STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAYE SHINN

A Member of the State Bar

No. 85-O-11506

Filed May 13, 1992

SUMMARY

Respondent was found culpable of misappropriating at least $90,000 of almost $200,000 in client funds held in trust as part of the proceeds of a eminent domain case, as well as failing to perform services competently and appearing without his client's authority. After weighing the aggravating effect of respondent's prior suspension for a less serious, but nonetheless similar trust fund violation and other aggravating factors, which outweighed respondent's mitigating evidence, the hearing judge recommended that respondent be disbarred. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent requested review, seeking limited modifications to the hearing judge's factual findings and contesting the fairness of the proceeding because the instant matter had not been consolidated with his prior disciplinary case, which involved misconduct occurring around the same time. The review department rejected respondent's procedural challenge, finding that it would not have been possible to consolidate the two matters, and that respondent did not suffer any prejudice as a result of the separation of the two proceedings. The review department also found the hearing judge's findings and conclusions to be well supported by the record, and adopted them. After reviewing the standards and relevant case law, the review department concurred in the hearing judge's conclusion that public protection necessitated respondent's disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: Robert L. Kirste, Daye Shinn, in pro. per.

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.

HEADNOTES

[1] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
When, without the client's consent, an attorney waived a client's rights to trial by jury, the presence of a shorthand reporter at the court proceeding, the preparation of findings of fact and conclusions of law and the right to appeal, the attorney's conduct constituted a failure to perform services competently.

[2] **162.20 Proof—Respondent's Burden**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Where, as justification for taking client trust funds, respondent asserted that his written fee agreements had been modified to provide for a large contingent fee in one matter and a large flat fee in another matter, but did not produce any documents to support this contention, and offered varying characterizations of the alleged change in the fee arrangements, and, in contrast, the client testified credibly that he had never consented to a change in the fee agreements and had never been billed for additional fees, respondent failed to establish entitlement to the claimed fees.

[3] **204.90 Culpability—General Substantive Issues**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Restitution of client funds taken by an attorney is no defense to disciplinary charges of misappropriation.

[4] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
Where respondent chose to place entrusted client funds in a complex series of numerous trust accounts, cashier's checks, and certificates of deposit, and failed to produce any accounting of the funds for more than three years after the client requested it, respondent's contention that his efforts to provide an accounting were impeded by an office fire which destroyed most of the records of the client's funds was unpersuasive given that a timely response to the client's request would have avoided the difficulties resulting from the loss of the records three years thereafter.

[5 a, b] **740.33 Mitigation—Good Character—Found but Discounted**
801.45 Standards—Deviation From—Not Justified
822.10 Standards—Misappropriation—Disbarment
Favorable testimony by six character witnesses, four of whom were respondent's co-workers, was not sufficient to show that disbarment was excessive given the many aggravating circumstances surrounding respondent's misappropriation of a large sum of client trust funds.

[6] **611 Aggravation—Lack of Candor—Bar—Found**
735.30 Mitigation—Candor—Bar—Found but Discounted
Despite respondent's cooperation in executing a detailed and broad pretrial stipulation, his efforts to show his innocence through testimony which was not credible, and his admitted misleading of a State Bar investigator, were aggravating factors.

[7] **513.20 Aggravation—Prior Record—Found but Discounted**
805.51 Standards—Effect of Prior Discipline
A private reproval more than 20 years earlier, for improperly stopping payment on a $500 check to another law firm, was too remote in time to merit significant weight on the issue of degree of discipline.

[8 a, b] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
110 Procedure—Consolidation/Severance
511 Aggravation—Prior Record—Found
755.52 Mitigation—Prejudicial Delay—Declined to Find
The passage of time since respondent's misconduct and the failure of the State Bar to consolidate respondent's two disciplinary matters did not render the disbarment recommendation in the second matter unfair. Consolidation of disciplinary matters, while preferable when reasonably possible and not prejudicial, is not mandatory, and independent consideration of separate matters involving the same attorney is not uncommon. Where an investigation by state law enforcement and the State Bar of respondent's misconduct in the second matter was still ongoing after the initiation and disposition of respondent's earlier disciplinary matter, consolidation would not have been possible. Further, it could not be presumed that if the matters had been consolidated, the recommended discipline would have been suspension rather than disbarment, given the far greater seriousness of the misconduct in the second matter. Finally, respondent had shown no prejudice from the delay, and had benefited from being able to practice almost continually in the interim.

