

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GARTH F. HEINER

A Member of the State Bar

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

Filed October 6, 1993

SUMMARY

In 1988, following a disbarment recommendation by a referee of the former State Bar Court, respondent was placed on involuntary inactive enrollment. In 1990, on review of the disbarment recommendation and another consolidated matter, the review department upheld some culpability findings but remanded for a rehearing on other charges; it also recommended that respondent be given credit for the period of inactive enrollment against the ultimate discipline imposed. On remand, the hearing judge dismissed some charges but found respondent culpable on others of misconduct including client neglect, retention of unearned fees, and acts of dishonesty. The judge recommended respondent's disbarment. (Daniel L. Rothman, Judge Pro Tempore.)

The Office of Trials requested review, reiterating its argument, which the review department had rejected on the earlier review, that respondent should not be given credit for his time on inactive enrollment against the waiting period to apply for reinstatement. The review department adopted the hearing judge's findings, conclusions, and disbarment recommendation, and reiterated its earlier holding recommending that respondent receive credit for the inactive enrollment.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: No appearance

HEADNOTES

- [1] 119 Procedure—Other Pretrial Matters
 120 Procedure—Conduct of Trial
 136 Procedure—Rules of Practice
 139 Procedure—Miscellaneous
 169 Standard of Proof or Review—Miscellaneous

Pretrial statements are an important tool in conducting an efficient multi-count trial. Unexcused failure to comply with an order requiring a pretrial statement (see rule 1222, Prov. Rules of

Practice) should not be treated lightly. However, where counsel failed to make appropriate motions during trial resulting from the other party's failure to file a pretrial statement, no issue was preserved for appeal.

- [2 a, b] **139 Procedure—Miscellaneous**
 169 Standard of Proof or Review—Miscellaneous
 199 General Issues—Miscellaneous

The law of the case doctrine is one of policy and does not preclude the relitigation of issues already determined in a prior appeal. However, strong reasons should be put forward for seeking to relitigate an issue already fully litigated and decided on a prior appeal. Where a party sought reconsideration, on a second appeal, of the review department's determination of an issue on an earlier appeal in the same proceeding, without offering any justification for its failure to seek reconsideration earlier, and relying on no new case law or statute, the review department had no cognizable reason to reconsider its prior conclusion.

- [3] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
 106.20 Procedure—Pleadings—Notice of Charges
 106.40 Procedure—Pleadings—Amendment
 120 Procedure—Conduct of Trial
 204.90 Culpability—General Substantive Issues
 277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

Where respondent was not charged with failure to return an unearned advance fee, no finding of culpability for such misconduct could be entered absent an amendment of the charges. Where evidence was insufficient to support such charge, motion to amend was properly denied as an idle act. However, where, despite a clear directive as to the need to amend and an opportunity to move for such amendment in advance of trial, deputy trial counsel waited until after evidence was in to move to amend to conform to proof, motion to amend could also have been denied simply for inexcusable delay in seeking amendment.

- [4] **120 Procedure—Conduct of Trial**
 148 Evidence—Witnesses
 165 Adequacy of Hearing Decision

The fact that no live witness appeared for the prosecution in a proceeding did not preclude the hearing judge from making a credibility determination based on prior recorded trial testimony which was subject to cross-examination.

- [5 a-f] **101 Procedure—Jurisdiction**
 135 Procedure—Rules of Procedure
 179 Discipline Conditions—Miscellaneous
 193 Constitutional Issues
 199 General Issues—Miscellaneous
 1099 Substantive Issues re Discipline—Miscellaneous
 2290 Section 6007(c)(2) Proceedings—Miscellaneous
 2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
 2502 Reinstatement—Waiting Period

Both the Legislature, by statute, and the Supreme Court, by case law, have recognized that the Supreme Court has inherent authority over regulation of the practice of law. The Supreme Court has not felt constrained by lack of authorizing legislation to exercise this inherent power, and has concerned itself with comparable treatment of respondents in comparable situations. Accordingly,

Supreme Court case law constituted appropriate authority for review department recommendation that a disbarred respondent be permitted to credit time spent on inactive enrollment toward waiting period to apply for reinstatement, just as an interimly suspended attorney-felon can do by rule (rule 662, Trans. Rules Proc. of State Bar).

