CALIFORNIA STATE BAR COURT REPORTER

Volume 1

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State Bar Court of California
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Allen	5	198	11/19/10	06-O-13329		Dismissed; NSCA
Ainsworth	3	894	7/1/98	95-R-17414	S073179	RD 10/4/98 Reinstatement denied NSCA
Amponsah	5	646	4/22/19	17-N-06871 17-O-06931 (Cons.)	S256330	RDA 10/31/19
Anderson	1	39	4/17/90	88-C-14303	BM 5960	Remanded to hearing department; reviewed after remand (see below)
Anderson	2	208	9/21/92	88-C-14303 88-C-14545	BM 5960 S010596 S031646	RDA 5/19/93
Anderson	3	775	11/6/97	89-O-11498	–	Remanded to hearing department. Dismissal after further proceedings, 5/3/99.
Applicant A	3	318	5/24/95	92-M-xxxxx† †confidential matter	S050821	RD 6/12/96

* For an explanation of the abbreviations used in this column, and information regarding limitations on whether opinions shown as "ASCA" or "PRF" can be cited, see the Introduction to Table of Cases Reported and Subsequent History, in the "How to Use" section. The publication cut-off date for this edition of the table was December 31, 2021.

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Babero	2	322	3/16/93	91-N-00909 90-C-17834	S014931	RDA 9/30/93
Bach	1	631	8/8/91	88-O-10872	S023123	RD, RDA 4/16/92
Bailey	4	220	3/16/01	98-O-01442 98-O-03538	S097551	RD, RDA 10/31/01
Bellicini	4	883	3/6/06	03-R-03728	–	Reinstatement Denied NSCA
Berg	3	725	8/5/97	92-O-11504 92-O-11486	S064786	RD, RDA 3/25/98
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Blum	3	170	10/14/94	90-O-14823 90-O-16589	S043643	RDA 2/7/95
Blum	4	403	5/24/02	96-O-03531	S108776	RDA 10/11/02
Bodell	4	459	11/22/02	99-R-12244	S112448	Reinstatement Ordered 1/13/03
Bouyer	1	404	3/22/91	86-O-15106 87-O-11321	S021354	RDA 8/6/91
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Braun	5	738	9/18/20	18-N-16608 18-O-17277	S265380	RDA 03/01/21
Brazil	2	679	2/7/94	89-C-12837	S039101	RD, RDA 9/8/94
Brimberry	3	390	10/19/95	86-O-14915 90-O-14748	S051321	RDA 5/22/96
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Caplin	5	768	11/13/20	17-C-05405	S266664	RDA 03/08/21
Carr	1	756	12/12/91	87-C-17557	BM 5578	Dismissal; NSCA
Carr	2	108	6/5/92	86-C-19520 86-C-19521 86-C-15714	BM 5262 BM 5282 BM 5347 S028443	RDA 11/4/92
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Chesnut	4	166	10/25/00	96-O-00544	S094661	RDA 3/30/01
Collins	5	551	3/28/18	16-O-10339	S248935	RDA 7/30/18
Collins	2	1	1/22/92	87-O-13132	S025085	DR 3/30/92 (Resignation accepted eff. 3/20/92, S025085)

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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND E. MAPPS

A Member of the State Bar

[Nos. 87-0-12533, 87-0-11669]

Filed March 27, 1990

Reconsideration denied, May 22, 1990 (see separate opinion,post, p. 19)

SUMMARY

Respondent was found culpable of two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of disciplinary proceedings. The hearing referee recommended disbarment, and respondent was enrolled on inactive status following such recommendation. (Hon. William A. Munnell (retired), Hearing Referee.)

The review department concluded that the facts found by the hearing referee were supported by the record, but modified the referee's conclusions of law. It also made more limited findings of aggravation and found some factors in mitigation, which the referee had not found. Analyzing Supreme Court precedent in cases involving misappropriation of client funds, the review department concluded that the public would be sufficiently protected by respondent being suspended from practice, including two years actual suspension, and being required to make a showing of rehabilitation, fitness to practice, and learning and ability in the law prior to returning to practice.

The review department also pointed out that if respondent's inactive enrollment was predicated solely on the disbarment recommendation of the hearing referee, which created a rebuttable presumption that the factors justifying inactive enrollment were met, the presumption no longer existed since the review department had recommended suspension rather than disbarment. The review department recommended that the period of involuntary inactive enrollment already served, as well as any additional, stipulated period of inactive enrollment, be credited towards the period of actual suspension ordered.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

Link directly to headnote [1 a,b] in opinion

IIEADNOTES

[1 a, b] **107 Procedure-Default/Relief from Default**
108 Procedure-Failure to Appear at Trial
162.19 Quantum of Proof Required
165 Adequacy of Hearing Decision
204.90 Culpability-General Substantive Issues
Where entry of attorney's default for failure to appear at disciplinary hearing resulted in the admission of all allegations in the notice to show cause, but certain of those allegations were in conflict with evidence adduced at hearing, examiner properly requested reconsideration of hearing decision to delete findings contrary to evidence adduced at hearing, and hearing referee properly deleted such findings from the decision, based on their conflict with the evidence.

[2] **135 Procedure-Rules of Procedure**
166 Independent Review of Record
Pursuant to rule 453 of the Transitional Rules of Procedure, the review department independently reviews the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. Its decisions are in turn subject to review by the Supreme Court which likewise conducts independent review of the record below and is not bound by the factual findings of the State Bar Court.

[3] **802.30 Standards-Purposes of Sanctions**
1099 Substantive Issues re Discipline-Miscellaneous
The Supreme Court's principal concern in the area of attorney discipline is protection of the public and preservation of confidence in the legal profession, interests served by maintaining the highest possible professional standards for attorneys. That same concern is therefore the principal concern of the review department.

[4] **213.10 State Bar Act-Section 6068(a)**
The duty to support the Constitution and laws of the United States and of this state is not violated in every case in which a violation of any provision of the Business and Professions Code has occurred.

[5] **220.10 State Bar Act-Section 6103, clause 2**
Business and Professions Code section 6103 does not define a duty or obligation of an attorney, but provides only that violation of an attorney's oath or duties defined elsewhere is a ground for discipline.

[6 a, b] **221.00 State Bar Act-Section 6106**
420.00 Misappropriation
An attorney's misappropriations of funds from his client trust account and other client funds constituted acts of dishonesty or moral turpitude. Misappropriation of funds is a serious offense involving moral turpitude.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Even though the Rule of Professional Conduct requiring payment of client funds upon demand refers only to an attorney's obligation to pay clients, not to any obligation to pay third parties out of funds held in trust, the rule also applies in instances where the attorney is in possession of funds to be paid to a client's medical provider. Accordingly, where an attorney failed to honor a medical

lien and failed to make agreed-upon payments to the doctor, the attorney could properly be found culpable of violating that rule.

[8] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
430.00 Breach of Fiduciary Duty
When an attorney agrees to hold client funds in trust for the benefit of a non-client, the nature of that agreement creates a fiduciary duty to the non-client, as well as the client. As a fiduciary, the attorney's obligation to account for the funds extends to both parties claiming an interest in the funds. Accordingly, the rules governing handling and payment of client trust funds apply to a non-client's funds as well.

[9] **280.00 Rule 4-lO0(A) [former 8-lOl(A)]**
An attorney's failure to deposit into his trust account settlement funds received for the benefit of a client is a direct violation of the Rules of Professional Conduct governing client trust funds.

