, we treat the issue of culpability under section 6103 as superfluous.

We turn now to the issue of respondent’s culpability on count two. As noted above, the referee found respondent’s testimony that the client had authorized the retention of fees to be more credible than the client’s testimony that it was not authorized.

4. Similarly, violation of section 6152 of the Business and Professions Code (prohibition of solicitation) constitutes a misdemeanor under section 6153, but no statute expressly makes violation of section 6152 a disciplinable offense. Section 6068 (a) likewise provides a basis for imposing discipline for violation of section 6152. (*In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 189.)

5. In *Maltaman*, the Supreme Court noted “the evidence warrants the conclusion that petitioner’s postjudgment disobedience . . . involved . . . a disrespect for law and the judicial system, as proscribed by Business and Professions Code section 6068.” (43 Cal.3d at p. 954.) The petitioner had been

charged with violating subsections (a), (b) and (d) of section 6068. The Court specifically linked petitioner’s disrespect for the legal system to violation of subsection (b). (43 Cal.3d at p. 958.)

6. Effective December 1, 1990, the State Bar Court will have the power to impose certain temporary suspensions. (Rule 951, Cal. Rules of Court, as amended Sept. 25, 1990, effective December 1, 1990.) The sole authority to impose final disciplinary suspensions will remain with the Supreme Court, however, and all suspensions will continue to be imposed by court order, either of the Supreme Court or the State Bar Court.

(Decision at pp. 4-5; see also *id.* at p. 3, fn. 3.) Based on the record, this finding cannot be characterized as clearly erroneous, and the examiner does not argue that it was. [7a] Nonetheless, the examiner argues that respondent should be found culpable of violating sections 6068 (a), 6103 and 6106 and former rule 8-101(B)(4) of the Rules of Professional Conduct⁷ contending, for the first time on review, that the payment of fees, even if authorized by the client, was illegal⁸ because the services for which the fees were charged were rendered while respondent was suspended from practice.⁹

[7b] We reject culpability under sections 6068 (a) and 6103 pursuant to *Baker, Sands and Middleton*. We likewise find no culpability as charged under rule 8-101(B)(4). As the referee pointed out at the hearing, respondent was not charged with having accepted an illegal fee (a violation of former rule 2-107(A)), and therefore could not be found culpable on such a charge even though the evidence established a violation. (R.T. p. 92.)

[8] While a client who has consented to retention of illegal fees may properly demand to receive back such illegal fees, the notice to show cause did not allege that respondent accepted illegal fees in violation of rule 2-107 and retained them after client demand in violation of rule 8-101(B)(4). [9a] The referee properly found that the issue of illegality was not before him. (R.T. p. 92.) The examiner

neither notified the respondent in the original charges that illegality of the fees was being charged as a basis for culpability under rule 8-101(B)(4), nor did she seek to amend the pleadings to so charge after the issue was brought to the referee's attention in closing arguments and he concluded that it was not charged. To the contrary, in the court below, the examiner put at issue solely the lack of client consent, and argued that respondent unilaterally decided to pay himself from client funds, which the referee found to be untrue. When the referee concluded that illegality was outside the charges, the examiner rested without seeking to amend the notice to conform to proof.

Thereafter, the examiner neither raised the illegality issue as a ground for review nor mentioned in her brief that the referee had rejected the issue of illegality as outside the charges before him. The procedural history of this issue should have been set forth in her brief. [9b] The State Bar Court cannot impose discipline for any violation not charged. (*Gendron v. State Bar* (1985) 35 Cal.3d 409, 420.) If evidence produced before the hearing panel shows the attorney committed uncharged ethical violations, the State Bar must seek to amend the notice to show cause to conform to the evidence in order to seek discipline based on those violations. (See *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929 for a discussion of the limitations of appropriate amendments to the charges at trial.)

7. New Rules of Professional Conduct became effective on May 27, 1989. References to Rules of Professional Conduct herein are to the former rules which were in effect at the time of the events at issue in this matter.

8. The examiner relies on *Alpers v. Hunt* (1890) 86 Cal. 78, a case involving illegal contracts to share attorneys fees with lay persons, as her sole cited authority for the proposition that suspended attorneys may not legally contract for attorneys fees for services rendered while suspended. There is more apt authority. Section 6125 is a regulatory statute prohibiting the practice of law by anyone other than an active member of the State Bar. Statutes of this type operate as "a police measure, for the protection of the public and . . . a contract of an unlicensed person for the furnishing of [legal] services will not be upheld." (*Payne v. De Vaughn* (1926) 77 Cal.App. 399, 403; *Fewel & Dawes, Inc. v. Pratt* (1941) 17 Cal.2d 85, 90; see generally 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 491, p. 436.)