[9] **130 Procedure—Procedure on Review**
166 Independent Review of Record
Where respondent failed to brief a contention raised on review, addressing it for the first time at oral argument, the review department was reluctant to consider it.

[10 a, b] **220.30 State Bar Act—Section 6104**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
582.10 Aggravation—Harm to Client—Found
591 Aggravation—Indifference—Found
801.45 Standards—Deviation From—Not Justified
822.10 Standards—Misappropriation—Disbarment
Disbarment was the appropriate sanction for an attorney's misappropriation of a very large sum of client funds over many years, which was surrounded by utter disregard of the attorney's fiduciary and trust account duties, and aggravated by incompetent representation of the client and prosecution of a lawsuit without the client's consent, demonstrating a lack of basic understanding of the fundamental responsibilities of an attorney.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d)
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
420.11 Misappropriation—Deliberate Theft/Dishonesty
420.13 Misappropriation—Wrongful Claim to Funds

Not Found

213.15 Section 6068(a)
213.35 Section 6068(c)
220.15 Section 6103, clause 2
221.50 Section 6106

Aggravation

Found

521 Multiple Acts

Mitigation

Found

745.10 Remorse/Restitution

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

After an extensive pre-trial stipulation and a five-day trial at which over 40 exhibits were received in evidence, a State Bar Court hearing judge filed a 60-page decision finding respondent, Daye Shinn, culpable of very serious professional misconduct, including the misappropriation of at least $90,000 of client trust funds in an eminent domain matter. The hearing judge recommended that respondent be disbarred. In making that recommendation, the judge considered respondent's 1987 suspension from practice for misconduct less serious than but similar to the present findings: the commingling with his personal funds of over $100,000 of client trust funds in another eminent domain matter.

Respondent's request for our review is extremely limited. As to a few findings, respondent claims that the hearing judge failed to adopt respondent's version of the facts. At oral argument, respondent's counsel also argued that unfair delay occurred in conducting the present disciplinary proceeding. He contended that since both the present and prior proceedings arose at essentially the same time, the present proceeding should not have been allowed to continue as a separate matter for several years after the prior proceeding was decided.

After independently reviewing the record of State Bar Court proceedings, we have determined that respondent's arguments are without merit. As to the issue of delay, respondent has made no showing that it was error for the State Bar to pursue this proceeding separately from his prior disciplinary proceeding or that he has been prejudiced by any delay. In any case, any passage of time that occurred during this proceeding has redounded to respondent's benefit since it has permitted him to practice law during almost its entire pendency. Since respondent's own pre-trial stipulation and testimony largely established his culpability of misconduct warranting severe discipline, his very limited attack on the findings cannot justify us adopting different findings or a less severe recommendation. For the protection of the public, courts and legal profession, we shall adopt the hearing judge's findings and recommendation of disbarment.

I. ISSUES BEARING ON CULPABILITY

A. Introduction.

This proceeding involves three aspects: 1) respondent's representation of client Oscar Dane in an eminent domain action between March 1978 and February 1979; 2) respondent's subsequent misappropriation between 1979 and 1985 of most of Dane's $200,000 recovery; and 3) respondent's filing in 1984 and prosecution until 1989 of a suit on behalf of Dane without Dane's authority to recover interest on a check stolen by another.

Most of the facts are undisputed. Nevertheless, we have independently reviewed the entire lengthy record of testimonial and documentary evidence. Upon that review, we have concluded that the hearing judge's findings of fact are amply supported by clear and convincing evidence and we adopt them. Considering what little of this case is disputed, for the most part we find it necessary only to summarize briefly the hearing judge's most detailed findings.

We deal with each of the three principal aspects of the case in turn.

B. Representation of Client Oscar Dane in Eminent Domain Action.

This aspect of the case rested almost entirely on stipulated facts.

Respondent was admitted to practice law in California in 1961. His practice was mainly criminal defense, but he had handled one or two eminent domain cases over the years. (R.T. pp. 584-586, 794-795, 801.) In 1977, the City of Santa Monica (City) filed suit to condemn the residential real property of one Oscar Dane in order to build a downtown mall as a redevelopment project. Dane had been a real estate broker for many years and he did business out of his 14-room home, built in 1927. (Decision of hearing judge ("D.") pp. 5-7.)

