STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS R. KIZER

A Member of the State Bar

[No. 88-O-10224]

Filed June 19, 1990

SUMMARY

Respondent withheld money from personal injury clients' settlement proceeds to pay the clients' treating physician, misappropriated such money for his own use, and misrepresented to the clients that the physician's bills had been paid. Respondent also failed to participate in the State Bar's investigation of the matter. The hearing referee recommended disbarment. (Jay C. Miller, Hearing Referee.)

The review department set the matter for review on its own motion because of questions it had concerning the proper findings to make and the proper method of considering respondent's prior record of discipline. The review department held that the proper method for proving a respondent's prior record is to admit the supporting documents into evidence. In light of respondent's present misconduct and his prior record, the review department adopted the referee's recommendation that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: No appearance (default)

HEADNOTES

[1] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
Where the hearing department's findings are incomplete, the review department, because its review of the record is independent, is empowered to reweigh the evidence and make its own findings and conclusions flowing appropriately from the record.

[2] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Attorney's failure to keep sums owed to clients' treating physician in a proper trust account and to promptly pay the sums to the doctor as requested constituted a wilful violation of rules requiring keeping client funds in trust account and paying them promptly upon demand.

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.

[3] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
Records of respondent's trust account, showing that balance dropped to a negative sum without payment having been made to clients' treating physician, warranted the conclusion that respondent misappropriated trust funds.

[4] **221.00 State Bar Act—Section 6106**
Attorney's misrepresentation to clients that attorney had paid all of clients' medical bills, when attorney had not done so, constituted act of moral turpitude.

[5 a, b] **120 Procedure—Conduct of Trial**
135 Procedure—Rules of Procedure
136 Procedure—Rules of Practice
146 Evidence—Judicial Notice
194 Statutes Outside State Bar Act
802.21 Standards—Definitions—Prior Record
An attorney's prior record of discipline is a record of the Supreme Court and also of the State Bar, and as such it is the proper subject of judicial notice. Even when judicial notice is taken of such records, the documents composing them should be identified, introduced in evidence, and made part of the record in the proceeding. (Rule 571, Rules Proc. of State Bar; rules 1260-1262, Prov. Rules of Practice of State Bar Ct.)

[6] **130 Procedure—Procedure on Review**
146 Evidence—Judicial Notice
166 Independent Review of Record
Ambiguity in the record, created when hearing referee took judicial notice of respondent's prior record of discipline but failed to admit it into evidence, was removed when review department admitted in evidence the prior record of discipline that was previously offered at trial and judicially noticed.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.19 Section 6106—Other Factual Basis
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.19 Misappropriation—Other Fact Patterns

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

Aggravation

Found

511 Prior Record
521 Multiple Acts
591 Indifference

Standards

802.30	Purposes of Sanctions
805.10	Effect of Prior Discipline
822.10	Misappropriation—Disbarment
824.10	Commingling/Trust Account Violations
831.50	Moral Turpitude—Disbarment
861.30	Standard 2.6—Disbarment
861.40	Standard 2.6—Disbarment

Discipline

1010	Disbarment

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that Thomas R. Kizer ("respondent") be disbarred from the practice of law in this state. Respondent is age 37 and was admitted to practice law in 1982. In December 1988, the Supreme Court ordered respondent suspended from practice for five years, stayed, with two years actual suspension and until he makes restitution. Respondent's prior discipline rested on findings showing that in 12 matters in 1983-1984, respondent either failed to pay over to doctors trust monies he withheld from clients' accident settlements (7 matters) or failed to notify or pay to the clients themselves their share of the settlements (5 matters). Respondent was also found culpable of two less serious counts. The amount of monies wrongfully withheld from doctors and clients totalled more than $33,000. Respondent restored most of that money to clients or doctors by 1986.

In the proceeding below, the record shows that in one matter in 1987, respondent withheld from his clients' personal injury settlement $1,180 of trust funds to pay to a doctor who treated respondent's clients; he failed to pay those funds to the doctor and instead misappropriated them, and he also misrepresented to his clients that he had paid the doctor bills. Respondent has failed to make restitution. In the second matter, the record shows that respondent failed to participate in the State Bar investigation in violation of his duties as an attorney.