[10 a, b] **543.10 Aggravation-Bad Faith, Dishonesty-Found but Discounted**
543.90 Aggravation-Bad Faith, Dishonesty-Found but Discounted
Where an attorney was charged with, and found culpable of, embezzling client funds, and this conduct was found to constitute moral turpitude, it was not appropriate to consider such conduct also as an aggravating factor based on dishonesty. However, it was appropriate to consider the attorney's subsequent conduct in writing bad checks as reimbursement for the embezzled funds as an aggravating factor, where the evidence showed that the attorney knew or should have known that one of the checks was drawn on insufficient funds. The weight of such aggravation was not great, however, since the bad check was closely tied to the underlying misconduct and was repaid within a few months.

[11] **221.00 State Bar Act-Section 6106**
490.00 Miscellaneous Misconduct
Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard for ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude.

[12] **162.11 Proof-State Bar's Burden-Clear and Convincing**
801.90 Standards-General Issues
The State Bar must prove aggravating factors by clear and convincing evidence.

[13 a, b] **545 Aggravation-Bad Faith, Dishonesty-Declined to Find**
605 Aggravation-Lack of Candor-Victim-Declined to Find
Where evidence showed that attorney was candid about mishandling of trust funds, but failed to keep promises to repay the money, this did not constitute clear and convincing evidence that the attorney made misrepresentations, because failure to keep a promise of future action, without more, is not proof of fraudulent intent.

[14] **613.90 Aggravation-Lack of Candor-Bar-Found but Discounted**
Respondent's failure to cooperate in disciplinary proceeding was an aggravating factor, but respondent was not deemed entirely uncooperative since he did meet with investigator on one occasion and attended oral argument on review despite entry of default.

[15] **760.12 Mitigation-Personal/FinancialProblems-Found**
791 Mitigation-Other-Found
Where attorney's two instances of misconduct took place during the same short period of time, and attorney attributed them to the same problem of financial difficulty, this factor could properly be considered in mitigation.

[16] **822.34 Standards-Misappropriation-One Year Minimum**
Some cases of misappropriation have resulted in lengthy suspensions rather than disbarment where restitution was made.

[17] **745.10 Mitigation-Remorse/Restitution-Found**
Restitution made voluntarily and before the commencement of disciplinary proceedings is entitled to consideration as a mitigating factor.

[18] **745.10 Mitigation-Remorse/Restitution-Found**
Where respondent took a year to complete restitution, but never disavowed his debt; where respondent made partial payment before client complained, and had paid in full before disciplinary proceeding commenced; and where there was no evidence in the record tending to show whether respondent had the financial wherewithal to have made restitution any faster or sooner than he did, respondent's restitution was a mitigating factor.

[19] **801.30 Standards-Effect as Guidelines**
The Supreme Court has instructed the State Bar Court to use the Standards for Attorney Sanctions for Professional Misconduct as guidelines in determining discipline.

[20] **802.62 Standards-Appropriate Sanction-Effect of Aggravation**
802.63 Standards-Appropriate Sanction-Effect of Mitigation
1091 Substantive Issues re Discipline-Proportionality
fu determining the appropriate sanction, the court must balance the aggravating circumstances with the mitigating circumstances and also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.

[21] **176 Discipline-Standard l.4(c)(ii)**
While standard 1.4(c)(ii) hearings are not appropriate in all cases where a two-year suspension is ordered, such a hearing appears particularly appropriate where lengthy suspension is recommended in a default proceeding. A defaulting attorney has called into question the propriety of the attorney's automatic return to practice by failing to appear in defense of the serious charges levied against the attorney. Public protection requires that after a lengthy suspension, the attorney not resume practice without demonstrating rehabilitation, fitness to practice, and learning and ability in the general law.

[22] **135 Procedure-Rules of Procedure**
176 Discipline-Standard 1.4(c)(ii)
2402 Standard l.4(c)(ii) Proceedings-Burden of Proof
2403 Standard 1.4(c)(ii) Proceedings-Expedited
Procedural rules proposed by State Bar which would permit attorney in standard 1.4(c)(ii) hearing to make required showing by preponderance of evidence; would allow stipulation that attorney meets conditions; would guarantee opportunity to make required showing before expiration of

two-year actual suspension; and would provide for expedited review, appeared to answer Supreme Court's concerns regarding conduct of such hearings.

[23] **174 Discipline-Office Management/Trust Account Auditing**
Trust account auditing was required as condition of probation in order to ensure against recurrence of respondent's misconduct, i.e., misappropriation of funds held to pay medical liens.

[24] **1099 Substantive Issues re Discipline-Miscellaneous**
2319 Section 6007-Inactive Enrollment After Disbarment-Miscellaneous
Where attorney had been placed on involuntary inactive enrollment following disbarment recommendation by hearing department, but on review, discipline recommendation was decreased to suspension and probation, review department recommended that period of involuntary inactive enrollment already served by attorney, and any additional period served thereafter, be credited towards period of actual suspension.

[25] **1099 Substantive Issues re Discipline-Miscellaneous**
2319 Section 6007-Inactive Enrollment After Disbarment-Miscellaneous
If order placing attorney on inactive enrollment was predicated solely on hearing department's disbarment recommendation, which was later superseded by review department's recommendation of suspension, parties could stipulate, pursuant to rule 799 of the Rules of Procedure, to permit attorney's retransfer to active status pending the finality of disciplinary proceedings. Attorney also retained option of stipulating to continued inactive enrollment, in which case review department recommended that such inactive enrollment be credited toward period of actual suspension.

Link to Digest Topic No. 221.11

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106-Deliberate Dishonesty/Fraud
280.01 Rule 4-lOO(A) [former 8-lOl(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.11 Misappropriation-Deliberate Theft/Dishonesty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
280.45 Rule 4-100(B)(3) [former 8-101(8)(3)]

Mitigation

Declined to Find

710.54 No Prior Record

Discipline

1013.11 Stayed Suspension-5 Years
1015.08 Actual Suspension-2 Years
1017.11 Probation-5 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

Other

2311 Section 6007-Inactive Enrollment After Disbarment-Imposed

OPINION

PEARLMAN, P.J.:

Respondent, Raymond E. Mapps, was admitted to the practice of law in this state in 1983. He has no prior record of discipline. This case involves review of a recommendation of disbarment for two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of formal proceedings. We set this case for hearing on our own motion[1] primarily to consider whether the degree of discipline recommended by the hearing panel is excessive in light of recent Supreme Court decisions on similar facts.[2]

Analysis of Supreme Court precedent leads us to conclude that the public would be sufficiently protected by respondent being suspended from the practice of law for five years with the suspension stayed and respondent placed on probation for five years on several conditions including two years actual suspension, coupled with a requirement that respondent make a showing in compliance with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (hereinafter "standard" or "std.") before being permitted to resume the practice of law.[3]

PROCEDURAL HISTORY

This case arose out of two consolidated proceedings tried before the Honorable William A Munnell, retired judge, on June 8, 1989.[4] At the time of the events in question respondent was a solo practitioner. By the time the formal proceedings were instituted, respondent had notified the State Bar that he had changed his address to the Los Angeles Public Defender's Office and the notices to show cause (formal charges) were served on him there. Respondent met with the State Bar investigator and explained to the investigator that he had been having financial problems at the time of the incidents. He admitted that he had used money from his trust account in order "to make ends meet" (R.T. p. 48), and offered to complete restitution which he had already voluntarily begun. Respondent did complete repayment to both complainants but failed to file an answer in one of the two proceedings and failed to appear at the pretrial and at the formal hearing.