- [6 a-c] **135 Procedure—Rules of Procedure**
 179 Discipline Conditions—Miscellaneous
 199 General Issues—Miscellaneous
 1099 Substantive Issues re Discipline—Miscellaneous
 1549 Conviction Matters—Interim Suspension—Miscellaneous
 2290 Section 6007(c)(2) Proceedings—Miscellaneous
 2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
 2502 Reinstatement—Waiting Period

By rule, convicted felons are always entitled to credit for time spent on interim suspension against the waiting period for seeking reinstatement. (Rule 662, Trans. Rules Proc. of State Bar.) Inactive enrollment has the same effect as interim suspension in banning the practice of law pending a final order of discipline, and is similarly designed to protect the public during the pendency of a disciplinary case against the malfeasant attorney. Giving credit for interim suspension against the waiting period for reinstatement reflects the decision that five years removal from practice is a sufficient minimum opportunity for rehabilitation, even if the time period precedes the order of disbarment. No policy interest would be served by treating inactively enrolled attorneys differently from interimly suspended attorneys in this regard.

- [7 a, b] **116 Procedure—Requirement of Expedited Proceeding**
 135 Procedure—Rules of Procedure
 139 Procedure—Miscellaneous
 2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
 2290 Section 6007(c)(2) Proceedings—Miscellaneous
 2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
 2349 Other Section 6007 Proceedings—Petitions to Terminate—Miscellaneous
 2502 Reinstatement—Waiting Period

Because of due process concerns, time spent on involuntary inactive enrollment pending disciplinary proceedings is limited to one year absent proof of delay by respondent or respondent's counsel or other circumstances justifying lack of compliance. (See rules 799, 799.8, Trans. Rules Proc. of State Bar.) Where review department had ruled on earlier appeal that respondent would receive credit against final discipline for time spent on involuntary inactive enrollment, and respondent had not sought to terminate inactive enrollment during pendency of proceedings on remand and second appeal, respondent would be prejudiced if period of over five years spent on inactive enrollment were not credited against waiting period to apply for reinstatement.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.11 Section 6068(a)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
231.01 Section 6126

- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Not Found

- 277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation**Found**

- 541 Bad Faith, Dishonesty
- 561 Uncharged Violations

Mitigation**Found but Discounted**

- 710.33 No Prior Record
- 725.36 Disability/Illness
- 740.31 Good Character
- 760.34 Personal/Financial Problems

Standards

- 822.10 Misappropriation—Disbarment

Discipline

- 1010 Disbarment

Other

- 175 Discipline—Rule 955

OPINION:

PEARLMAN, P.J:

The Office of Trials' request for review from the decision of the hearing judge recommending disbarment in this expedited proceeding raises for a second time an issue that was decided by this court against that office on respondent's appeal from a prior decision in this very same proceeding.

The issue we decided at respondent's request in 1990 was whether respondent should get credit for time spent on inactive enrollment against the final discipline ordered in this case, thus putting him on equal footing with interrimly suspended felons. We granted respondent's request on the authority of two recent Supreme Court orders in similar cases, including one which had resulted from a recommendation of this review department.

The law has not changed in the interim. Nonetheless, because of the Office of Trials' request for review, this court has been compelled to review de novo the entire proceedings on remand, including 10 volumes of transcripts, in order to determine whether or not to adopt the hearing judge's disbarment recommendation to the Supreme Court, in addition to readdressing a question which we thought we had put to rest in our earlier decision. All of this has occurred while respondent remained on inactive enrollment for a total of five years, which, while of undeniable benefit to the public, is of almost certain unconstitutionality under *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1120-1122 absent delay attributable to the respondent or voluntary acquiescence by the respondent.¹

Upon de novo review we adopt the recommendation of disbarment and reject as meritless the argument of the Office of Trials that we should reconsider and deny credit for time spent on inactive enrollment on the ground that the law does not authorize such credit and that respondent would not be prejudiced by belated reversal on this issue of constitutional dimensions.

BACKGROUND

These two proceedings were consolidated on review when they first came before us on a disbarment recommendation in *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, following two separate hearings before a volunteer referee of the State Bar Court. We concluded that respondent had not had a fair trial on certain counts in case number 84-O-14336 and remanded the consolidated matters for further proceedings including retrial of certain specified counts in case number 84-O-14336 that turned on the credibility of conflicting testimony of witnesses. We also directed the hearing judge on remand to recommend appropriate discipline for both matters combined.

