

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES EMILE TADY

A Member of the State Bar

No. 91-O-06041

Filed July 6, 1992; as modified, July 10, 1992

SUMMARY

Respondent was charged with violating the prohibition against unauthorized practice of law by rendering legal services to his wife in a probate matter while on voluntary inactive status. He moved to dismiss the notice to show cause for failure to state a disciplinable offense. The hearing judge denied the motion. (Hon. Jennifer Gee, Hearing Judge.)

Respondent requested review, raising two contentions. First, he argued that the notice to show cause should be dismissed because it did not allege a "serious offense" and the alleged misconduct was appropriate for resolution by admonition. The review department rejected this contention, noting that the Office of Trial Counsel has discretion to file formal charges even when a matter meets the criteria for issuance of an admonition.

Second, respondent argued that his provision of legal services to his wife did not constitute unauthorized practice of law. The review department concluded otherwise, noting that the conduct alleged in the notice to show cause went beyond merely giving private legal advice. The review department therefore affirmed the denial of respondent's motion to dismiss.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Charles Emile Tady, in pro. per.

HEADNOTES

- [1 a, b] **106.10 Procedure—Pleadings—Sufficiency**
135 Procedure—Rules of Procedure
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous

On review of a facial challenge to the legal sufficiency of charges in the notice to show cause, the sole issue presented is whether the facts alleged in the notice, if proven, would constitute a disciplinable offense. For the purpose of such review, the review department treats the factual allegations of the notice as true, but draws independent conclusions regarding the legal import of those facts. (Trans. Rules Proc. of State Bar, rule 554.1.)

- [2] **169 Standard of Proof or Review—Miscellaneous**
194 Statutes Outside State Bar Act

Where there is no precedent regarding the standard of review to be applied in a matter coming before the review department in a certain procedural posture, the review department proceeds by analogy to the closest civil and criminal rules.

- [3] **106.10 Procedure—Pleadings—Sufficiency**
119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
169 Standard of Proof or Review—Miscellaneous
194 Statutes Outside State Bar Act

The Transitional Rules of Procedure of the State Bar, unlike equivalent California and federal rules, provide for review as of right following the denial of a motion to dismiss, as well as the grant of such a motion. However, this does not affect the type of review to be afforded on the merits. (Trans. Rules Proc. of State Bar, rule 554.1.)

- [4 a, b] **106.10 Procedure—Pleadings—Sufficiency**
119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
146 Evidence—Judicial Notice
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous

Both at hearing and on review, the court considering a motion to dismiss a notice to show cause for failure to state a disciplinable offense should disregard all factual matters outside the ambit of the notice, except for judicially noticeable facts. Accordingly, the review department considered respondent's uncontroverted statement that the alleged client referred to in the notice to show cause was respondent's spouse, and also considered respondent's date of admission to the bar and lack of any prior disciplinary record. However, respondent's other factual assertions in support of his motion to dismiss were not suited for judicial notice and were not considered on review.

- [5] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
 106.90 Procedure—Pleadings—Other Issues
 119 Procedure—Other Pretrial Matters
 131 Procedure—Procedural Issues re Admonitions
 135 Procedure—Rules of Procedure
 199 General Issues—Miscellaneous
 1094 Substantive Issues re Discipline—Admonition

The Office of Trial Counsel has discretion whether or not to file formal charges in a matter eligible for disposition by admonition. The State Bar Court cannot dismiss a proceeding prior to hearing on the ground that it meets the criteria for admonition, unless a case for selective prosecution is established. (Trans. Rules Proc. of State Bar, rule 415.)

- [6] **106.10 Procedure—Pleadings—Sufficiency**
 213.10 State Bar Act—Section 6068(a)
 230.00 State Bar Act—Section 6125

Under section 6125 of the Business and Professions Code, members of the State Bar who are on inactive status may not practice law in California. Section 6068(a) makes violation of section 6125 a disciplinable offense. A member on inactive status who is alleged to have committed acts constituting the practice of law is properly charged with violating sections 6125 and 6068(a).

- [7] **106.10 Procedure—Pleadings—Sufficiency**
 220.00 State Bar Act—Section 6103, clause 1
 220.10 State Bar Act—Section 6103, clause 2

Section 6103 of the Business and Professions Code does not provide a basis for charging an attorney with any misconduct other than violating a court order. Where respondent who was charged with unauthorized practice of law while inactive had transferred to inactive status voluntarily and not as a result of a court order, section 6103 charge should have been dismissed.