Informal proceeding No. 87-0-12533 filed December 1, 1988, respondent was charged with one count of misappropriation of $2,271 in funds held for medical expenses after settlement of a personal injury action brought by respondent on behalf of a client named Leron Tidwell. The count included charges of knowingly issuing a trust account check drawn against insufficient funds, failing to honor a medical lien and failing to make agreed-upon payments in a subsequent

1. No request for review was filed by the examiner. The respondent had no right to file a request for review without first moving to set aside his default, which he did not seek to do. As part of the transition to the new State Bar Court system, the decision of a referee is automatically subject to review by this review department pursuant to rules 109 and 452 of the Transitional Rules of Procedure of the State Bar (hereinafter "Rules of Procedure" or "Rules Proc. of State Bar") adopted by the State Bar Board of Governors, effective September 1, 1989. This automatic review is not accorded decisions of full-time judges appointed by the Supreme Court under Business and Professions Code section 6079.1, effective July 1, 1989.

2. In setting the case for oral argument pursuant to rule 452(b) of the Rules of Procedure, we requested the examiner to address two issues: 1. Whether respondent was properly charged and found culpable of a violation of (former) rule 8-101(B)(4) of the Rules of Professional Conduct in case no. 87-0-12533; and 2. Whether the degree of discipline recommended by the hearing panel is excessive in light of *Weller* v. *State Bar* (1989) 49 Cal.3d 670; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448 and *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357.

3. Proposed rules governing standard 1.4(c)(ii) hearings recommended by the Executive Committee of the State Bar Court and the State Bar Board Committee on Discipline in compliance with *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071, 1080, fn. 6 are scheduled to be on the agenda of the State Bar Board of Governors for approval at its next meeting on April 7, 1990.

4. Judge Munnell tried this matter under legislation predating the trial of attorney disciplinary matters before full-time judges of the State Bar Court appointed by the Supreme Court. (Bus. & Prof. Code, § 6079.1, eff. prior to July 1, 1989.)

promissory note to Tidwell' s doctor, Dr. Alexander. These acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and (former) Rule of Professional Conduct 8-10l(B)(4).[5] Respondent answered admitting that he represented Tidwell and held back $2,271 of settlement funds in that action to pay medical expenses, and admitting that he failed to make the agreed-upon payments in the promissory note to Dr. Alexander.

Respondent's answer to the notice to show cause denied that he knowingly issued a check for insufficient funds, failed to honor Dr. Alexander's medical lien or misappropriated funds held for medical expenses. He further denied any wilful violation of Business and Professions Code sections 6068 (a), 6103 or 6106 or rule 8-10l(B)(4) of the Rules of Professional Conduct. Respondent was subsequently served with a notice to appear at the hearing and failed to appear. Accordingly, respondent's default was entered and the allegations of the notice to show cause were deemed admitted despite the denials made in respondent's answer. (Rule 555(c), Rules Proc. of State Bar.)

In formal proceeding No. 87-0-11669 filed March 22, 1989, respondent was again charged in a single count with misappropriating funds held to pay a client's medical expenses, failing to promptly pay funds due his client and issuing a check when he knew or should have known he did not have sufficient funds available to cover the check. The notice to show cause specifically alleged in relevant part that he was hired by Tracy Walker to represent her in a personal injury matter; that he settled her case for $10,500; that he withheld $3,515 of the settlement funds to pay her treating physician; that he misappropriated the funds held to pay his client's medical expenses; that he misappropriated and failed to account for an additional $522 of settlement proceeds and that he failed to pay his client promptly the amount withheld to pay her medical bills when she informed him that the treating physician's bill had been paid by a collateral source. It further alleged that respondent issued a $200 trust account check in partial payment to his client when he knew or should have known that he did not have sufficient funds available to cover the check. All of the respondent's acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-lOl(A), 8-101(B)(3) and 8-10l(B)(4). Respondent failed to answer this notice to show cause and his default was entered at the hearing. (Rule 555(c), Rules Proc. of State Bar.) As a consequence, the allegations of the notice to show cause were deemed admitted.

On count one,[6] the ***Tidwell*** matter, the referee found that the State Bar examiner proved the truth of the allegations by clear and convincing written and oral evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103, and 6106 and Rules of Professional Conduct 8-101 (d)(4) [sic]. On count two, the *Walker matter,* the referee found that the examiner likewise proved the truth of the allegations by clear and convincing oral and documentary evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-l0l(A) and 8-101(B)(3) and 8-101(B)(4).

The referee's original decision was filed on July 12, 1989. Thereafter, the examiner, by written motion, requested reconsideration of two findings which were then deleted from the amended decision filed by the referee on August 24, 1989. These findings related to the charge in the *Walker* matter that an additional $522 of the settlement was unaccounted for and misappropriated. The evidence

5. New Rules of Professional Conduct became operative on May 27, 1989. As part of the general revision of the Rules of Professional Conduct, former rule 8-101 (B)(4) of the Rules of Professional Conduct was readopted as rule 4-100(8)(4) without substantial modification. All further references to the Rules of Professional Conduct herein are to the rules in effect during the period January 1, 1975, through May 26, 1989.

6. The referee referred to the two consolidated proceedings against respondent as if they were two "counts" in a single proceeding rather than two separate original proceedings. For convenience, we have adopted this terminology.

produced at the hearing showed to the contrary, and the examiner so noted for the record. (R.T. p. 54.) **[la]** After receiving the original decision, including findings against the respondent on this issue, the examiner commendably moved for reconsideration and the referee deleted these findings in his amended decision.[7] **[lb - see fn.** 7]

The referee concluded that both offenses involved moral turpitude. He found no mitigating factors and found numerous aggravating factors, including misleading clients and failing to cooperate with the State Bar by failing to appear. In addition to recommending disbarment, the referee also recommended the initiation of an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007 (c) which the examiner subsequently commenced. The hearing on the section 6007 (c) proceeding took place before Hearing Judge JoAnne Earls Robbins on October 19, 1989, and she subsequently ordered respondent inactively enrolled, effective October 27, 1989. The effect of our decision on such order is discussed ***post.***

FACTS

We agree with the referee's essential findings of fact on both counts as set forth in his amended decision at pages 1 through 3 and restate the facts here.[8]

Count One-The Tidwell Matter

In formal proceeding No. 87-0-12533, the respondent had been retained by Leron Tidwell on or about November of 1986 to represent him in a personal injury action. The case was settled for $7,500 in January of 1987-within two months of respondent being retained. The settlement check was deposited in respondent's trust account; respondent disbursed to Tidwell the appropriate funds and retained $2,271 to cover the medical lien of Dr. Alexander, the complaining witness in the subsequent State Bar proceedings. Respondent timely issued a trust account check for the full amount of Dr. Alexander's lien; however, this check was returned for insufficient funds. (R.T. pp. 15-16; exh. 4.)

After many unreturned telephone calls from Dr. Alexander over the next two months, respondent came to the doctor's office in early April 1987, gave him a valid check for $500, and signed a promissory note for the balance due. (R.T. pp. 17-19; exh. 5.) Respondent then failed to make the payments called for by the note. (R.T. p. 20.) After many more unreturned telephone calls from the doctor, and after the State Bar had contacted respondent concerning its investigation of both cases, respondent paid the remaining balance due on March 9, 1988.[9] (R.T. pp. 20-21; see exhs. 13, 14, & 15.)