At the time of our earlier review we also considered the fact that respondent had been placed on involuntary inactive enrollment effective May 14, 1988, under Business and Professions Code section 6007 (c)² and continued in that status. Respondent asked us to give him credit against the ultimate discipline imposed for time spent on inactive enrollment by analogy to *In re Young* (1989) 49 Cal.3d 257. In determining that credit would be appropriate we noted that in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, opn. filed on

1. A large portion of the extraordinary time consumed to date in this proceeding is clearly not attributable to respondent, including the fact that the proceedings had to be remanded for a new trial, but a significant portion of the delay is attributable to him. For example, completion of the trial in the original hearing proceeding was delayed 14 months largely due to continuation at respondent's request and delay during respondent's tender of his resignation which he subsequently rescinded. The hearing proceeding on remand was also prolonged by respondent. This review was also delayed from the spring oral argument calendar until the fall

because of respondent's failure to file a responsive brief after being given additional time to do so. He was thereafter precluded by order of the Presiding Judge from participating at oral argument although he was permitted to attend the argument given by the Office of Trials. Regardless of the reasons for delay, respondent was entitled to assume, based on our 1990 order, that the entire time would be credited to the ultimate discipline imposed.

2. Unless otherwise noted, all references hereafter to sections are to sections of the Business and Professions Code.

den. reh'g., 1 Cal. State Bar Ct. Rptr. 19, we had similarly recommended that the Supreme Court give Mapps credit for time spent on involuntary inactive enrollment pursuant to section 6007 (c) and that the recommended discipline was adopted by the Supreme Court on November 29, 1990, expressly ordering "credit for any time on related inactive status." (No. S016265.) No request for reconsideration was filed by either party after our first opinion in this proceeding issued.

On remand after 10 days of hearing in October of 1991,³ [1 - see fn. 3] consideration of additional evidence submitted by both parties and allowing an opportunity for post-trial briefs, the newly assigned hearing judge pro tempore ultimately issued his decision on December 23, 1992, making findings on all of the remanded issues and recommending that respondent be disbarred. Pursuant to our directive, the hearing judge recommended that respondent be given credit for all time spent on inactive enrollment. Costs were recommended to be awarded to the State Bar, but the hearing judge did not recommend that respondent be ordered to comply with rule 955 of the California Rules of Court since, by that time, he had been on inactive status for more than four years.

DISCUSSION

The Office of Trials sought review solely on the issue of whether respondent should have been given credit by the hearing judge for the time spent on involuntary inactive status. It argues, as it did in 1990 on the first appeal, that no authority supports giving

credit for inactive enrollment against the time period for seeking reinstatement following disbarment. [2a] In essence, the Office of Trials is seeking reconsideration of our first determination of this issue long after the time for seeking reconsideration has passed without offering any justification for its delay. No new case law or statute is relied upon that was not in existence at the time of our earlier opinion. While the law of the case doctrine is one of policy and does not preclude the relitigation of issues already determined in a prior appeal before the review department (see, e.g., *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261), strong reasons should be put forward for seeking to relitigate an issue already fully litigated and decided on a prior appeal.

[2b] We have been provided with no cognizable reason to reconsider our prior conclusion that respondent is entitled to credit for time spent on involuntary inactive enrollment. However, because the Office of Trials apparently misconceives the relationship of the Legislature to the Supreme Court on this issue and the policy reasons for giving respondent credit, we will explain our reasoning at greater length in this opinion after we review the findings below which resulted in the disbarment recommendation.

The Proceedings Below and Recommendation of Disbarment

The two matters that were consolidated on review in 1990 were case number 84-O-14336 which involved 13 counts⁴ and case number 88-O-12250

3. The hearing below appears to have been unduly prolonged in part due to respondent's disorganization. Respondent failed to file a pretrial statement as he had been ordered to do. No sanction was ordered by the hearing judge for that failure although the hearing judge did indicate that he would entertain appropriate trial motions by the deputy trial counsel based on respondent's failure to file a pretrial statement.

[1] Pretrial statements are an important tool in conducting an efficient multi-count trial. Their principal purpose is "to simplify and define the issues and determine how the trial may proceed most expeditiously." (*Trickey v. Superior Court* (1967) 252 Cal.App.2d 650, 653.) Unexcused failure to comply with an order requiring a pretrial statement in compliance with rule 1222 of the Provisional Rules of Practice of the State Bar Court should not be treated lightly. (Cf. Gov. Code, §

68609, subd. (d); Super. Ct. L.A. County Rules 1105.3, 1109; Fed. Rules Civ.Proc., rule 16(f); *Link v. Wabash R.R. Co.* (1962) 370 U.S. 626 [dismissal for failure to appear at pretrial conference]; *Admiral Theatre Corp. v. Douglas Theatre* (8th Cir. 1978) 585 F.2d 877 [court had discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of pretrial order].) Unfortunately here, despite the court's invitation, no motions were made by the deputy trial counsel resulting from respondent's failure to file a pretrial statement and no issue was preserved for appeal.