The general rule with respect to contracts made in violation of regulatory statutes is that "when the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public . . . the imposition of the penalty amounts to a prohibition against doing the business without a license and a contract made by an unlicensed person in violation of the statute or ordinance is void." (*Wood v. Krepps* (1914) 168 Cal. 382, 386; see also *Otlino v. Campbell* (1949) 91 Cal.App.2d 382; *California Chicks, Inc. v. Viebrock* (1967) 254 Cal.App.2d 638, 641; 1 Witkin, Summary of Cal. Law, Contracts, § 492, p. 437, and cases cited therein.)

9. The August 6, 1984 letter from respondent to the client that discusses the retention of fees specifies the services for which the fees were charged. (Exh. 29.) It appears from the record that these services were rendered after April 13, 1984, while respondent was under disciplinary suspension.

We turn now to the question of whether respondent violated section 6106. The referee found that respondent's conduct in this matter did not amount to moral turpitude. (Conclusions of law 3, 4.) We agree. Neither *Chasteen* nor *Morgan* addressed the issue of whether it is or may be moral turpitude to continue to practice law while under suspension. Violation of section 6106 does not appear to have been charged in either *Chasteen* or *Morgan*.

The fact that payment for services of unlicensed persons is prohibited by statute does not, in and of itself, make it morally reprehensible. The distinction has long been drawn between contracts *malum in se* (against good morals) and those which are *malum prohibitum* (prohibited by statute). (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 441, p. 396.) While either type of proscribed contract is generally void (*Smith v. Bach* (1920) 183 Cal. 259, 262), a contract which is *malum prohibitum* does not necessarily evince "serious moral turpitude." (*Robertson v. Hyde* (1943) 58 Cal.App.2d 667, 672; see also *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 451, p. 402.) "There are many varieties and degrees of illegality. These varieties and degrees must be taken into account in determining the juristic effect of a transaction that involves some form of illegality." (6A Corbin on Contracts (1962) § 1534, p. 816.) For this reason, the Supreme Court routinely asks the State Bar Court to hold a hearing on whether various misdemeanor convictions involve moral turpitude or other misconduct warranting discipline. [10a] Violation of sections 6125 and 6126 appears to fall into the category of conduct which may or may not involve moral turpitude as defined by Supreme Court precedent in attorney disciplinary proceedings.

[10b] We therefore examine the record as a whole. At the time the services in question were rendered, respondent represented the client only because the client insisted that respondent remain in the case even though the client knew that respondent had been suspended and wished to withdraw. (Finding of fact 8; R.T. pp. 67, 74.) The referee did find that respondent misrepresented to the bankruptcy court his continued authorization to practice (presumably a misrepresentation accomplished by silence

when there was a duty to speak), but the referee further found that such misrepresentation was incidental to the unauthorized practice itself. (Finding 17, citing standard 1.2(b)(iii).) We agree with the referee's construction of section 6106 as not intending to embrace within its ambit the bare essentials of a section 6125 violation. Nor do we find evidence that respondent violated section 6106 on the basis of the facts before us. While it was wrong of respondent knowingly to continue to practice while suspended, we conclude the pressure of his client's request negates a conclusion that moral turpitude was involved.

FACTORS IN AGGRAVATION

Respondent has three prior disciplinary proceedings on his record which were admitted as factors in aggravation in this proceeding. First, in 1984, he was suspended for two years, the suspension was stayed, and he was given two years probation with an actual suspension for six months. This is the suspension which was in effect while respondent represented Castanon between April and August 1984. The offense for which respondent was suspended this first time was that, in 1980, he had made use of a forged power of attorney, purportedly issued by a man whom he knew to be dead, to obtain a loan for the latter's widow, and misappropriated a portion of the proceeds thereof. (Exh. 39.)

In March 1985, effective in April 1985, respondent was again suspended for a period of two years. Once again, the suspension was stayed, and he was given two years probation with an actual suspension for six months. In this second proceeding, the basis for discipline was that in four matters during 1978, 1979 and 1981, respondent failed to keep his clients adequately informed, failed to represent clients diligently and failed promptly to deliver funds and property to his clients. (Exh. 41; see *Trousil v. State Bar* (1985) 38 Cal.3d 337.)