We set this matter for review on our own motion because of questions we had concerning the proper findings to make and the proper method of considering respondent's prior record of discipline. Upon our independent record review, we shall modify the findings in several respects. Since we conclude that disbarment is the appropriate discipline, we shall adopt as our recommendation to the Supreme Court, the disbarment recommendation of the referee below.

1. PROCEDURAL BACKGROUND.

a. The Charges.

This formal disciplinary proceeding started on April 13, 1989, by the filing in the State Bar Court of a two-count notice to show cause ("notice"). (Trans. Rules Proc. of State Bar, rule 550.) In count one of the notice, respondent was charged in essence with having misrepresented to his personal injury clients that he had paid their medical bills from the total settlement he had received for them, with failing to promptly pay to the clients or their doctor all funds to which they were entitled and with misappropriating the funds respondent received on behalf of his clients. (Bus. & Prof. Code, §§ 6068 (a), 6103 and 6106; Rules Prof. Conduct, rules 8-101(A) and 8-101(B)(4)).[1] In count two, respondent was charged with having failed to cooperate and participate in the State Bar investigation looking into the charges of count one. (Bus. & Prof. Code, §§ 6068 (a), 6068 (i) and 6103.)

b. Entry of Respondent's Default.

As prescribed, the notice was served on respondent by certified mail on his State Bar record address at the time. (See exhs. 1-2; declarations of service attached to notice to show cause dated April 19, 1989; Bus. & Prof. Code, § 6002.1 (c).)[2] The notice warned respondent that his default may be entered and the charges admitted if he did not timely file an answer to the notice. On June 19, 1989, after the State Bar sent respondent the prescribed additional notice that his default would be entered if he failed to answer within 20 days, his default was entered and the charges against him were deemed admitted. (Trans. Rules Proc. of State Bar, rules 552, 552.1(c).)

1. Unless noted, all references to the Rules of Professional Conduct of the State Bar are to the former rules in effect between January 1, 1975, and May 26, 1989, and which apply to respondent's conduct.

2. The certificate from the State Bar's supervisor of member records attesting to respondent's address of record, mistakenly refers to his city as Los Angeles. The records themselves, show it as Beverly Hills, he was served in Beverly Hills and thus it appears that any error was limited to the certificate itself and did not extend to the underlying records nor to the service of process. (Compare exh. 2 with declaration of service attached to notice to show cause.)

c. The Evidentiary Hearing.

On August 10, 1989, the referee assigned to this matter held a formal hearing on the charges. He received documentary evidence offered by the examiner including seven declarations under penalty of perjury of the clients or others concerning respondent's handling of the funds in this matter. The referee also received in evidence a declaration from a State Bar investigator relating to respondent's failure to participate in the investigation of the charges against him. After determining that respondent was culpable of professional misconduct, the referee invited the examiner to present evidence bearing on discipline. (R.T. p. 16.) In response, the examiner offered to introduce in evidence respondent's prior record of discipline. The referee stated that he would "just take judicial notice [of it]" but did not physically place the prior record into the record below. (R.T. pp. 17-18.) The examiner concluded her presentation by citing portions of the Standards for Attorney Sanctions for Professional Misconduct ("stds.") (Rules Proc. of State Bar, div. V) she deemed applicable to the record and recommended that respondent be disbarred. (R.T. p. 19.)

d. The Referee's Decision.

On August 10, 1989, the hearing referee filed his decision. In substance, the referee found that in October of 1989 [sic][3] respondent represented one set of clients, in April of 1987 he recovered a sum of money for them, falsely represented to them that he "would pay" all their medical bills owing a certain doctor, overdrew his trust account and failed on two occasions to respond to a State Bar investigator. The referee concluded in aggravation that respondent had a prior record of discipline and failed to cooperate with the State Bar in this (present) matter. The referee also concluded that respondent wilfully violated the same sections of the State Bar Act and Rules of Professional Conduct of the State Bar charged in the notice. (Bus. & Prof. Code, §§ 6068 (a), 6103 and 6106; Rules Prof. Conduct, rules 8-101(A) and 8-101(B)(4).) Finally, the referee recommended that respondent be disbarred and ordered to comply with rule 955, California Rules of Court.

Because of our concern over the adequacy and completeness of the referee's findings as well as the form by which the respondent's prior record of discipline was considered, we set the matter for hearing before us.[4]

2. THE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS.

a. The Present ("Ses") Matter.