4. Respondent was originally found culpable on 10 counts, 9 of which were also relied on in a separate proceeding for his inactive enrollment under section 6007 (c).

which arose out of respondent's alleged unlawful practice of law following his inactive enrollment on May 14, 1988. On our review of the original culpability findings and disciplinary recommendations, we found clear and convincing evidence that respondent was culpable in case number 84-O-14336 on counts 2 and 3 (Porsch matters) of violating former rules 8-101(A), 8-101(B)(1), 8-101(B)(3) and 8-101(B)(4) of the Rules of Professional Conduct; on count 8 (Martel matter) of violating former rules 6-101(A)(2) and 2-111(A)(2) and section 6068 (m); on count 11 (Williams/Rego matter) of violating section 6106 by the knowing issuance of a check drawn on insufficient funds; and on count 12 (Floyd matter) of violating former rules 2-111(A)(2) and 6-101(A)(2).⁵ We also found respondent culpable in case number 88-O-12250 of violating sections 6068 (a), 6125 and 6126. We remanded for further proceedings to determine other charges in counts 1 through 5 and counts 7 and 10 in case number 84-O-14336 and for a recommendation of discipline. (*In the Matter of Heiner, supra*, 1 Cal. State Bar Ct. Rptr. 301.)

On remand, the hearing judge found respondent culpable on count 1 (Frierson matter) for failing to perform services for which he was employed; failure to return the unearned fee and failure to turn over the client's file pursuant to her written request. Respondent therefore was held to have violated former rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2). He was also additionally found culpable on counts 2 and 3 (Porsch matters) of violating section 6106 by con-

cealing his misappropriation of funds and issuing a check with knowledge that there were insufficient funds to cover it. Respondent was further found culpable of violating former rules 2-111(A)(2) and 6-101(A)(2) on count 4 (Gilliland matter).⁶ [3 - see fn. 6] Count 5 (Gardner matter) was submitted on the prior record because the witness was unavailable to testify and was thereafter dismissed for failure of proof. On count 7 (Terry matter) the hearing judge found culpability of violating former rule 6-101(A)(2) for failure to perform services competently, but lack of clear and convincing evidence of violations of former rules 2-111(A)(2) and 2-111(A)(3). The record showed that respondent had been removed as counsel in a murder case pursuant to a *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118, 123 [inadequacy of counsel].) The hearing judge dismissed count 10 (Jackson matter) for lack of proof after considering both the testimony of Jackson and respondent and the documentary evidence.⁷

The hearing judge also made findings in aggravation and mitigation. In aggravation, the misconduct was surrounded by bad faith and dishonesty. The evidence in aggravation included, among other things, the filing of an unlawful *lis pendens* in 1990 against real property in the name of a woman friend who had testified on his behalf in the 1989 proceedings in this court and came back to testify against him in the current proceeding after he failed to repay loans and otherwise betrayed her trust. He also, while on inactive status, entered into a business transaction with a divorced woman to purchase real property for which

5. At the first trial, the examiner had dismissed count 6 of case number 88-O-14336 and the referee had found respondent not culpable on counts 9 and 13.

6. [3] In our prior opinion, we noted that in count 4 respondent was not charged with failing to return an unearned advance fee or with violating former rule 2-111(A)(3) and that "no finding could be entered against respondent on this issue absent an amendment of the charges." (*In the Matter of Heiner, supra*, 1 Cal. State Bar Ct. Rptr. at p. 312.) Despite a clear directive as to the need to amend the charges and an opportunity to do so well in advance of the trial date, the deputy trial counsel waited until *after* all the evidence was in on this count to move to amend "to conform to proof." This was properly denied as an idle act in light of lack of sufficient evidence to support the charge. However, it appears it could also have been denied simply for inexcusable delay in seeking the amendment.

7. The testimony of Jackson at the rehearing indicates that Jackson was totally surprised on cross-examination with copies of documents she did not recall but which she testified nonetheless appeared to bear her signature—a chapter 7 bankruptcy petition (ex. O), the retainer agreement (ex. P) and a receipt (ex. Q). Given the opportunity for pretrial discovery, it is puzzling why the witness was not made aware of these intended exhibits prior to testifying. It is unclear on the record whether the deputy trial counsel requested them in discovery or had seen them prior to trial. Although the deputy trial counsel did initially object to their introduction in evidence, she did not object to the witness being questioned about these documents despite respondent's failure to file a pretrial statement listing any exhibits. Later she also dropped any objection to the inclusion of these exhibits in the record.

she put up her house as collateral and lost both the purchased property and her home following his abandonment of the project after receipt of approximately \$16,000 in cash advances.