Count Two--The Walker Matter

In formal proceeding No. 87-0-11669, the complaining witness was the client, Tracy Walker. Respondent was retained by Walker on or about January 10, 1986, to represent her in a personal injury matter. On or about November 4, 1986, the case was settled for $10,000. He promptly paid Walker her share of the proceeds[10] and retained approximately $3,500 to pay medical bills. Respondent cashed the settlement draft without depositing the draft in his trust account. In December 1986, about a month after

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7. **[lb]The** entry of respondent's default in the *Walker* matter resulted in the admission of misappropriation and failure to account for the $522 as alleged in the notice to show cause. Nonetheless, the taking of evidence negating such allegations permitted the referee to reject the allegations based on a conflict between the admission and the evidence adduced at trial. (See *Riddle* v. *Fiano* (1961) 194 Cal.App.2d 684 [refusing to reverse a trial court's ruling that evidence adduced by the plaintiff in proving a default negated the admitted allegations of the complaint].)

8. As noted *ante,* the factual allegations of both notices to show cause must be deemed admitted by virtue of respondent's default. The introduction of evidence at the hearing on both counts was essentially cumulative.

9. There is no evidence that the doctor ever requested interest on the overdue balance. The total payment called for by the promissory note exceeds the amount due to the doctor by $8.00; however, there is no evidence as to whether this excess was supposed to represent interest or simply resulted from a computational error.

10. Nothing in the record indicates that Walker had any complaints about the way respondent handled the underlying case or about the amount of the settlement he obtained.

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DIGEST OVERVIEW

Link to "Evidentiary Issues" on page iii of DIGEST TOPICS.

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Note: For an explanatory introduction to the Digest, see Introduction to the California State Bar Court Reporter Digest in Vol. 6.

DIGEST TOPICS

100 Generally Applicable Procedural Issues

Note: References to rules in topic headings 101 through 199, unless otherwise noted, are to the Rules of Procedure of the State Bar, as adopted effective January 1, 2011 (2011 rules), including subsequent amendments and additions. The 2011 rules reorganized and renumbered the rules governing State Bar Court proceedings, and grouped them under Title V, Discipline.

Link to first occurrence of each topic in Digest Supplement

Note: Other pretrial matters include all motions made prior to trial (rule 5.45); stipulations (rules 5.53-5.58); and pretrial statements and conferences (rule 5.101).

Note: For specific Rules of Procedure applicable to involuntary inactive enrollment proceedings, see the Digest section for the specific type of proceeding, topic number 2000 et seq.

Note: Certain chapters of the 2011 version of the Rules of Procedure, as subsequently augmented, are indexed out of sequence, as follows:

Division 6, Chapter 4, Fee Arbitration Award Enforcement Proceedings
Rules 5.360-5.371: Topic number 3000 et seq.
Division 6, Chapter 5, Alternative Discipline Program
Rules 5.380-5.389: Topic number 3100 et seq.
Division 6, Chapter 6, Legal Specialization Proceedings
Rules 5.390-5.399: Topic number 2900 et seq.
Division 7, Chapter 2, Resignation Proceedings
Rules 5.420-5.427: Topic number 3300 et seq.

100 Generally Applicable Procedural Issues

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101 Jurisdiction

Actual notice is not a necessary element of proper service in disciplinary proceedings, and service is deemed completed upon mailing to respondent's official membership address. State Bar Court therefore had jurisdiction to hear disciplinary case even where respondent did not personally receive service of notice of disciplinary charges, motion for entry of default, and default order, all of which were sent to respondent's official membership records address. *In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348 **[10]**

Links directly to p.1 of this opinion

Links directly to this headnote within opinioin

In order to find culpability under rule 1-300(B) of the Rules of Professional Conduct, the State Bar Court must examine applicable out-of-state authority to determine whether a California attorney has violated [illegible] regulations in a foreign jurisdiction. *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar [illegible]

Rules of Procedure of the State Bar, rule 220(b), which requires the court to file its decision [illegible] of taking a matter under submission, is not jurisdictional. Although filing a decision well beyond the prescribed 90 days undermines important objectives, an attorney's decision to abate his law practice pending filing of hearing decision is too speculative to establish specific, legally cognizable prejudice. *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 **[1]**

Although the State Bar apparently believed that it had perfected its right to appeal due to having filed two requests for review, no timely request for review was filed after service of a final order disposing of a posttrial motion, and therefore the review department was without jurisdiction to hear the appeal. Due to the *sui generis* nature of disciplinary proceedings, as well as the differences between statutes and rules regarding notices of appeal applicable in civil matters and those applicable in disciplinary matters, the review department could not apply civil rules and statutes so as to consider the requests for review as prematurely filed or to stay proceedings at the trial level after a request for review had been filed. Although the State Bar asked for relief on the grounds that it never received a copy of the hearing judge's final order and that it was misled when the review department clerk's office did not reject pleadings filed after the requests for review, the evidence established that service of the hearing judge's final order was properly effectuated, and the review department clerk's failure to issue a notice of rejection of pleadings was not a ground for relief under any rule but merely a courtesy function. More importantly, because the review department was divested of jurisdiction, it was powerless to relieve against mistake, inadvertence, accident, or misfortune. *In the Matter of Ozowski* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 67. **[2 a–g]**

The review department concluded that the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction and found that the procedural requirement of Rules of Procedure of the State Bar, rule 662(c) did not divest the court of jurisdiction to extend the time for, or to grant relief from, payment of costs. Relying on well–settled rules of statutory construction, the review department construed the rule to be directory rather than mandatory or jurisdictional and thus found that the court retained jurisdiction to determine whether petitioner's failure to provide proof of payment of costs prior to filing the reinstatement petition should have resulted in a dismissal under the facts and circumstances of the case. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 **[1a, b]**

Despite its seemingly mandatory wording, Rules of Procedure of the State Bar, rule 662(c) is merely procedural, advancing a time requirement for the payment of costs, while the relevant Business and Professions Code sections confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board of Governors of the State Bar attempted to supplant the statutory authority set forth in Business and Professions Code section 6140.7 and 6086.10, or to divest the State Bar Court of jurisdiction, by implementing a rule of procedure, and indeed, the Board of Governors is proscribed from doing so by Business and Professions Code section 6086. That section is consistent with the more general rule that, where a statute empowers an administrative agency to

adopt regulations, those regulations must be consistent and not conflict with the governing statute. Because there is no express language or clear intent to render the rule jurisdictional, the review department looks to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from potential constructions. If the rule were interpreted to be mandatory or jurisdictional, the rule would conflict with and/or constrict relevant statutes and other rules, inadvertently alter the reinstatement requirements, and at times produce unreasonable results. Construing the rule as directory, however, in no way interferes with or compromises the ability of the State Bar or the State Bar Court to effectuate the intent of obtaining costs as money judgments. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 **[2a, b]**

In construing statutes, a practical construction is preferred. A construction of Rules of Procedure of the State Bar, rule 662(c) which permits the State Bar Court to retain jurisdiction is manifestly more practical than one which cuts off the court's jurisdiction regardless of the time and resources the parties have already expended in the court proceedings. Where a reinstatement proceeding had been pending for almost a year at the time a motion to dismiss was filed, the State Bar's investigation period and the discovery period for both parties had expired, and the trial was set to commence in approximately one month, dismissal was a severe remedy for noncompliance with payment of costs, and denial of a motion to set aside the dismissal was draconian. If a petitioner fails to pay the disciplinary costs prior to filing his reinstatement petition, the hearing judge has discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in petitioner's showing of rehabilitation or condition a petitioner's return to active status on the payment of some or all of the costs. Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. Construing Rules of Procedure of the State Bar, rule 662(c) as directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings. *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56 **[5a b, c]**