- [8 a-c] **106.10 Procedure—Pleadings—Sufficiency**
 204.90 Culpability—General Substantive Issues
 230.00 State Bar Act—Section 6125

A broad scope of activities may be held to constitute the practice of law, but the unauthorized practice of law outside of court appearances is difficult to define. Where respondent, while on inactive status, allegedly referred to a family member as respondent's client in a letter to another lawyer and expressed an intention to seek statutory fees in a probate matter involving the family member, respondent was properly charged with unauthorized practice of law.

ADDITIONAL ANALYSIS

Culpability

Not Found

- 220.05 Section 6103, clause 1
220.15 Section 6103, clause 2

Other

- 106.20 Procedure—Pleadings—Notice of Charges
196 ABA Model Code/Rules

OPINION

PEARLMAN, P.J.:

This case poses the question whether, as a matter of law, an inactive member of the State Bar is chargeable with a disciplinable offense by rendering legal services to his wife in a probate matter, referring to her as his "client" in correspondence with another lawyer, and expressing an intent to request statutory fees for the services rendered in the probate matter. The procedural posture in which this matter is presently before us is that, pursuant to rule 554.1 of the Transitional Rules of Procedure of the State Bar, respondent moved to dismiss the notice to show cause for failure to charge a disciplinable offense; the motion was denied by the hearing judge; and respondent timely requested review of the hearing judge's order.¹ For the reasons stated below, we affirm the hearing judge's denial of the motion to dismiss, but express no opinion as to the appropriate outcome of the proceeding.

STANDARD OF REVIEW

[1a] As already noted, we review the dismissal of a facial challenge to the legal sufficiency of the charges set forth in the notice to show cause. The sole issue presented, therefore, is whether the facts alleged in the notice, *if proven*, would constitute a disciplinable offense.

[2] There is no published State Bar Court or Supreme Court precedent regarding the standard of review to be applied in a matter coming before the review department in this procedural posture. Accordingly, we proceed by analogy to the closest civil and criminal rules. (See, e.g., *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525,

536; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 437; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168.) The review of a decision regarding a California general civil demurrer, or a federal motion to dismiss for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure, appears most closely akin to the review provided for under rule 554.1 of the Transitional Rules of Procedure.² [3 - see fn. 2] [1b] Thus, for the purpose of our review, we treat the factual allegations of the notice as true, but draw our own independent conclusions regarding the legal import of those facts. (See, e.g., *Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 153; *Bane v. Ferguson* (7th Cir. 1989) 890 F.2d 11, 13.)

FACTS TO BE CONSIDERED

[4a] Both at hearing and on review, the court considering a motion to dismiss of this type should disregard all factual matters outside the ambit of the notice to show cause, since the purpose of the motion is to test the sufficiency of the notice, not to contest the charges. (See *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 Cal.App.3d 978, 987, 987-988, fn. 6.) However, judicially noticeable facts outside the scope of the notice are an exception to this rule, and are cognizable. (*Ibid.*; see also *United States v. Wood* (7th Cir. 1991) 925 F.2d 1580, 1581-1582.)

[4b] In that connection, we note that in a declaration filed in the hearing department in support of his motion to dismiss, respondent averred that the alleged client referred to in the notice to show cause, Barbara L. Tady, is his wife. The examiner made no objection to the filing of respondent's declaration and does not contest respondent's statement regarding

1. Rule 554.1 of the Transitional Rules of Procedure of the State Bar provides in pertinent part: "No later than ten (10) days prior to the pre-trial conference set by the State Bar Court, the respondent may file and serve a motion to dismiss the notice to show cause on the ground that it fails to state a disciplinable offense as a matter of law. . . . The ruling of the [judge] on said motion shall be reviewed by the Review Department under rules 450-453 of these rules."

2. [3] Our Transitional Rules of Procedure, unlike the equivalent California and federal rules, provide for review as of right following the denial of a motion to dismiss, as well as the grant of such a motion. (Trans. Rules Proc. of State Bar, rule 554.1.) Thus, unlike the California courts of record and the federal courts (see, e.g., *Babb v. Superior Court* (1971) 3 Cal.3d 841; *Fluor Ocean Services, Inc. v. Hampton* (5th Cir. 1974) 502 F.2d 1169, 1170), we are required to grant review at this stage of the proceedings. However, this difference does not affect the type of review to be afforded on the merits.

the identity of Ms. Tady. We will therefore treat her relationship to respondent as established for the purpose of this review even though it is not pleaded in the notice to show cause. (Cf. Evid. Code, § 452, subd. (h).) We will also take judicial notice that respondent was admitted to practice law in California in June of 1950 and has no prior record of discipline. The remainder of the facts asserted by respondent in support of the motion to dismiss, however, are not properly suited for judicial notice, and we decline to consider them on review. Assuming the notice to show cause properly charges a disciplinable offense, the appropriate time for respondent to present evidence in defense or mitigation will be at the hearing on the merits, unless the mitigation evidence is not disputed and the parties can reach a stipulation of the facts in advance of the hearing.