In mitigation, respondent had no prior record of discipline since his admission in 1971. (Std. 1.2(e)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V (“standards”).) However, it was also noted that the misconduct started in 1983. The hearing judge also found that respondent suffered personal problems including a bitter divorce and difficulties as sole custodian of three of his minor children that affected his performance as an attorney. (Std. 1.2(e)(iv).) The hearing judge accorded slight weight to these problems and to respondent’s severe financial problems, resulting in two bankruptcy proceedings in 1981 and 1989 because respondent took new matters which he mishandled while he was already having difficulty handling his existing caseload during the time of his personal and financial troubles. The hearing judge also accorded little weight to the character evidence respondent presented which did not consist of a wide range of references or persons outside his family with sufficient contacts to make the character testimony meaningful.

After reviewing the entire record on remand de novo, we adopt all of the findings of the hearing judge on remand as supported by clear and convincing evidence. [4] However, we note that count 5 was dismissed without any credibility determinations having been made on conflicting evidence in the prior record. The fact that no live witness appeared for the prosecution did not preclude the hearing judge from making a credibility determination based on prior recorded trial testimony which was subjected to cross-examination. The problem with the first trial is that tentative culpability was announced before respondent testified and the referee did not

resolve the credibility issue raised by respondent’s conflicting testimony. Nonetheless, the deputy trial counsel did not object to the dismissal of count 5 and we conclude that the hearing judge’s recommendation of disbarment on the remaining counts is fully supported by the standards (see, e.g., std. 2.2(a)) and the case law. (*Grim v. State Bar* (1991) 53 Cal.3d 21; *Chang v. State Bar* (1989) 49 Cal.3d 114; *Kelly v. State Bar* (1988) 45 Cal.3d 649.) We further note that respondent’s misconduct continued for a number of years and that should he seek reinstatement at some point he will have to demonstrate “sustained exemplary conduct over an extended period of time.” (*In re Giddens* (1981) 30 Cal.3d 110, 116, quoting *In re Petty* (1981) 29 Cal.3d 356, 362.)

Credit for Time on Inactive Enrollment

The Office of Trials notes in its brief that the Rules of Procedure of the State Bar adopted by the Board of Governors expressly provide that respondents who are disbarred be given credit for time served on interim suspension against the minimum time period which must expire prior to seeking reinstatement. Rule 662 states the general rule in this regard: “No petition [for reinstatement] shall be filed within five years after the effective date of interim suspension or disbarment or resignation whichever first occurred.”⁸ The Office of Trials also points out that the Legislature expressly provides for credit to respondents pursuant to section 6007 (d) for any period of inactive enrollment against any period of actual suspension subsequently ordered based on the respondent’s violation of probation. The Office of Trials then argues that if the Legislature had intended to give credit to respondents placed on inactive enrollment pursuant to section 6007 (c), it would have so provided. The brief goes on to note that “notwithstanding the apparent intent of the legislature, however, in the last four years, the [Supreme] Court has, in several instances awarded credit to

8. For good cause, this period can be reduced to three years (rule 662, Trans. Rules Proc. of State Bar), although historically this reduction of time has rarely been granted. As the Office of Trials knows from representing the State Bar in all reinstatement proceedings, rule 662 merely provides the opportunity to apply for reinstatement. All petitioners for reinstatement must, among other things, show by clear

and convincing evidence sustained exemplary conduct in order to qualify for reinstatement. (See, e.g., *In re Giddens*, *supra*, 30 Cal.3d at p. 116; *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091-1092.) The burden on petitioners for reinstatement is a heavy one. (See discussion and cases cited in *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30.)

respondents of time so spent,” citing *In re Lamb* (1989) 49 Cal.3d 239 and *In the Matter of Mapps, supra*, 1 Cal. State Bar Ct. Rptr. 1.

[5a] By arguing that our reliance on case law did not constitute proper authority for our 1990 decision to grant respondent credit, the Office of Trials questions the Supreme Court’s authority to order on the Court’s own initiative, as it did in *In re Lamb, supra*, and in *In the Matter of Mapps, supra*, parallel treatment of inactively enrolled attorneys to the treatment accorded attorneys on interim suspension and inactive enrollment under section 6007 (d). This evidences a fundamental misunderstanding of the Supreme Court’s role with respect to attorney regulation in the State of California.

[5b] We reviewed the nature of the Supreme Court’s inherent authority over practitioners in *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71. As we noted therein, the Legislature has expressly acknowledged in section 6087 of the State Bar Act that “Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of chapter 34 of the statutes of 1927, relating to the State Bar of California.” It reiterated this limitation in similar language in section 6100: “Nothing in this article limits the inherent power of the Supreme Court to discipline . . . any attorney.”