In March 1978, Dane retained respondent to defend him in the eminent domain action. Their written fee agreement provided for a $75 per hour fee for respondent's legal services on that matter. That agreement also provided an identical fee for

respondent's services in pursuing a civil action against the City arising out of alleged police misconduct. For convenience, this second matter will be referred to as the "police case." (D. pp. 5-6.)

At the time he hired respondent, Dane gave him an "initial retainer" of $400. In June 1978 respondent asked for and received an additional $502 in fees from Dane. (D. p. 6.)[1] Dane never received any other bills from respondent on the eminent domain case. (D. p. 28; R.T. pp. 377-379.)

In 1977, the City had obtained a writ of possession for Dane's property. Pursuant to the writ, Dane was evicted in September 1978 and moved to Texas to live with his son. The City demolished his home and trial on the issue of fair market value of Dane's property was set for early 1979. (D. pp. 6-7.)

In late 1978, after demolition, respondent told Dane to obtain an owner's appraisal of the property. He also advised Dane of an upcoming trial date. In January 1979, Dane sent respondent his personal, handwritten appraisal[2] and told respondent he could not afford to return to California for the trial. (D. pp. 7-8.)

On February 20, 1978, a mandatory settlement conference was held in the eminent domain action. Respondent appeared before a temporary judge and waived the following of Dane's rights: 1) trial by jury, submitting the case instead to the judge pro tempore conducting the settlement conference; 2) the presence of a shorthand reporter; 3) preparation of findings of fact and conclusions of law; and 4) the right to appeal. (D. pp. 8-9.) Respondent failed to submit Dane's letter of appraisal to the court and did not get an independent appraisal until after Dane's home had been demolished by the City. (D. pp. 7-9, 39-40.)[3] Because respondent did not submit an "owner's statement" by Dane as to his property's value, as required by the superior court's pretrial rules, the court ruled that Dane would not be allowed to testify at trial concerning his opinion of the property's fair market value. (Exh. 1, Memorandum of Intended Decision, filed February 22, 1979.)[4] After trial, the temporary judge ordered that the City pay Dane $200,000 as fair market value. The judge deducted $1,376.52 owing by Dane to the Franchise Tax Board, leaving Dane with a net recovery of $198,623.48. (D. pp. 9-10.)

The only issue not made entirely clear by respondent's State Bar Court pre-trial stipulation was whether Dane had authorized respondent to waive Dane's rights.[5] **[1]** After considering the evidence at trial, the hearing judge found that Dane had not given consent and that respondent failed to act competently in several aspects of his representation of Dane in wilful violation of former rule 6-101(A)(2), Rules of Professional Conduct.[6] Upon our independent review of the record, we agree with the hearing judge. Respondent testified only that he consulted with opposing counsel as to the waiving of Dane's rights (R.T. p. 562) and never testified that he had any conversations with Dane about them or that he had gotten Dane's consent. Respondent's testimony was that he did not recall whether he had waived presence of a court reporter and whether a reporter was present although he stipulated in the State Bar Court pro-

1. Respondent allocated half of the $902 he had collected from Dane to fees and costs in the eminent domain case and the other half to the police case. (Exh. 3.)

2. Dane's appraisal was in the form of a three-page letter valuing his property at $1.6 million for the land and $900,000 for the residence which had since been bulldozed. He calculated the value of the residence on his estimate of current replacement value and did not provide detailed support for his estimate. (Exh. 41.)

3. At the eminent domain trial, respondent also stipulated that Dane's appraiser would value the property at $220,000 and the City's appraiser at $180,000 (See Partial Stipulation of Facts, filed March 8, 1990 ("Stip."), p. 3.)

4. As noted, Dane was not present at the settlement conference or the trial that same day.

5. The parties' State Bar Court stipulation strongly suggested that, as to the waiver of right to appeal, Dane did not consent, for the stipulation stated that, "[n]otwithstanding [r]espondent's knowledge that . . . Dane was out of town and therefore could not be consulted at time of trial, [r]espondent waived his client's right to appeal the [j]udgment entered." (Stip. p. 4.)