In November 1985, respondent was again charged with misconduct. In this third matter, respondent and the State Bar stipulated to both facts and discipline. Once again, notwithstanding respondent's two prior suspensions, respondent was suspended for a period of two years (consecutive to the suspension ordered earlier in 1985 proceedings

as described above), the suspension was stayed, and respondent was placed on probation for two years. However, significantly, this time no actual suspension was imposed, by stipulation of the State Bar. The charges to which respondent stipulated in the third proceeding were similar to the charges in the second proceeding, that in three matters during 1980, 1981 and 1982, he failed to represent clients diligently and failed to communicate with clients. (Exh. 42).¹⁰

Besides the three prior instances of discipline, no other factors in aggravation were found by the referee. (See findings of fact 16-20.)¹¹ On review, although the examiner urges disbarment, she does not argue that any additional aggravating factors should have been found to exist.

MITIGATING FACTORS

The referee's findings as to mitigation are set forth in findings of fact 21 through 25. There was no harm caused to the client or any other individuals by respondent's misconduct herein; he has been diagnosed as a manic depressive which has been brought under control since the time he undertook the representation of Castanon; respondent exhibited candor and cooperation with the State Bar; and the record discloses no suggestion of misconduct in the five years (now six) since the events in question. The examiner does not argue that any of these findings are unsupported by the evidence, except the second finding. We construe the referee's finding of no harm caused to be limited to the issue of harm to individuals involved in the bankruptcy proceeding, presumably because no one became aware of respondent's incapacity to act prior to completion of the proceeding. [11] Inherent in the section 6125 violation, of which respondent was found culpable, was harm to

the public and administration of justice by holding himself out as a licensed practitioner before the United States Bankruptcy Court in the Central District of California when he had no authority to so act. He thereby also created a risk of substantial harm to his client which did not in fact materialize.

As to the second finding, the examiner argues that respondent did not introduce adequate evidence that his psychiatric disorder was under control. However, in addition to respondent's testimony on this point, and the medical evidence attached to the stipulation in the most recent prior procedure (which was introduced into evidence in the present matter as exhibit 42), the following facts support the referee's finding.

First, in the third prior proceeding, the State Bar stipulated to no actual suspension of respondent for conduct which did cause harm to his clients on the basis that "[t]he new information regarding [r]espondent's medical condition provides a perspective on [r]espondent's prior disciplinary matters which was not available during the pendency of those matters." (Exh. 42, stipulation at p. 10.) That stipulation to no actual suspension was approved by the review department and adopted by the California Supreme Court. Significantly, the misconduct in this matter also began *prior* to the time respondent's condition was first diagnosed and initially treated in February 1984, was continued thereafter only at the insistence of his client, and terminated no more than six months later.

Second, the record discloses substantial additional evidence that respondent's medical condition no longer makes him a threat to the public. Respondent was on State Bar probation continuously from the end of his first six-month suspension (October

10. The record does not reflect that the charges brought in the instant proceeding were able to be consolidated into the third proceeding in which the stipulation was entered. One matter which was pending in investigation at that time was consolidated into the stipulation, but the stipulation does not state whether any additional investigation matters were pending when it was signed. We assume that this matter was not the subject of pending charges when the stipulation was reached.

11. The referee found that respondent's testimony indicated that respondent had previously had "a lack of appreciation of the seriousness of his offense" with respect to practicing while suspended for nonpayment of dues. (Finding of fact 19; see also finding of fact 8.) However, the referee concluded that respondent's attitude had subsequently improved, and apparently did not rely on this finding as an aggravating factor. (Finding of fact 19.) We decline to adopt the finding, because it is not supported by the record. (See R.T. pp. 71-73 [testimony stricken].)

15, 1984) through the end of his probation period in the third matter on April 16, 1989 (with an interruption for his six-month actual suspension during 1985). One of the conditions of respondent's probation in the stipulated matter was that he submit to monthly blood tests to verify that he was taking his medication. (Exh. 42, stipulation at pp. 12-13.) No probation revocation proceedings were brought during the entire time respondent was on probation, and respondent testified that he had successfully completed probation, and introduced a letter to that effect from the probation department. (R.T. pp. 101-102; exh. A.) Respondent has been actively practicing law since the end of his second actual suspension in October 1985, and the record discloses that no new complaints were made against him during the nearly four years between that date and the hearing in the present matter. (R.T. pp. 104-105.)