[5c] The Legislature’s recognition of its limited role in attorney regulation in light of the Supreme Court’s inherent authority mirrors the Supreme Court’s own repeated pronouncements. Thus, over 30 years ago in *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300, the Supreme Court explained: “Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them [citations].” The Supreme Court also stated in *Brotsky* that “In disciplinary matters . . . [the State Bar]

proceeds as an arm of this court. If the Legislature had not recognized this fact, and made provision therefor, the constitutionality of those portions of the State Bar Act which provided for the admission, discipline and disbarment of attorneys could have been seriously challenged on the ground of legislative infringement on the judicial prerogative.” (*Ibid.*)

In *Husted v. Workers’ Compensation Appeals Board* (1981) 30 Cal.3d 329 the Supreme Court again reviewed the inherent powers of the courts, noting that “An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.” (*Id.* at pp. 336-337, fns. omitted.) [5d] Not surprisingly therefore, the Supreme Court has not felt constrained by lack of authorizing legislation to exercise its inherent power. (See, e.g., *Stratmore v. State Bar* (1975) 14 Cal.3d 887 [suspending an attorney for misconduct occurring before he was admitted to practice].)

[5e] If a convicted felon is automatically entitled under rule 662 to apply for reinstatement after five years of interim suspension,⁹ on what basis could the Court justify denying the same opportunity to an attorney not convicted of a crime who is placed on involuntary inactive enrollment under 6007 (c) for five years prior to being disbarred? The only answer provided by the Office of Trials is that the Court is not the appropriate body to address this issue. As discussed above, this answer is misconceived. The Supreme Court had no trouble deciding in *In re Lamb, supra*, 49 Cal.3d 239, that it had authority without any prior legislative action to award Lamb credit toward the time period for applying for reinstatement for time spent on stipulated inactive enrollment. In so acting, the Court explained: “We realize . . . that as a direct result of these proceedings, petitioner has been under a legal disability to practice law since April 10, 1988. She stipulated to inactive status, effective on that date, after the hearing officer’s disbarment recommendation opened the way for the

9. By definition, attorneys on interim suspension are attorneys who have been convicted of either a felony or a misdemeanor involving moral turpitude. (See § 6102 (a).) As noted above, if these attorneys are subsequently disbarred in the same proceeding, rule 662 of the Transitional Rules of Procedure, promulgated by the State Bar Board of Governors, provides

that the attorneys *automatically* receive credit toward the minimum time for seeking reinstatement, regardless of the circumstances. No determination need be made in connection with giving credit as to the petitioner’s readiness to resume the practice of law—that determination is only necessary if a reinstatement proceeding is subsequently instituted.

State Bar examiner to seek involuntary inactive status pending final determination of the disciplinary case. [Citation.] Under the stipulation, petitioner may not regain active status except by the terms of our final order herein.

“The Rules of Procedure of the State Bar specify that a petition for reinstatement may not be filed ‘within five years after the effective date of *interim suspension* or disbarment or resignation whichever first occurred . . .’ (Rule 662, Rules Proc. of State Bar [emphasis added by Supreme Court].) Though petitioner suffered no ‘interim suspension’ in the technical sense, her acquiescence to inactive enrollment was of similar import.

“Moreover, rules governing State Bar procedures do not limit this court’s inherent authority to fashion an appropriate discipline. (Bus. & Prof. Code, § 6087.) Under the circumstances, and in furtherance of the policy that disbarred attorneys should receive ‘credit’ against the reinstatement period for any related interim ban on practice, we conclude that petitioner may obtain such credit for the period of her enrollment in inactive status.” (*In re Lamb, supra*, 49 Cal.3d at pp. 248-249, fn. omitted.)

[5f] The Supreme Court has always concerned itself with comparable treatment of respondents in comparable situations. Thus, for example, in *Snyder v. State Bar* (1990) 49 Cal.3d 1302, the Court noted that it was appropriate to consider whether the discipline imposed was disproportionate to that imposed in similar cases. In *In re Young, supra*, 49 Cal.3d 257, in light of all relevant evidence, the Supreme Court refused to order two years prospective disciplinary suspension of an attorney irrespective of his three years on interim, as urged by the State Bar, because it placed the respondent at a disadvantage compared with disciplined attorneys who were not intermly suspended. In *In re Leardo* (1991) 53 Cal.3d 1, 18, where interim suspension had also been imposed, the Supreme Court rejected the State Bar’s argument for disbarment or actual prospective suspension, took into account four years of interim suspension and ordered that all prospective suspension be stayed, noting that “Whether a suspension be called interim or actual, of course, the effect on the attorney is the same—

he is denied the right to practice his profession for the duration of the suspension.” (*Ibid.*)