6. Unless noted, all references to rules are to the Rules of Professional Conduct in effect prior to May 27, 1989.

ceeding that he had made such waiver. (*Id.* at p. 592.) The memorandum of intended decision prepared by the temporary judge who tried the eminent domain case also recited, inter alia, that the parties stipulated that no "court stenographer" need be present, that the matter be heard by the temporary judge without jury and the parties waived findings of fact and conclusions of law and time for and right of appeal. (Exh. 1.) Dane testified clearly that he never gave respondent permission to waive appeal. (R.T. p. 325.) Accordingly, we adopt the hearing judge's findings and conclusions as to this aspect of the charges. (See D. pp. 5-9, 39-40.)

C. Respondent's Handling of Dane's Funds.

1. Misappropriation of funds.

As we stated *ante*, in 1979, the superior court awarded Dane $198,623.48. Dane was still in Texas at this time and in January 1980 the court ordered payment issued to respondent for that sum on respondent's declaration that he would hold the money for Dane's benefit. (Stip. pp. 4-5.) The court order for payment also required respondent to hold the funds for Dane's benefit. (Exh. 1.) In February 1980, respondent deposited the $198,623.48 in his client trust account.[7] For different reasons, Dane refused to accept his funds until February 1985, five years after respondent first deposited them. Respondent stipulated that in 1985 he gave Dane $178,287.93. (Stip. p. 12.) This sum was $20,000 *less* than respondent recovered for Dane five years earlier even though substantial interest had been earned on Dane's funds during the five-year period. (See *id.* at pp. 6-8, 11-12.)

Before the start of the State Bar Court trial, respondent stipulated to many of the facts concerning his handling of Dane's funds. He admitted that he had held them in five different trust accounts, had opened and closed six different certificates of deposit or money market accounts and purchased eleven cashier's checks, mostly used to transfer funds from one account to another.[8] He had also stipulated to the use made of his larger withdrawals from these accounts; for example, that in February 1980 he had loaned $50,000 to a former law associate and in July 1981 had paid $70,019 to another former client, unconnected with Dane. (*Id.* at pp. 5-12.) Respondent did not admit in his stipulation that these withdrawals and many smaller ones were from Dane's funds and were without Dane's authority. At the State Bar Court trial, respondent sought to show that he was innocent of the charges of misappropriation and failure to account, claiming that he had a right to the use of some of Dane's funds because of an orally modified fee agreement and that the withdrawals from respondent's trust accounts did not make use of Dane's funds. However, Dane testified that he had never given respondent permission to invade those funds and one of the State Bar's expert witnesses who had investigated respondent's use of Dane's funds was able to reconstruct the basic flow of Dane's funds through respondent's different accounts. At the very end of his testimony, respondent admitted he had misappropriated $26,538 of Dane's funds, and (although not charged) that he misled a State Bar investigator about the misappropriation. (See R.T. pp. 803-817.)

After weighing all the evidence, the hearing judge found that respondent misappropriated far more than $26,538. Because of the complexity of respondent's trust account transactions, and the lack of adequate records by respondent, it was not possible for the witnesses or the judge to determine the precise amount of misappropriation. However, the

7. Respondent was unable to deposit the first warrant issued to him for it was payable jointly to respondent and Dane and respondent did not have Dane's endorsement. Respondent had a new warrant issued for the sum without Dane's name as payee. (Stip. p. 5.)

8. The examiner called to testify Hassan Attalla, Supervising Investigative Auditor for the Los Angeles County District Attorney's Office and Charles Gibbons, Los Angeles County Deputy Sheriff who had had 11 years of experience exclusively in investigation of fraud cases. Each had investigated respondent's flow of Dane's funds through the various accounts after Dane had complained to law enforcement agencies about respondent's handling of his (Dane's) funds. According to Gibbons, of all his investigations, this one was unusual because it had more cashier's checks and bank accounts to trace than any other investigation. (R.T. pp. 421-423.)