SUBSTANCE OF THE CHARGES

The material factual allegations of the notice to show cause may be summarized as follows. Respondent has been on voluntary inactive membership status with the State Bar since January 1, 1982. After that date, respondent provided legal assistance to Barbara L. Tady in connection with two probate matters pending in Los Angeles County Superior Court. On March 18, 1991, respondent wrote a letter to an attorney admonishing the attorney to cease communicating with respondent's client, Barbara L. Tady, in connection with one of the probate matters, pursuant to rule 2-100 of the Rules of Professional Conduct.³ In a letter dated April 1, 1991, respondent indicated that he intended to petition for statutory fees in conjunction with the same probate matter.

The notice to show cause goes on to allege that by his actions, respondent practiced law in the State

of California during a period when respondent was not qualified by law to do so, and that respondent thereby wilfully violated his oath and duties as an attorney "under disciplinary case law and/or California Business and Professions Code sections 6068(a), 6103 and 6125." The validity of these conclusions of law is the issue we must decide at respondent's request.

APPLICATION OF RULE 415

Before proceeding to review the legal sufficiency of the notice, we dispose of an additional argument raised by respondent. In his motion at hearing and again on review, respondent argues that this matter should be dismissed because the notice to show cause does not allege a "serious offense" as defined in the last paragraph of rule 415 of the Transitional Rules of Procedure of the State Bar, and the matter otherwise meets the criteria set forth in that rule.⁴ Respondent misconstrues the import of rule 415.

[5] Rule 415 provides that under the circumstances defined therein, the Office of Trial Counsel or the State Bar Court *may* dispose of certain non-serious disciplinary matters by admonition. Assuming arguendo that disposition by admonition would be appropriate in this matter (an issue we do not decide), rule 415's permissive language gives the Office of Trial Counsel *discretion* to decide whether or not to file formal charges in a matter eligible for disposition by admonition. The court cannot dismiss the proceeding prior to hearing unless a case for selective prosecution is established which has not been done here. A notice to show cause may issue for minor offenses as well as serious offenses and the ultimate disposition will vary according to the proof. (See, e.g., *In the Matter of Aguiluz* (Review Dept. 1992) 2

3. Rule 2-100 prohibits members of the State Bar from communicating with a party whom the member knows to be represented by another lawyer, without the other lawyer's consent.

4. Rule 415 provides in pertinent part as follows: "When the subject matter of the investigation, or the charge in a formal proceeding, does not involve a matter which is, or probably is, a client security fund matter, or a serious offense, . . . the Office of Trial Counsel . . . may dispose of the matter before it by an

admonition to the member, if it concludes (a) the violation or violations were not intentional or occurred under mitigating circumstances, and (b) no pecuniary loss resulted. . . . The giving of an admonition does not constitute imposition of discipline upon the member. . . . [¶] As used in this rule, 'serious offense' is dishonest conduct [or] a dishonest act, . . . and conduct or acts constituting bribery, forgery, perjury, extortion, obstruction of justice, burglary or offenses related thereto, intentional fraud and intentional breach of a fiduciary relationship."

Cal. State Bar Ct. Rptr. 32.) The court may dismiss the matter after the hearing if the charges are not proved (cf. *In the Matter of Respondent A* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 255); it may decide upon hearing the evidence that an admonition is appropriate instead of discipline (cf. *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439); or it may conclude that discipline is appropriate. (See, e.g., *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 241-242.) What we address here as a matter of law is only the legal sufficiency of the charges.

THE LEGAL SUFFICIENCY OF THE CHARGES

[6] Under section 6125 of the Business and Professions Code, members of the State Bar who are on inactive status may not practice law in California.⁵ Section 6068 (a) makes violation of section 6125 a disciplinable offense. (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487; *In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 236-237.) Accordingly, if the acts respondent is alleged to have committed constituted the practice of law, he was properly charged with having violated sections 6125 and 6068 (a). [7] The charge of violation of section 6103, however, should have been dismissed. Section 6103 does not provide a basis for charging an attorney with any misconduct other than violating a court order. (*Read v. State Bar* (1991) 53 Cal.3d 394, 406, 407, fn. 2.) No such charge was made. Indeed, in this case, as expressly acknowledged in the notice to show cause, respondent transferred to inactive status voluntarily, not as the result of a court order. (See Bus. & Prof. Code, § 6005.)