In re Ford (1988) 44 Cal.3d 810, cited by the Office of Trials in its brief, is not inconsistent with the above Supreme Court opinion. In *In re Ford*, the attorney had similarly argued that his interim suspension for three years prior to the Supreme Court’s consideration of his case was sufficient discipline for his conviction for embezzlement and that disbarment was unnecessary. In that case, the Supreme Court found no compelling mitigation justifying a remedy short of disbarment. However, as a consequence Ford automatically got credit pursuant to rule 662 for his three years of interim suspension toward the five-year waiting period for reinstatement. Ford, as it turned out, still has not been reinstated.

Nor does *In re Basinger* (1988) 45 Cal.3d 1348 support the Office of Trials’ position. There an attorney also argued that his lengthy time on interim suspension should militate against disbarment. The Supreme Court again noted that it must determine the appropriate discipline in light of all of the relevant evidence. (*Id.* at p. 1361.) The Office of Trials correctly points out that the Supreme Court did, in dictum, reject the argument that fundamental fairness required credit for time spent on interim suspension and stated that the interim suspension was not imposed to punish the petitioner but to protect the public. However, this was prior to the Supreme Court decision in *In re Leardo, supra*, and in any event the cited language in the *Basinger* opinion had no relevance to the issue before us now. Basinger was arguing, as did Ford, that his lengthy interim suspension justified final discipline short of disbarment.

In Basinger’s case the hearing referee had concluded that the lengthy interim suspension and Basinger’s changed behavior since his crime justified only one further year of stayed suspension with monitored probation. While the Supreme Court rejected this argument and found that Basinger’s misconduct did justify disbarment, its discussion of “credit” for interim suspension was simply a repeat of the issue raised by Ford whether time already served on suspension was sufficient discipline in lieu of disbarment. In fact, Basinger was entitled to

automatic credit under rule 662 for the time spent on interim suspension and, as the Office of Trials is aware from having participated in the proceeding, Basinger was ordered reinstated by the Supreme Court on October 16, 1991 (S023180), just over three years after his disbarment.

[6a] Rather than supporting the position of the Office of Trials, both *In re Ford* and *In re Basinger* illustrate the fact that, by operation of rule 662, convicted felons are always entitled to credit for time spent on interim suspension against the waiting period for seeking reinstatement. As the Supreme Court recognized in *In re Lamb*, inactive enrollment has the same effect as interim suspension in banning the practice of law pending a final order of discipline. It is also similarly designed to protect the public during the pendency of a disciplinary case against the malfeasant attorney. When ordered inactively enrolled pursuant to section 6007 (c), the attorney generally cannot practice law until proof has been made that the attorney no longer poses a threat to clients or the public. However, unlike interim suspension, involuntary inactive enrollment does not follow a criminal conviction, but results solely from action by the State Bar Court. [7a] Because of the due process concerns addressed in *Conway v. State Bar*, *supra*, 47 Cal.3d 1107, time spent on involuntary inactive enrollment is limited to a total period of one year from the filing of the order of inactive enrollment to the filing of the review department decision on the merits of the underlying matter, absent proof of delay caused by the respondent or his counsel or circumstances otherwise affirmatively justifying lack of compliance with the time requirements of rule 799 of the Transitional Rules of Procedure. (See *Conway*, 47 Cal.3d at p. 1122 and rule 799.8, Trans. Rules Proc. of State Bar.)

[7b] Here, respondent's inactive enrollment has been continuous since it was ordered in 1988. Respondent asked us for a ruling in 1990 whether he could get credit for remaining on inactive status. The deputy trial counsel herself notes that we discussed at oral argument on the first appeal the alternative opportunity respondent had on remand to seek to resume practice on the basis of unconstitutional delay in completion of the proceeding. She also notes that at no time did respondent seek to terminate his

involuntary inactive status, which thereby protected the public for the duration of this proceeding. She nonetheless contends that respondent would not be prejudiced by retroactively being denied credit for more than five years time spent on inactive enrollment and being required to wait five years following his disbarment before being permitted as of right to apply for reinstatement. This would require him to wait twice as long as numerous convicted felons who had the right to seek immediate reinstatement following the order of disbarment because of the lengthy time spent on interim suspension following conviction. (See, e.g., *In re Aquino* (1989) 49 Cal.3d 1122, 1134; *id.* at p. 1135 (conc. opn. of Kaufman, J.); *In re Rivas* (1989) 49 Cal.3d 794, 802, fn. 8.) The prejudice to respondent is obvious.