judge found that respondent improperly withdrew $180,693.03 from Dane's eminent domain recovery. (D. pp. 26-27.) These sums were made up of respondent's February 1980 loan of $50,000 to his former law associate and his July 1981 payment of $70,019 to his other former client. In addition, the hearing judge found that over more than a three-year period, respondent retained $10,755 of interest earned on Dane's funds and $34,241 in principal or principal and interest combined from maturing certificates of deposit purchased with Dane's funds and withdrew $7,000 in cash from the different trust accounts holding Dane's funds. Further, two weeks after he deposited Dane's funds, respondent withdrew $8,623.78 for fees in the eminent domain case. Recognizing that there was a sharp conflict in the evidence over whether respondent modified his written hourly fee agreement, the hearing judge noted the varying nature of respondent's testimony and found that respondent's hourly fee agreement was unmodified. (D. pp. 27-29.) The judge concluded that "at a minimum," respondent misappropriated $90,000 of Dane's funds in wilful violation of section 6106[9] and wilfully violated rule 8-101(A) by failing to maintain Dane's funds in a proper trust account. (D. pp. 36-42.) Our review of the record finds ample support for the hearing judge's findings and conclusions which we adopt.

[2] On review, respondent has devoted most of his brief to rearguing his testimony that he modified his fee agreement to provide himself with a contingency fee of $40,000 in the eminent domain case and a flat fee of $50,000 in the police case. Significantly, respondent does not deal with those findings of the hearing judge which detail why the judge disbelieved respondent's testimony of entitlement to those fees. Moreover, respondent's theory of fee modification was unaccompanied by any supporting documentation. That respondent would make a major undocumented change in basis for his fees was a suspicious circumstance in light of respondent's use of a written contract to set forth his hourly fee agreement with Dane on both cases as soon as he was hired. Dane's testimony was clear and uniform that he never entered into a modified fee agreement and that respondent never billed Dane for additional fees due. But perhaps the strongest supporting evidence for the hearing judge's findings that respondent's fee agreement was unmodified was the varying nature of respondent's own characterization of the alleged fee change. The judge's decision cited four different versions of his eminent domain fee change offered by respondent, either in his testimony or to others. (D. pp. 28-29.) Respondent's urging to us that he was entitled to $50,000 in police case fees is even more baffling because after testifying that he had changed his hourly fee contract to provide for that fixed fee, he abandoned that theory, testifying that he decided to "give back" the $50,000 police case fee. (R.T. pp. 36, 42-44, 46-47, 53-55, 59, 112, 122, 139-141.)

Even if, arguendo, respondent were somehow entitled to $90,000 of fees from Dane's settlement, he has never satisfactorily explained the remaining $90,000 he improperly withdrew from Dane's funds. **[3]** His argument on review that the hearing judge's finding of that misappropriation had no basis because respondent ultimately gave Dane $178,287.93 completely fails to deal with the holding by our Supreme Court that restitution of funds is no defense to their misappropriation. (See, e.g., *Athearn* v. *State Bar* (1977) 20 Cal.3d 232, 237; *Sevin* v. *State Bar* (1972) 8 Cal.3d 641, 646.)

Although respondent testified that his $70,000 payment to his former client and $50,000 loan to his former associate did not use Dane's funds, the hearing judge gave detailed reasons for not crediting that testimony. Those reasons included documentary evidence listing Dane's name along with respondent's as beneficiary of a trust deed given when the loan to his associate was made or listing Dane's name on a cashier's check the relevant funds of which were later used for the payment to respondent's other client. (See D. pp. 12-17.)

Finally, respondent testified that he shifted accounts and placed Dane's money in certificates of deposit to get high rates of interest for Dane. (See

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

R.T. pp. 148, 185.) However, respondent admitted that at times, Dane's funds earned no interest. (*Id.* at p. 142.) The district attorney's auditor, Attalla, testified that the total interest earned on respondent's accounts used to hold Dane's funds was $59,594.21. (R.T. pp. 305-306.) Despite this accrued interest, respondent ultimately turned over to Dane about $20,000 *less* than the $198,623.48 he first deposited for Dane.