A disciplinary action may be maintained even though the attorney has been acquitted of criminal charges that have been dismissed based on the same facts. Moreover, the State Bar Court has jurisdiction to regulate misconduct even when it occurred in another state and did not result in an out–of–state criminal conviction. *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896. **[7]**

The review department declined to consider applicant's argument that the Supreme Court's order in his previous disciplinary matter, filed in 1998, was void on its face because of numerous constitutional infirmities. The review department simply does not have the authority to set aside the Supreme Court's order. Once the record in applicant's previous disciplinary cases was transmitted to the Supreme Court, the review department no longer retained jurisdiction over the matter. Accordingly, the review department declined to consider applicant's collateral attack on his prior discipline.*In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731.**[1]**

Rule 15.2 of the Rules Governing the State Bar Program for Certifying Legal Specialists provides that a denial, suspension, or revocation of certification or re-certification by the Board of Legal Specialization based on a final disciplinary action by the Supreme Court, the State Bar Court, or any body authorized to impose professional discipline, shall be final and shall not be subject to further review. The legislative history of rule 15.2 made it abundantly clear that the State Bar proposed the adoption of this rule to the Supreme Court with the specific intent of divesting previously disciplined applicants of their right of appeal to the State Bar Court. Thus, the rule expressly deprived the State Bar Court of jurisdiction to consider applicant's procedural due process challenge. Accordingly, the review department was compelled to agree with the hearing judge, who correctly dismissed the matter for lack of jurisdiction. Although the State Bar Court lacked jurisdiction in this case, the review department construed rule 15.2 to mean that the decision of the Board denying applicant re-certification was subject to review by the Supreme Court. *In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731.**[1]**

The ability of federal courts and federal agencies to discipline attorneys who practice before them does not deprive a state bar of jurisdiction to discipline one of its members for engaging in misconduct while practicing before the federal courts or agencies. While neither the State Bar Court nor the Supreme Court has jurisdiction to prevent a person from practicing law in federal courts or agencies, the Supreme Court has the inherent authority to discipline attorneys licensed to practice in the State of California, and the State Bar Court has authority to conduct disciplinary proceedings and make recommendations of discipline to the Supreme Court. The federal regulations pertaining to discipline of attorneys practicing before federal immigration agencies themselves contemplate that the

disciplinary agency of a state in which an attorney is admitted to practice has authority to discipline the attorney for misconduct committed in federal immigration agencies. In addition, various cases from federal courts and from the Board of Immigration Appeals have indicated that the disciplinary agencies of the states in which immigration attorneys are licensed have jurisdiction to discipline these attorneys for misconduct committed in immigration cases in federal courts and agencies. *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416. **[1 a-e]**

Rule of Procedure requiring hearing judges to file decisions within 90 days after taking cases under submission is neither mandatory nor jurisdictional. Thus, respondent's contention that the hearing judge's decision was void because it was filed four days after the expiration of the ninety-day time limit was rejected. Furthermore, because respondent failed to establish that he suffered any actual harm or prejudice, he was not entitled to any relief for the hearing judge's failure to file his decision timely. *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231. **[8]**

As the reproval imposed on respondent in the prior disciplinary proceeding is final, it and the conditions attached to it are presumed valid and enforceable. The reproval decision is subject to collateral attack only on the grounds that the judge (1) lacked jurisdiction of the subject matter, (2) lacked personal jurisdiction over respondent, or (3) acted in excess of jurisdiction. The burden of proof is on the party who attacks the judgment to show lack of jurisdiction. Furthermore, to succeed on collateral attack, the jurisdictional defect must be proven from the face of the record in the prior proceeding. Respondent's contention that the conditions attached to his prior private reproval are subject to collateral attack because the hearing judge failed to explicitly recite in her decision two findings required by rule 956 of the California Rules of Court, that the reproval conditions would serve to protect the public and to serve respondent's interests, is an allegation that the hearing judge acted in excess of her jurisdiction. Respondent failed to prove from the face of the record in the prior reproval that the conditions attached to it would not serve to protect the public or serve respondent's interest. In any event, the unchallenged factual findings in the hearing judge's decision in the prior case establish that the hearing judge acted within her jurisdiction in attaching the conditions. Without question, the reproval conditions that he take and pass a professional responsibility examination and attend the State Bar's Ethics School will serve to protect the public and serve respondent's interests. The hearing judge's error is not a jurisdictional error that can subject the hearing judge's decision to collateral attack. At most, the error was a procedural defect that respondent waived by failing to appear in the prior proceeding and object to the hearing judge's decision on that ground. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929. **[1]**

The two requisite elements of personal jurisdiction are (1) that respondent is a member of the State Bar for the duration of the proceeding and (2) that respondent was properly served with a copy of the notice of disciplinary charges. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929. **[2]**

Proper subject matter jurisdiction in the State Bar Court is not limited to the subject of attorney misconduct committed in the course of practicing law. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929. **[3]**

In the absence of any direct precedent construing rule 956 of the California Rules of Court, the review department held that the purpose of the rule's findings is to aid in ensuring that any duties attached to a reproval are reasonably related to its purposes. Although rule 956 prescribes a salutary requirement, it cannot be said that it is jurisdictional. The findings themselves do not go to the essential fairness of the underlying disciplinary proceeding or even a subsequent enforcement proceeding. If findings are omitted from a reproval decision to which rule 956 applies, the error can be called to the State Bar Court's attention in a timely manner. If not done timely, the objection is waived, absent a showing that respondent was clearly prejudiced by the omitted findings. No showing of prejudice was made in this proceeding and such a claim would be hard to envision regarding the two duties that respondent was charged with violating in this proceeding: passage of a professional responsibility examination and attendance at the State Bar's Ethics School. These are requirements imposed in almost every disciplinary probation. *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929. **[4]**

California Rules of Court, rule 951, which explicitly authorizes the State Bar Court to extend the time within which an attorney must take and pass a professional responsibility examination, applies only when the Supreme Court orders the attorney take and pass such an examination. It does not apply when the State Bar Court orders an attorney to take and pass the examination as a condition attached to a reproval. When the State Bar Court imposes such a condition, its authority to extend the time for the attorney to comply is derived from California Rules of Court,

rule 956, which authorizes the State Bar Court to attach conditions to the reprovals that it imposes. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813. **[1]**

Even after respondent's private reproval became final, the State Bar Court retained jurisdiction over the conditions attached to it under the Former Transitional Rules of Procedure of the State Bar (now the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings). Thus, when the hearing judge extended the time for respondent to comply with the conditions attached to the reproval after the time to comply had expired, the hearing judge did not act without jurisdiction; but in excess of jurisdiction. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813. **[2]**

When a party seeks or consents to a court's action that is in excess of the court's jurisdiction, the party may be estopped to complain of the court's action as long as the court had subject matter jurisdiction. Respondent was estopped from collaterally attacking a final order extending the time in which he was required to comply with conditions attached to a reproval where he consented to the order and where the court had jurisdiction of the subject. The review department concluded that the application of estoppel was in harmony with the primary goals of attorney discipline. *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813. **[3]**