[1] From even a cursory comparison of the hearing referee's findings with the charges (deemed admitted by respondent's default) and record, we have concluded that the referee's findings are incomplete in several important areas.[5] Because our review of the record is *independent* (Trans. Rules Proc. of State Bar, rule 453), we are empowered to reweigh the evidence and make our own findings and conclusions which flow appropriately from the record. Because this matter is relatively straightforward, we believe it will be clearer if we set forth our findings anew rather than attempt to modify selectively and adopt the referee's findings.

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3. This date is clearly an error. As we shall detail *post*, the record shows that these clients hired respondent in October *1986*.

4. We asked the State Bar (the respondent was in default) to address the propriety of considering respondent's prior record by judicial notice and not by introduction of the record in evidence; whether in the *Ses* matter, findings of misappropriation and misrepresentation as to payment of medical bills were warranted; and, in count two, whether the evidence would warrant a finding that respondent was culpable of failing to cooperate or participate in the State Bar investigation.

5. For example, the referee seemed to confuse respondent's misrepresentation as to payment of doctor bills with his promise in the future to pay them. He found the respondent's trust account overdrawn without making a finding that the funds were first placed in the account and then misappropriated therefrom and he appeared to have treated respondent's failure to participate in the State Bar investigation as an aggravating circumstance rather than a substantive offense as it was actually charged.

In October of 1986 three members of the Ses family hired respondent to represent them in seeking damages arising out of an accident. The Ses family spoke only the Cambodian language, but they had the assistance of someone who spoke both English and Cambodian. (Exh. 6.)

In mid-March and mid-April 1987, respondent settled all of the Ses' claims for a gross recovery of $11,250. These sums came to respondent by a total of six insurance company drafts made payable to the respective client and to respondent. He deposited each of the checks into his client trust account (no. 03-165-701) at the Mitsui Manufacturers Bank in Beverly Hills. (Exhs. 7, 8 and 9.) Respondent accounted for the Ses' claims separately, apportioning the settlement among each of the three clients. The following chart shows the breakdown of the settlement for each of the three Ses clients, including the gross settlement, respondent's fee, the amount paid directly to the client and the amount respondent withheld from each Ses settlement for the doctor who treated each of the Ses clients, Dr. Emmanual Taylan:

Client	*Gross Recovery*	*Respondent's Fee*	*Paid to Client*	*Kept for Dr. Taylan*
Lao Ses	$4,860	$1,620	$2,280	$ 960
Sothon Ses	1,470	490	760	220
Sophath Ses	4,920	1,640	2,260	1,020
Total	**11,250**	**3,750**	**5,300**	**2,200**

On April 14, 1987, the Ses clients went to respondent's office to sign settlement papers. At that time, respondent told them that respondent "had paid" their medical bills totalling $2,200. (Exhs. 3, 4 and 5.)[6] On a settlement breakdown sheet respondent gave Lao Ses, there appeared the words, "*Medical paid:* [¶] Taylan. 960 -." (Exh. 3, emphasis in original.)

On the breakdown sheet respondent gave Sothon Ses, there appeared the words, "*Medical paid:* [¶] S Taylan. 220 -." (Exh. 4, emphasis in original.)

Finally, on the breakdown sheet respondent gave Sophath Ses, there appeared the words: "Dr. Taylan $1020." (Exh. 5.)

Ms. Rose Taylan, Dr. Taylan's office manager, stated in her declaration, dated July 31, 1989, that in April 1987, respondent paid Dr. Taylan *$1,020* of the $2,200 of medical charges Dr. Taylan had recorded for treating the Ses clients. However, despite calling respondent's office several times and sending him a letter in October 1987, Ms. Taylan never received payment of the remaining $1,180 from respondent. (Exh. 10.)

The records of respondent's bank trust account show that his account balance remained above $1,180 until December 18, 1987. On December 18, the balance dropped to -$2,191.69. The balance stayed below +$1,180 until December 29, 1987. On January 4, 1988, that account balance was at -$2,681.69. (Exh. 9.)

b. Respondent's Failure to Cooperate with State Bar Investigation.

On May 31 and August 8, 1988, a State Bar investigator wrote to respondent about his alleged failure to pay to Dr. Taylan amounts withheld from the Ses. The August letter specifically referred respondent to Business and Professions Code section 6068 (i) (duty of member to cooperate and participate in any State Bar investigation). Respondent never replied to the investigator by telephone, in writing or by any other means. (Exh. 11 [declaration of State Bar investigator S. Hank Oh].)

c. Our Ultimate Findings and Conclusions.