In short, partly as a result of the bar's delay in prosecuting the instant matter,¹² [12 - see fn. 12] respondent had, by the time of the hearing in late August of 1989, a substantial record of successful practice following the detection and treatment of his psychiatric problem. As respondent argues, this record must be given substantial consideration in determining whether respondent continues to pose a danger to the public. (See standard 1.2(e)(viii); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 595-596; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-317; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 450.)

RECOMMENDED DISCIPLINE

The examiner argues that standards 1.7, 2.2 and 2.3 require disbarment of respondent. [13] First of all, the standards operate as a guideline and do not require any outcome. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Arm v. State Bar* (1990) 50 Cal.3d

763, 774.) Secondly, neither standard 2.2 nor 2.3 is involved here because the referee properly rejected culpability under former rule 8-101(B)(4) and section 6106. This brings us to the applicability of standard 1.7(b).

[14a] As the Court stated in *Arm v. State Bar, supra*, rejecting a recommendation of disbarment pursuant to standard 1.7(b), "a common thread" among the various disciplinary proceedings should be articulated from which the State Bar can urge that increased discipline be imposed for a "habitual course of conduct" or "a repetition of offenses for which an accused has previously been disciplined." (50 Cal.3d at p. 780.) Similarly, in *Morgan v. State Bar* (1990) 51 Cal.3d 598, 606-607, the Court applied standard 1.7(b) only upon concluding that "petitioner's behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders; this is the *second* time that petitioner has been found culpable of practicing law while under suspension." (*Id.* at p. 607, emphasis in original.)

[14b] Here, we are not dealing with a common thread, a repeated finding of culpability of the same offense, or continuing misconduct of increasing severity. Indeed, the referee found that the respondent's case is one of those exceptional ones recognized in standard 1.7(b) in which the most "compelling mitigating circumstances clearly predominate." On review, the examiner has failed to demonstrate that the referee erred in making such a finding and we adopt it as supported by the record.

Upon a finding of compelling mitigating circumstances, the guideline provided by standard 1.7(b) affirmatively indicates that disbarment is *not* appropriate. Standard 1.7(b) provides no guidance as to the appropriate lesser sanction. For violations of sec-

12. [12] The referee found that the State Bar had inexcusably delayed in bringing these proceedings, but that respondent was not prejudiced thereby. (Finding 25.) The examiner represented at oral argument that the investigation had been pushed along as quickly as possible. The record was augmented on review to take judicial notice of certain records of the Office of Investigations of the State Bar disclosing that this matter was closed in December of 1985 "without prejudice" to being reopened and was reopened following request of the

complaining witness in March of 1988. The documentation provided by the State Bar pursuant to court order satisfactorily demonstrated that the closure and reopening was in compliance with former rule 512 and the matter was not barred under former rule 511. (Rules Proc. of State Bar, rules 511, 512.) (See *In the Matter of Trousil* (State Bar Ct. Review Dept., No. 85-O-13574) order re taking of judicial notice filed August 1, 1990; *Chang v. State Bar* (1989) 49 Cal.3d 114, 125.)

tions 6068 (a), 6125 and 6126, standard 2.6 indicates that the appropriate sanction is "disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim . . ." The referee concluded that the most apposite case is *Chefsky v. State Bar* (1984) 36 Cal.3d 116. There, while Chefsky had no record of prior discipline, he was found culpable in five separate matters involving misappropriation and moral turpitude (neither of which were found here). Chefsky's evidence in mitigation was that he was ill at the time of the offenses, that his misconduct had taken place five years before, and that his conduct in the meantime had been exemplary. The Supreme Court reduced the review department's recommendation to three years stayed suspension conditioned on thirty days actual suspension. The referee, in the present matter, concluded "The parallels to this case are obvious." We agree.

We also see some parallels to *Chasteen v. State Bar*, *supra*, 40 Cal.3d 586. There, the petitioner was found to have engaged in misconduct for a period of six years involving failure to act competently and to perform his duties as an attorney, commingling and misappropriating funds, and the unauthorized practice of law while under suspension. He had a prior record of discipline. In mitigation, the hearing panel considered petitioner's previous addiction to alcohol and severe depression during the time period in which the misconduct occurred. The Supreme Court ordered a two-month period of actual suspension conditioned on lengthy probation and restitution to one client.