The complaining clients' settlement of their civil matter against respondent and the clients' release of all claims against him does not preclude the State Bar from proceeding with the disciplinary matter. A disciplinary proceeding is not a controversy between two individuals, the complainant and the accused attorney, but is an adverse proceeding against the accused attorney and may be instituted and prosecuted upon the complaint of any person knowing the facts upon which the proceeding is based. The complaining person or client is not a party to the disciplinary proceeding, and need not appear and testify at trial. Thus, the disciplinary case was not a right, claim, or cause of action that accrued to the complaining clients; and therefore it was not a claim that they could release or otherwise compromise. *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690. **[1]**

Because jurisdiction vests in only one court at a time, once a review department opinion remanding the proceeding to hearing department for further proceedings becomes final, only the hearing department had jurisdiction to rule on State Bar's motion to expand the issues to be addressed at the trial on remand. Because the review department did not adjudicate the issue of petitioner's present moral fitness in its opinion remanding the proceeding to hearing department, the hearing judge's consideration of that issue on remand was not inconsistent with the review department's remanding opinion, and the hearing judge therefore did not error in admitting additional relevant evidence on the issue. *In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630. **[3]**

In California, as in all the states, the regulation of the practice of law is a judicial function. The California Supreme Court has original, inherent, and plenary jurisdiction to regulate attorneys in California. The State Bar provides assistance in the area of attorney regulation; it serves as an administrative assistant to or adjunct of the Supreme Court, which nonetheless retains its inherent judicial authority. Thus, contrary to respondent's suggestions, the State Bar Court possesses the jurisdiction to adjudicate attorney disciplinary proceedings as an arm of the Supreme Court. *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 495. **[1]**

Even though statutes authorizing conviction referral proceedings authorize only the disbarment or suspension of attorneys convicted of crimes, the State Bar Court still had jurisdiction in conviction matter to recommend to the Supreme Court that it cancel respondent's license to practice law. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483. **[9]**

Respondent's willful failure to disclose his arrest and pending trial on felony charges by updating his answers to the moral character questions on his initial application for admission to practice law was a fraud upon the Supreme Court because it allowed him to admitted without adequate consideration of his moral character. Thus, the State Bar Court may recommend that his license to practice be revoked without addressing the nature of his crimes or the facts and circumstances surrounding them. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483. **[12]**

Respondent's argument that the State Bar Court lacked jurisdiction because any misconduct occurred in another state was rejected because there is no jurisdictional requirement that alleged misconduct occur in this state. *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442. **[3]**

Review Department had jurisdiction under rule 113 of Transitional Rules of Procedure to review portion of order by hearing judge which, in dismissing disciplinary proceeding pursuant to agreement in lieu of discipline, placed conditions on reopening of underlying disciplinary matter. Scope of such review was to determine whether hearing judge abused discretion in including condition in agreement in lieu of discipline which had not been agreed to by parties. *In the Matter of Respondent R* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 227. **[1]**

Notice to show cause under rule 550 of Transitional Rules of Procedure of State Bar is not required in conviction referral proceeding. Pursuant to Supreme Court's delegation of authority to State Bar Court in conviction referral matters (Cal. Rules of Court, rule 951(a)), only State Bar Court referral order and notice of time and place of hearing are needed to initiate a conviction referral proceeding. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. **[2]**

Supreme Court and State Bar Court have unquestioned jurisdiction over attorneys' convictions of crime whether or not they are eligible for summary disbarment. There is no requirement that notice of time and place of hearing in conviction referral matter charge commission of "serious" offense for which admonition would be unavailable (Trans. Rules Proc. of State Bar, rule 415), or offense for which State Bar Court may recommend summary disbarment. *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52. **[3]**

State Bar's motion for emergency relief from hearing judge's order regarding conduct of disciplinary investigation was not properly brought before review department under either rule 350 of Transitional Rules of Procedure or rule 1400 of Provisional Rules of Practice. However, motion by State Bar to stay or vacate order issued by hearing judge based on argument that hearing judge acted without jurisdiction was properly brought under rule 113 of Transitional Rules of Procedure. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[1]**

Except with respect to motions to quash investigative subpoenas, the State Bar Court does not have jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges by the Office of the Chief Trial Counsel, and therefore had no jurisdiction to grant relief requested by attorney regarding conduct of disciplinary investigation, absent a Supreme Court order conferring authority to do so. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[2]**

The State Bar Court's statutory exercise of independent decision-making authority over the determination of disciplinary and reinstatement proceedings does not extend to the investigation of such matters. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[3]**

In the statute establishing the State Bar Court (Business and Professions Code section 6086.5), the reference to "committees" which are replaced by the State Bar Court does not include the standing Discipline Committee of the Board of Governors. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[4]**

Former disciplinary structure under which local administrative committees had both investigative and fact-finding powers raised due process concerns. Under volunteer State Bar Court system which superseded it, investigative and prosecutorial functions were separated from fact-finding and adjudicative functions. This separation was strengthened and institutionalized by reforms which created independently appointed State Bar Court. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[5]**

Statutory scheme regarding State Bar discipline system does not provide for State Bar Court judges to report to Board of Governors or any of its committees, nor does it require Chief Trial Counsel to report to State Bar Court. Consistent with separation of prosecutorial and judicial roles, State Bar Court has no administrative oversight role with respect to functions of Chief Trial Counsel, and does not have general, plenary authority to supervise the conduct of investigations. Board of Governors and its Discipline Committee have general statutory authority over Chief Trial Counsel and Office of Investigations, subject to review by California Supreme Court. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[6]**

The State Bar Court's statutory jurisdiction (Business and Professions Code section 6051.1) to adjudicate motions to quash investigative subpoenas issued by the Office of the Chief Trial Counsel constitutes the sole exception to the State Bar Court's lack of jurisdiction during the investigation phase of disciplinary proceedings. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[7]**

Review department declined to adopt construction of statute giving State Bar Court jurisdiction over motions to quash subpoenas (Business and Professions Code section 6051.1) which would do violence both to plain meaning of statute and to necessary separation of powers within disciplinary system. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[8]**

When a disciplinary proceeding is pending in State Bar Court, the respondent may be able to argue that evidence sought to be used by the State Bar which was obtained by improper means should be excluded. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[9]**

Nothing in the California Rules of Court delegates to the State Bar Court the Supreme Court's general review power over decisions of the State Bar Board of Governors and its committees. However, in the exercise of its inherent authority to regulate the legal profession, the Supreme Court could order the State Bar Court to adjudicate or make findings and recommendations regarding a motion for a protective order regarding a State Bar disciplinary investigation, or could adopt a rule of court giving the State Bar Court jurisdiction over such motions generally. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18. **[10]**

Respondent's attempts to have clients withdraw pending State Bar complaints as part of settlements of actions which were not for malpractice did not violate statute prohibiting attorneys from conditioning malpractice settlements on agreement by client not to file State Bar complaint. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Trans. Rules Proc. of State Bar, rule 507.) *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752. **[12]**

The Legislature itself has recognized that the inherent authority of the Supreme Court controls the outcome in disciplinary proceedings. It is therefore incumbent upon the review department not only to review the statutory criteria for summary disbarment, but also to review Supreme Court precedent to assure that application of statutory summary disbarment does not conflict with Supreme Court standards for disbarment. *In the Matter of Salameh* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 729. **[4]**

Finality of an attorney's criminal conviction is not essential for an order referring the conviction to the State Bar Court Hearing Department for a determination whether there is probable cause to conclude that the circumstances of the conviction involved moral turpitude for purposes of interim suspension of the attorney. *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. **[1]**