[6b] The general rule authorizing a reinstatement proceeding to be brought no sooner than five years after disbarment is presumably predicated on the assumption that the passage of five years since the attorney has been ordered to stop practicing law is the minimum time needed to provide a sufficient opportunity for rehabilitation. The authorization of credit against the five-year waiting period for time spent on interim suspension reflects the decision that five years removal from practice is a sufficient minimum opportunity, even if the time period precedes the order of disbarment. The focus is on the duration of the ban from the practice of law, not the timing of the disbarment itself. Indeed, whether a convicted attorney is interimly suspended at all can be arbitrary (*In re Young*, *supra*, 49 Cal.3d at p. 267, fn. 11), and the difference in length of interim suspension can reflect one convicted attorney's decision to exercise a right to appeal his criminal conviction and another's decision not to do so. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 515.) Fairness dictates taking the length of interim suspension into account.

[6c] No policy interest has been articulated that would be served by treating respondent differently from an interimly suspended attorney when both are similarly banned from the practice of law for the duration of the order pursuant to which they have been removed from the list of authorized practitioners. Similarly to an attorney exercising his right of appeal of a conviction while interimly suspended,

respondent, while on inactive enrollment, exercised his right of appeal of the first decision recommending disbarment. After respondent's successful argument on the first appeal, the final recommendation of the State Bar Court was necessarily delayed pending remand and reconsideration of several counts of charged misconduct. The necessity of a remand raised the issue of the propriety of respondent continuing on inactive enrollment.

If we had declined to permit respondent credit in 1990 the public could have been placed at great risk in this proceeding. Under *Conway v. State Bar, supra*, 47 Cal.3d 1107, every inactive enrollment of an attorney whose underlying disciplinary proceeding takes more than a year to reach the Supreme Court is of doubtful constitutionality regardless of the risk posed to the public. If we had rejected his request for credit, respondent would have had every incentive to seek to resume practice pending the final outcome of these proceedings despite the very concerns that the Office of Trials has raised about the suitability of the respondent practicing law under the circumstances. Under the dictates of *Conway v. State Bar, supra*, the hearing judge in a proceeding brought by respondent pursuant to rule 799.8 of the Transitional Rules of Procedure of the State Bar would have had very little choice but to allow respondent to resume practice long before now.

This brings us to the Office of Trials' argument that respondent still poses a risk of harm to the public and potential clients. We recommend his disbarment on the current record precisely because we have determined that respondent has committed very serious acts of misconduct for several years starting in 1983. Whether he can achieve reinstatement is not an issue before us at this time. We do note, however, that most disbarred attorneys do not ever achieve reinstatement as a consequence of the high burden of proof that they must meet on the issue of rehabilitation. "In determining whether that burden has been met, the evidence of present character must be considered in light of the moral shortcomings which resulted in the imposition of discipline." (*Tardiff v. State Bar, supra*, 27 Cal.3d at p. 403, quoting *Roth v. State Bar* (1953) 40 Cal.2d 307, 313.)

Assuming arguendo, therefore, that respondent still poses a serious current risk to the public, respondent has done a service to the public by remaining on inactive status. But this does not support the Office of Trials' position on the issue of credit. Indeed, the risk respondent might pose in the immediate future is even more likely to be true of the convicted felon who receives automatic credit for interim suspension prior to disbarment. Just as the Board of Governors in enacting rule 662 expressed no opinion as to the viability of reinstatement petitions by attorneys following lengthy interim suspension prior to disbarment, we did not by our decision to give respondent credit in 1990 express any opinion as to the timing or likelihood of his actual readiness to resume the practice of law, nor do we do so now.

If the Supreme Court accepts our disbarment recommendation, due to the extraordinary length of these proceedings, respondent will have the right to file his petition for reinstatement immediately thereafter, but may well choose to wait longer depending on his assessment of his chances of meeting the high burden that is required for reinstatement. If, as the Office of Trials contends, he is not yet rehabilitated, that office should have no trouble opposing an immediate petition for reinstatement. This does not justify requiring respondent to wait five years longer than a convicted felon before being allowed to present any evidence on the issue because he was inactively enrolled under 6007 (c) for serious misconduct not necessarily constituting a crime instead of intermly suspended for serious criminal conduct.

CONCLUSION

For the reasons stated above, we recommend that respondent be disbarred; that he be given credit for time spent on inactive enrollment toward the time period for seeking reinstatement as previously ordered; and that costs be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.