From the charges standing alone, which were admitted by respondent's default and supplemented by additional evidence, we would be required to find as to count one (the Ses matter) that respondent

6. The evidence offered by the Ses clients was in the form of declarations under penalty of perjury. Another declaration was signed by Sohoen Huot who stated he was fluent in Cambodian and English. Huot accompanied the Ses clients to respondent's office on April 14 and translated from English to Cambodian the settlement breakdown sheets which respondent gave each client. According to Huot, respondent told the Ses that he "had paid to Dr. Taylan the amounts circled in red on the left hand corner of the settlement breakdown sheets." Huot also translated from English to Cambodian each of the Ses' declarations offered here in evidence. (Exh. 6.)

misrepresented to his clients that he had paid all sums owing to Dr. Taylan for treatment when in fact he had not. Instead, he failed to keep those sums in his trust account, misappropriated them to his own use and failed to pay them to the doctor. These findings are also compelled by the independent documentary evidence and declarations under penalty of perjury from each client and a third party fluent in English and Cambodian as well as from a member of Dr. Taylan's office staff, copies of the insurance drafts and respondent's trust bank account records. **[2]** This evidence shows respondent's failure to keep the required sums owing to Dr. Taylan in a proper trust account and his failure to promptly pay the sum to Dr. Taylan and warrants a conclusion that respondent wilfully violated rules 8-101(A) and 8-101(B)(4). (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.) **[3]** Moreover, the records of respondent's trust account standing alone, which showed that the balance dropped to a negative sum, without payment of monies owed Dr. Taylan would warrant the conclusion we make that respondent misappropriated trust funds in violation of Business and Professions Code section 6106. (See, e.g., *Jackson* v. *State Bar* (1979) 25 Cal.3d 398, 403.) **[4]** We conclude also that respondent's misrepresentation to the Ses clients that he had paid all their medical bills when he had not done so also violated section 6106. (See *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567.)

The record also warrants a finding that as to count two, respondent failed to participate and cooperate in the State Bar investigation into this matter and we conclude that this breach was a wilful violation of Business and Professions Code section 6068 (i).[7]

We find in aggravation that respondent has a prior record of serious misconduct which we shall discuss in greater detail *post*. (See std. 1.2(b)(i).) We find also, that respondent's conduct in the Ses matter is aggravated by his failure to make restitution of the $1,180 he misappropriated (std. 1.2(b)(v)) and that respondent's misconduct in the present record shows multiple acts of wrongdoing (std. 1.2(b)(ii)). Regrettably, we see no evidence warranting findings in mitigation.

3. DISCUSSION.

a. Introduction Into Evidence of Respondent's Prior Record.

[5a] Respondent's prior record of discipline was a record of the Supreme Court of this state and also of the State Bar. As such, it was the proper subject of judicial notice. (Evid. Code, § 451, subd. (a); *id.*, § 452, subds. (c), (d), (g) and (h); *id.*, § 459, subd. (a).) Although judicial notice is no longer recognized expressly as a form of evidence,[8] it is a substitute for formal proof of facts. (1 Witkin, *California Evidence* (3d ed. 1986) Judicial Notice, § 80, pp. 74-75; 2 Jefferson, *California Evidence Benchbook* (2d ed. 1982) Judicial Notice § 47.1, p. 1748.) While taking judicial notice of the prior record, the referee did not specify the documents or records which he noticed, nor did he make them part of the record for our review.

The long-standing prescribed procedure in the State Bar Court is to offer in evidence the admissible prior record. (Rules Proc. of State Bar, rule 571; (former) State Bar Court Rules of Practice, rule 1263, effective at the time of the evidentiary hearing below; (present) Provisional Rules of Practice of the State Bar Court, rules 1260-1262.) This procedure of physically admitting a prior record of discipline insures that all bodies vested with deciding this case, including this department and the Supreme Court, are examining the identical documents and all counsel can cite uniformly to those documents. **[5b]** It is just as important to identify the documents composing a prior record of discipline and make them part of the record of State Bar proceedings when the hearing judge proposes to take judicial notice of them. (See Evid. Code, § 455; *People* v. *Maxwell* (1978) 78

7. We decline to adopt the hearing referee's conclusions in either count that respondent violated sections 6068 (a) and 6103 for the reasons articulated by our Supreme Court in *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931 and *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.