The possibility that criminal proceedings against an attorney may be dismissed if the attorney complies with the terms of criminal probation is not relevant to the effect of the conviction in disciplinary proceedings. *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. **[2]**

No method of enforcement of settlement agreements in disciplinary proceedings is set forth in the Transitional Rules of Procedure, but an express provision governing this subject is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. Where one party refused to abide by a settlement agreement, the other party could have made a motion to compel enforcement of the agreement, by analogy with the statutory motion permitted by Code of Civil Procedure section 664.6, or could have asserted the agreement as an affirmative defense in the pending proceeding. *In the Matter of Chen* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 571. **[6]**

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). *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559. **[5]**

Where respondent challenged the use of a prior disciplinary matter as evidence in aggravation because he contended the matter had been time-barred, but respondent had defaulted in the earlier proceeding and the prior discipline had been ordered by the Supreme Court over three years earlier, only the Supreme Court could grant the requested relief. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480. **[19]**

101 Generally Applicable Procedural Issues — Jurisdiction

For disciplinary purposes, superior court orders are final and binding once review in courts of record is waived or exhausted. Attorneys cannot wait until State Bar disciplinary proceedings commence to collaterally challenge legitimacy of superior court orders. State Bar Court does not have jurisdiction to determine validity of civil court orders. *In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 551. **[4a-c]**

102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in Prosecution

If disciplinary proceeding is based solely on complainant's allegations of violation of State Bar Act or Rules of Professional Conduct, rule of limitations (Rules of Proc. of State Bar, rule 5.21) provides that proceeding must begin within five years from date of violation. Normally, a statute or rule is violated when every element of violation has occurred. However, rule of limitations is tolled during period that attorney acts in fiduciary relationship with complainant or related party, even if it is other than an attorney-client relationship. Moreover, if disciplinary charge is based on continuing violation of duty, violation is deemed committed at termination of entire course of conduct. Where respondent allegedly breached fiduciary duty [illegible] under movie financing agreement requiring respondent to hold funds in escrow until close of [illegible]duction, rule of limitations was tolled as long as fiduciary relationship continued, and respondent's [illegible]version of funds created continuing violation lasting until completion of purpose of fiduciary duty. Accordingly, where initial notice of disciplinary charges was filed within five years after completion of movie production, misappropriation charge was timely even though diversion of funds occurred more than five years earlier. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[2a-h]**

Links directly p.1 of this opinion

Under rule 5.21(C)(3) of Rules of Procedure of State Bar, rule of limitations for disciplinary charges is tolled during pendency of government investigations or proceedings based on same acts or circumstances as violation. Where Tennessee civil proceeding found that respondent had defrauded investor and was liable for damages, rule of limitations was tolled for disciplinary charges based on same acts or circumstances. However, subsequent sister state collection proceedings, and bankruptcy proceed[illegible] to determine dischargeability of debt under Tennessee judgment, were not based on same acts or circu[illegible] did not toll rule of limitations. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State [illegible] **[3a, b]**

Links directly to headnote 2a-b wihtin this opinion

Respondent seeking to dismiss disciplinary charges on basis of rule of limitation has burden of proving facts showing rule of limitation applies. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[6]**

Limitations period is calculated from date of filing of original notice of disciplinary charges (NDC). Where original NDC was filed within five years after termination of fiduciary duty that respondent was alleged to have violated, original NDC was timely filed, and amended NDC based on same misconduct related back to filing of original NDC. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[8]**

102.30 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct– Investigative and/or pretrial misconduct

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. In California disciplinary proceedings, adequate notice requires only that attorney be fairly apprised of precise nature of charges before proceedings commence. Where Notice of Disciplinary Charges pled specific facts comprising violation and specific rule violated, respondent received due process, and Review Department rejected respondent's contention that due process required that respondent be given notice during investigation that conduct violated specific rule before State Bar could charge respondent with violation. *In the Matter of Martin* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 753. **[2]**

103 Generally Applicable Procedural Issues — Disqualification/Bias of Judge

Where respondent failed to establish that hearing judge demonstrated bias or that respondent was specifically prejudiced, and where purpose of hearing judge's questions at trial was to clarify judge's own confusion about testimony, respondent failed to meet burden to show judicial bias, and failed to show he was deprived of due process. *In the Matter of Gordon* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 610. **[2]**

106.10 Generally Applicable Procedural Issues – Issues re Pleadings – Sufficiency of pleadings to state grounds for action sought

In reviewing an order dismissing a disciplinary proceeding, Review Department looks to operative notice of disciplinary charges (NDC), deems all allegations in that NDC to be true, and may also rely on any judicially noticed facts to assess the sufficiency of the operative NDC. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[1]**

If disciplinary proceeding is based solely on complainant's allegations of violation of State Bar Act or Rules of Professional Conduct, rule of limitations (Rules of Proc. of State Bar, rule 5.21) provides that proceeding must begin within five years from date of violation. Normally, a statute or rule is violated when every element of violation has occurred. However, rule of limitations is tolled during period that attorney acts in fiduciary relationship with complainant or related party, even if it is other than an attorney-client relationship. Moreover, if disciplinary charge is based on continuing violation of duty, violation is deemed committed at termination of entire course of conduct. Where respondent allegedly breached fiduciary duty to investor under movie financing agreement requiring respondent to hold funds in escrow until close of movie production, rule of limitations was tolled as long as fiduciary relationship continued, and respondent's alleged diversion of funds created continuing violation lasting until completion of purpose of fiduciary duty. Accordingly, where initial notice of disciplinary charges was filed within five years after completion of movie production, misappropriation charge was timely even though diversion of funds occurred more than five years earlier. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[2a-h]**

106.20 Standards of Proof/Standards of Review – Respondent's burden in disciplinary matters

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. In California disciplinary proceedings, adequate notice requires only that attorney be fairly apprised of precise nature of charges before proceedings commence. Where Notice of Disciplinary Charges pled specific facts comprising violation and specific rule violated, respondent received due process, and Review Department rejected respondent's contention that due process required that respondent be given notice during investigation that conduct violated specific rule before State Bar could charge respondent with violation. *In the Matter of Martin* (Review Dept. 2020) 5 Cl State Bar Ct. Rptr. 753. **[2]**

Respondent seeking to dismiss disciplinary charges on basis of rule of limitation has burden of proving facts showing rule of limitation applies. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[6]**

Where disciplinary statute defined violation of specified Civil Code section as constituting attorney misconduct, attorney was properly found culpable of violating disciplinary statute even though notice of disciplinary charges charged violation of disciplinary statute only, and did not expressly charge violation of Civil Code section. *In the Matter of Gordon* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 610. **[9]**

106.30 Procedural Issues—Issues re Pleadings—Duplicative charges

Where same acts of misconduct by respondent violated both section 6068(a) and rule 3-300, hearing judge erred by dismissing section 6068(a) charge with prejudice. Better approach was to find both violations, but assign duplicative violation no additional weight in determining discipline. *In the Matter of Lingwood* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 660. **[6]**

Where respondent was culpable of committing act of moral turpitude and of violating rule of professional conduct based on same misconduct underlying respondent's culpability of violating Business and Professions Code section 6068(a), hearing judge was correct in giving other violations no additional weight in culpability. *In the Matter of Nassar* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 593. **[4a, b]**