Here, the current misconduct was much less serious than in *Chefsky* and *Chasteen*, but was preceded by multiple priors. However, all of the prior misconduct occurred during a period of serious psychological impairment which has since been diagnosed and brought under control. Nonetheless, absent the lengthy subsequent period of time during which respondent has complied with terms of probation and remained free of disciplinary problems, we would weigh the priors more heavily.

[15] While we deem a lengthy period of probation appropriate, we do not see the need for an additional actual suspension in order to protect the public. The integrity of the bar and the courts (standard 1.3) does require, however, that respondent be suspended for initially signing up the client while suspended for nonpayment of dues and continued representation of the client before the United States Bankruptcy Court while under disciplinary suspension. Thirty days actual suspension appears appropriate for that purpose. [16] We also recommend that the conditions of probation include a blood testing condition in addition to the continued psychological treatment condition recommended by the referee. Otherwise, we adopt the referee's recommendation as to discipline, with minor modifications to conform to the standard language presently in use and with other minor changes in the conditions of probation, as set forth below.¹³ [17, 18 - see fn. 13]

FORMAL RECOMMENDATION

It is therefore RECOMMENDED to the Supreme Court that:

1. Respondent DOUGLAS WAYNE TROUSIL be suspended from the practice of law for two (2) years;

2. Execution of respondent's suspension be stayed, and he be placed on probation for two (2) years subject to the following conditions:

(a) That during the first thirty (30) days of said period of probation, he shall be actually suspended from the practice of law in the State of California;

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

(c) That during the period of probation, he shall report not later than January 10, April 10, July

13. [17] We have eliminated condition 2(f), recommended by the referee, requiring detailed reporting on current client matters, as excessively burdensome and not required for the protection of the public, since respondent has not been charged with or found culpable in this matter of neglecting any client.

[18] We have also deleted the referee's recommendation that respondent be required to comply with rule 955 of the California Rules of Court, which has become inappropriate in light of the reduced length of the actual suspension which we recommend.

10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

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

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

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

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

(e) That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is

complying or has complied with these terms of probation;

(f) That respondent shall promptly report, and in no event in more than ten (10) days, to the membership records office of the State Bar and to the Probation Department, all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

(g) That respondent shall continue to undergo treatment, including medication, for his bipolar mood disorder, as prescribed by his physician, at his own expense and shall furnish evidence to the Office of the Clerk, State Bar Court, Los Angeles, that he is so complying with each report that he is required to render under these conditions of probation; provided, however, that should it be determined by respondent's physician that respondent no longer requires such treatment and/or medication, he may furnish to the State Bar a written statement from said physician so certifying by affidavit or under penalty of perjury, in which event, and subject to the approval of the court, no reports or further reports under this paragraph shall be required and he shall not be required to obtain further treatment, to continue to take medication, or to undergo testing as provided in the following paragraph (h);

(h) That, unless and until relieved from the obligations under this paragraph as provided in paragraph (g) above, respondent shall provide the Probation Department at respondent's expense on or before the 10th day of each month respondent is on probation with a laboratory screening report containing a laboratory analysis obtained not more than 10 days previously of respondent's blood and/or urine as may be required to show respondent has taken his medication for bipolar mood disorder as prescribed by his physician. The blood and/or urine sample or samples shall be furnished by respondent to the laboratory in such manner as may be specified by the laboratory to ensure specimen integrity. The screening report shall be issued by a licensed medical laboratory selected by respondent and previously determined to be satisfactory to the Probation Department. Respondent shall also provide the Probation Department with any additional screening

reports the Department may in its discretion require. Urine and/or blood fluid samples for such additional reports shall be delivered to the laboratory facility making the report no later than six hours after notification of respondent by the Department that an additional screening report is required;

(i) That respondent shall provide the Probation Department with medical waivers on its request and with access to all of respondent's medical records; revocation of any medical waiver is a violation of this condition. Any medical records obtained by the Probation Department shall be confidential and no information concerning them or their contents shall be given to anyone except members of the State Bar's Probation Department, Office of Investigation, Office of Trial Counsel, and State Bar Court who are directly involved with maintaining or enforcing this order of probation;

(j) That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

(k) That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated;

3. [19] Respondent should not be required to take the Professional Responsibility Examination since he successfully completed the examination in connection with previous discipline; and

4. Respondent should not be required to comply with rule 955 of the California Rules of Court inasmuch as the actual suspension recommended herein is of only thirty (30) days duration.

We concur:

NORIAN, J.
STOVITZ, J.