With regard to the question what constitutes "practicing law" in violation of section 6125, the examiner has relied on six cases: *In re Cadwell* (1975) 15 Cal.3d 762; *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844, disapproved on another point in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11; *Farnham v. State Bar* (1976) 17 Cal.3d

605; *In re Naney* (1990) 51 Cal.3d 186; *Morgan v. State Bar* (1990) 51 Cal.3d 598; and *In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. 229.

All of the situations in the cited cases were far more serious than that which is alleged to have occurred here. Indeed, all but one of these cases involved attorneys suspended for disciplinary violations, who were found to have violated a Supreme Court order prohibiting them from practicing law or holding themselves out as practicing law. The final case, *People v. Sipper, supra*, involved a criminal conviction for the practice of law by a real estate agent. We also note that in *In re Naney, supra*, and *In re Cadwell, supra*, the Supreme Court focused on the respondent's violation of the prohibition in Business and Professions Code section 6126 against an unqualified person "holding himself or herself out as entitled to practice law." Thus, in *In re Cadwell*, the Supreme Court found it unnecessary to resolve the question whether Cadwell had given legal advice to a client. (*Id.* at p. 771.) Respondent herein was not charged with violation of section 6126, but only of violating section 6125. He cannot be disciplined for a violation not alleged in the notice to show cause. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928-929.)

[8a] While the cases cited above provide some insight into the broad scope of activities that may be held to constitute the practice of law, we note that the unauthorized practice of law outside of court appearances is not easy to define. No case resolves the specific question of what constitutes the unauthorized practice of law in a probate matter or whether an inactive member of the State Bar violates the ban on unauthorized practice by giving legal assistance to a family member in a probate matter. This issue is analogous to one which has been raised in connection with California judges who, upon ascension to the bench, cease being members of the State Bar (*State Bar v. Superior Court* (1929) 207 C. 323, 337) and cannot practice law. (Cal. Const., art. VI, § 17.) There is unofficial authority stating that it "would be hard to criticize a judge . . . for giving private [legal]

5. Unless otherwise stated, all statutory references hereafter are to the Business and Professions Code.

advice to a child, spouse, or parent. But, it is certainly improper to appear or advocate on their behalf.” (Rothman, California Judicial Conduct Handbook (Cal. Judges Assn. 1990) § 210.811, fn. omitted.)

Canon 4G of the revised Code of Judicial Conduct adopted by the ABA in 1990 provides as follows: “A judge shall not practice law. Notwithstanding this prohibition, a judge . . . may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family.”⁶ This language has been deleted from the proposed revised California Code of Judicial Conduct which will be considered for adoption by the California Judges’ Association at its 1992 annual meeting. The accompanying note by the Committee on Judicial Ethics states that it has proposed to delete from Canon 4G the ABA exception for legal advice to family members because it considers the scope of the California constitutional prohibition against judges practicing law to be an issue of law and not a matter for the Code of Judicial Conduct.

[8b] We do not decide, on this review, whether giving legal advice privately to a member of one’s immediate family, *without more*, constitutes a violation of the prohibition against practicing law while an inactive member of the State Bar, nor whether the authorities cited above regarding judges apply to inactive members. The authorities which make exception for such activities by judges consistently draw the line at *appearing* or *acting as an advocate* on behalf of the family member.

[8c] In this matter, the notice to show cause plainly charges that respondent went beyond merely advising his wife privately regarding her rights and duties in connection with the referenced probate matters, including referring to his wife as his “client” in a letter admonishing another attorney to cease communicating with her directly. He is also alleged to have expressed an intention to petition for statutory fees in one of the probate matters. Respondent, in his motion papers, asserts that he did not in fact receive any compensation for his assistance and at all

times acted in good faith. We cannot resolve such issues at this stage of the proceedings.

CONCLUSION

The hearing judge’s order denying respondent’s motion to dismiss is affirmed. However, given the limited scope of the charges, we urge the parties to stipulate to the facts insofar as possible to reduce the time and expense of resolving this matter. Nothing in this opinion shall be construed to limit the State Bar or respondent in presenting relevant evidence at the hearing, or to preclude dismissal of one or more charges, after the hearing, if the facts alleged in the notice to show cause are not proven by clear and convincing evidence, or to preclude ultimate disposition of this matter by admonition at the instance of the hearing judge if such appears appropriate after hearing.

We concur:

NORIAN, J.
STOVITZ, J.

6. The official commentary to this section notes that the activities permitted by the section do not include “act[ing] as

an advocate or negotiator for a member of the judge’s family in a legal matter.”