Misrepresentation of fact to court for purpose of obtaining continuance violates attorney's duty not to mislead courts. For this purpose, administrative tribunal acting in quasi-judicial capacity is not distinct from court. Where respondent directed assistant to make material misrepresentation to administrative tribunal on respondent's behalf, and then took no steps to correct record despite notice that tribunal had relied on misrepresentation, respondent was culpable of intentional act of moral turpitude and of misleading tribunal,

but violations were treated as single offense involving moral turpitude, and no additional weight was assigned to duplicative charge. *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511. **[3a - f]**

Where respondent misused her authority and discretion as trustee of her family's trust, intentionally violated numerous fiduciary duties set forth in the Probate Code by means infused with dishonesty and/or concealment, made repeated misrepresentations to the court and third parties in documents filed which falsely represented her as trustee after she had been removed, and intentionally violated court orders, respondent was culpable of multiple intentional acts of moral turpitude. Respondent was also culpable of violating section 6068(a), but Review Department assigned these violations no additional weight because they were duplicative of section 6106 violations. *In the Matter of Schooler* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 494. **[3a, b]**

Where charge against respondent prosecutor of failing to comply with Constitution and laws, based on respondent's willful violation of criminal defendant's constitutional rights, overlapped with moral turpitude charge based on same misconduct, charge of failing to comply with law was properly dismissed as duplicative. *In the Matter of Murray* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 479. **[4]**

Where section 6106 moral turpitude charge for making misrepresentations to a tribunal and section 6068, subdivision (d) charge for seeking to mislead a judge were based on the same misconduct, section 6068, subdivision (d) charge dismissed as duplicative. *In the Matter of Hansen* (Review Dept. 2016) 5 Cal State Bar Ct. Rptr. 464. **[1]**

Where finding that respondent was culpable of moral turpitude already accounted for respondent's pattern of telling half-truths, Review Department rejected OCTC's request for finding of aggravation under either multiple acts of wrongdoing or pattern of misconduct. *In the Matter of Hansen* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 464. **[7]**

Where respondent, after learning that he was suspended from practice, attempted to negotiate settlement of clients' case and appeared for a client at a deposition, respondent was culpable of violating section 6068(a) by his unauthorized practice of law, but this violation was given no weight, because respondent was also found culpable of moral turpitude based on same facts. *In the Matter of Burke (Review* Dept. 2016)5Cal State Bar Ct. Rptr. 448. **[8a-c]**

106.40 Procedural Issues – Issues re Pleadings – Amendment of pleadings

Limitations period is calculated from date of filing of original notice of disciplinary charges (NDC). Where original NDC was filed within five years after termination of fiduciary duty that respondent was alleged to have violated, original NDC was timely filed, and amended NDC based on same misconduct related back to filing of original NDC. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[8]**

Evidence of uncharged misconduct can be considered in aggravation if respondent's due process rights are not violated. Where OCTC was or should have been aware of uncharged misconduct before disciplinary charges were filed, misconduct should have been charged. Nonetheless, where respondent stipulated to conduct constituting uncharged misconduct; uncharged misconduct was elicited for relevant purpose and based on respondent's own representations; and hearing judge granted motion to conform charges to proof at trial, hearing judge correctly assigned nominal weight in aggravation for uncharged misconduct. *In the Matter of Golden* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 574. **[7a-c]**

106.50 Generally Applicable Procedural Issues – Issues re Pleadings – Answer to initial pleading

Willful violation of rule 9.20(c) requires neither bad faith nor even actual knowledge of rule provision violated. Where respondent conceded in answer to charges, and in stipulation of facts, that respondent failed to timely file rule 9.20(c) declaration and that State Bar sent email notices informing respondent of rule 9.20(c) filing duties, one that was received and another that was not returned, respondent was culpable of willfully violating rule 9.20(c). *In the Matter of Braun* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 738. **[1]**

Where respondent's answer to disciplinary charges and subsequent stipulation admitted his culpability of willful violation of rule 9.20(c); respondent admitted facts of uncharged misconduct; and respondent did not dispute culpability of violating statutory duty even though stipulation was technically limited to facts of offenses, respondent was entitled to significant mitigating credit for cooperation with State Bar, even though facts in probation and rule 9.20 matters are generally easily provable and stipulations do not save significant time. *In the Matter of Braun* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 738. **[5]**

106.90 Generally Applicable Procedural Issues – Issues re Pleadings – Other issues

Whether an attorney engaged in multiple acts of misconduct in aggravation is not limited to counts pleaded. Where respondent's culpability of two counts of violating former rule 4-100(A) encompassed 168 separate acts of misconduct, respondent committed multiple acts of misconduct. However, where misconduct lasted only 10 months, respondent's multiple acts did not warrant substantial aggravation. *In the Matter of Martin* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 753. **[5]**

Evidence of uncharged misconduct can be considered in aggravation if respondent's due process rights are not violated. Where OCTC was or should have been aware of uncharged misconduct before disciplinary charges were filed, misconduct should have been charged. Nonetheless, where respondent stipulated to conduct constituting uncharged misconduct; uncharged misconduct was elicited for relevant purpose and based on respondent's own representations; and hearing judge granted motion to conform charges to proof at trial, hearing judge correctly assigned nominal weight in aggravation for uncharged misconduct. *In the Matter of Golden* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 574. **[7a-c]**

Where respondent was found culpable of three disciplinary violations, but committed at least 25 acts of wrongdoing over two-year period by repeatedly failing to respond to letters from insurer regarding client's claim, hearing judge erred in assigning only minimal aggravating weight to respondent's multiple acts of wrongdoing. Multiple acts of wrongdoing are not limited to the counts pled, and respondent's recurring ethical violations were assigned significant aggravating weight. *In the Matter of Khishaveh* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 564. **[3]**

115 Procedural Issues – Continuances (rule 5.49)

Where OCTC argued for first time in closing trial brief that respondent engaged in dishonesty and bad faith in seeking continuance of disciplinary trial, Review Department declined to assign bad faith as aggravating factor, because respondent did not have opportunity to respond to OCTC's bad faith allegation, and OCTC did not establish by clear and convincing evidence that respondent deliberately attempted to mislead court. *In the Matter of Khakshooy* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 681. **[7a-c]**

117 Generally Applicable Procedural Issues — Dismissal (rules 5.122-5.124)

In reviewing an order dismissing a disciplinary proceeding, Review Department looks to operative notice of disciplinary charges (NDC), deems all allegations in that NDC to be true, and may also rely on any judicially noticed facts to assess the sufficiency of the operative NDC. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[1]**

If disciplinary proceeding is based solely on complainant's allegations of violation of State Bar Act or Rules of Professional Conduct, rule of limitations (Rules of Proc. of State Bar, rule 5.21) provides that proceeding must begin within five years from date of violation. Normally, a statute or rule is violated when every element of violation has occurred. However, rule of limitations is tolled during period that attorney acts in fiduciary relationship with complainant or related party, even if it is other than an attorney-client relationship. Moreover, if disciplinary charge is based on continuing violation of duty, violation is deemed committed at termination of entire course of conduct. Where respondent allegedly breached fiduciary duty to investor under movie financing agreement requiring respondent to hold funds in escrow until close of movie production, rule of limitations was tolled as long as fiduciary relationship continued, and respondent's alleged diversion of funds created continuing violation lasting until completion of purpose of fiduciary duty. Accordingly, where initial notice of disciplinary charges was filed within five years after completion of movie production, misappropriation charge was timely even though diversion of funds occurred more than five years earlier. *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 **[2a-h]**