8. Compare former Code of Civil Procedure section 1827 with Evidence Code section 140; see 1 Witkin, *California Evidence* (3d ed. 1986), Introduction, § 18, pp. 20-21.

Cal.App.3d 124, 130-131.) **[6]** In this case, ambiguity regarding the precise subject of judicial notice was removed when the examiner offered in evidence, at the time of oral argument before us, the respondent's prior record of discipline previously offered at trial. We have made it part of the record and we, too, take judicial notice of it (Evid. Code, § 459) to establish the Supreme Court's action and the stipulated facts and conclusions leading up to it. (Exh. 1 introduced before review department; Supreme Court Bar Misc. No. 5865; see, e.g., *People* v. *Thacker* (1988) 175 Cal.App.3d 594, 599.)

b. The Appropriate Degree of Discipline.

Were we to have before us *only* the record of the present two-count disciplinary matter we review, we would be compelled to consider recommending at least lengthy actual suspension from practice as a result of respondent's misappropriation of funds, his failure to comply with the important requirements of rule 8-101, his misrepresentation and his failure to participate in the State Bar investigation. (See stds. 2.2(a) and (b), 2.3 and 2.6.)

However, we now have in evidence the respondent's record of discipline. That record shows that respondent stipulated that he committed 12 offenses over a two-year period (1983-1984) as to his handling of funds in personal injury matters and committed two additional instances of misconduct unrelated to the handling of funds. That record shows that in seven matters respondent failed to pay over to doctors trust monies he withheld from clients' accident settlements and in five matters he failed to notify or pay to the clients themselves their share of the settlements. The total amount of monies wrongfully withheld from doctors and clients was more than $33,000. Respondent restored most of that money to clients or doctors by 1986. Significantly, respondent's prior discipline found only mitigating and no aggravating circumstances. Those circumstances were that respondent was candid and cooperative with the State Bar, he had no additional complaints, the conduct in the prior matter happened shortly after his admission and showed his unfamiliarity with and poor training about the business of law practice, all funds were intact in his trust account, competing claims needed to be resolved before respondent could pay some funds, respondent had made all needed restitution or had agreed to make the remaining restitution, he underwent a partnership dissolution, his records were seized in a law enforcement investigation, he was severely wounded when ambushed by a gunman in 1985 and since early 1983, he had experienced significant marital difficulties.

Despite the significant mitigating circumstances, the parties stipulated in the prior matter to a five-year suspension, stayed on conditions including two years of actual suspension. The Supreme Court ordered that discipline, effective December 17, 1988.

When we analyze respondent's present and prior records together, we are led to conclude that disbarment is now necessary to fulfill the purposes of imposing discipline: protection of the public, preservation of integrity in the profession and maintenance of confidence in the legal profession. (See std. 1.3; see also std. 1.7(a).) Although respondent's present record consists of only one client matter and one count of failure to participate in the State Bar investigation, it depicts conduct more serious than was found in his prior. In this record, unlike in his prior record, respondent failed to maintain inviolate trust funds in his account and instead misappropriated them. Moreover, none of the fourteen matters of culpability in respondent's prior record involved a finding of misrepresentation of facts. But respondent did misrepresent facts in the present matter. Although it was possible to ascribe respondent's conduct in the prior record to his inexperience, he had been practicing for over four years at the time he engaged in the misdeeds before us. Restitution is still owing in the Ses matter. Finally, the record shows no participation from respondent in this matter, in sharp contrast to his cooperation in the prior matter.

We are forced to conclude that the public, courts and legal profession would be exposed to an unwarranted risk of further harm were we to recommend that respondent be allowed to continue in practice, even after an additional lengthy suspension. (See, e.g., *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 447; *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 728; *In re Vaughn* (1985) 38 Cal.3d 614, 620.)

4. FORMAL RECOMMENDATION.

For the reasons stated above, we recommend that respondent, Thomas R. Kizer, be disbarred from the practice of law in this state and that if his period of actual suspension from practice in the prior matter ends before the Supreme Court should impose its final disciplinary order in this matter, we also recommend that he be ordered to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified by subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's final order.

We concur:

PEARLMAN, P.J.
NORIAN, J.