2. Failure to account.

[4] In 1981, Dane learned that respondent had received the eminent domain proceeds. Dane demanded an accounting, but respondent never gave him one. In 1984 respondent had an office fire which he testified largely destroyed his records of Dane's funds. (R.T. pp. 146-147.)[10] By this time, Dane had complained to various legislators and the district attorney's office. Under this pressure, in 1984, respondent delivered to the district attorney's office and in 1985 to the office of a member of congress, a five-page handwritten summary of the bank accounts in which respondent held Dane's funds, the interest earned and his alleged fee agreement. (Exh. 36.) As the hearing judge found, this summary contained errors and significant omissions. (D. pp. 43-44.) Accordingly, the judge concluded that respondent wilfully violated rule 8-101(B)(3) by failing to render any appropriate accounting of Dane's funds. (D. pp. 32-34, 43-44.) On review, respondent's sketchy defense of his "accounting" does not address the hearing judge's findings and we adopt those findings and the related conclusion. While respondent appears to have suffered a serious office fire in 1984, had he not waited until he was under pressure of several agencies of government and instead had provided a *timely* accounting to Dane, the 1984 fire would not have frustrated his ability to accurately record his receipt and disbursal of most of Dane's funds. Additionally, given the great complexity of how respondent chose to handle Dane's funds, the belated difficulty of accounting for them was not surprising. However, respondent must bear full responsibility for any such difficulty as he had chosen this patently complex structure of numerous trust accounts, cashier's checks and certificates of deposit.

D. Respondent's Unauthorized Filing of Suit on Dane's Behalf.

This final aspect of the proceeding was entirely admitted by respondent in his pre-hearing stipulation. We shall summarize it briefly: In January 1984, while still holding Dane's funds, respondent closed out a State Savings and Loan Association (State Savings) account and received a check for $145,285.88. This check was made payable to "##Daye Shinn## Trust Account Attn Oscar Dane . . . ." (Exh. 30.) The wife of respondent's law partner stole this check. In September 1984, State Savings' acquirer, American Savings and Loan Association, replaced the check. (Stip. pp. 11-12.)

In November 1984, without Dane's consent or knowledge, respondent filed suit against his partner's wife and the savings and loan associations involved, to recover lost interest on the funds from the time the check was stolen until it was replaced. (*Id.* at pp. 12-13.) Respondent sued as attorney for both himself and Dane and started litigation without Dane's consent or knowledge. Respondent appeared "throughout the course of the litigation" as Dane's attorney, but respondent did not have Dane's authority for that role. (*Id.* at p. 13.)[11]

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10. The fire in respondent's office was corroborated by respondent's character witnesses who described the damage as extensive.

11. A copy of the court file in respondent's suit on behalf of himself and Dane arising out of the stolen check is in evidence. (Exh. 32.) It was started by a 16-page complaint on behalf of himself and Dane as the only plaintiffs. Therein, respondent alleged in part that he and Dane "were and . . . are entitled" to possession of the $145,285.88 savings and loan association check which was stolen. Six named defendants were listed including Home Federal Savings and Loan and American Savings and Loan. Respondent sought unliquidated general and special damages and exemplary damages of $1 million. This action was defended by the savings and loan defendants and pended over five years, until February 1990 when it was dismissed for respondent's failure to attend a court conference. (Code Civ. Proc., § 583.410.) In the interim, according to a request for trial de novo filed by respondent in January 1990, the case had been ordered to arbitration resulting in an award of $4,594.47 for Dane.

In July 1988, while speaking to counsel for one of the State Savings defendants, respondent admitted that he did not have Dane's authority to represent him and that Dane did not want respondent's representation. In later conversations with that same attorney, respondent repeated that Dane did not want respondent to represent him. Despite respondent's knowledge that Dane did not want his representation, respondent never withdrew nor filed a substitution. (*Id.* at pp. 13-14.)

In their stipulation, the parties did not agree to any statutory or rule violations committed by respondent. In count two of the notice to show cause (regarding the lawsuit on the forged check), respondent was charged with violations of sections 6068 (a), 6068 (c), 6068 (d), 6103, 6104 and 6106. The hearing judge concluded that respondent's offenses in this count violated sections 6068 (d) and 6104 but none of the other charged sections. (D. pp. 48-49.) We adopt the findings and conclusions of the judge as to this final aspect of the matter, noting that they are undisputed on review.

E. Evidence in Mitigation and Aggravation.

[5a] In mitigation, respondent presented six character witnesses. Three were lawyers who worked with him and one was a legal secretary, also in his office. Another witness was an outside attorney and another was the real estate broker whom respondent had consulted in the Dane matter. These witnesses knew respondent for from seven to twenty years. Most had a general knowledge of the charges against him and a very favorable opinion of the quality of his service to clients and his honesty and integrity. This was the only circumstance deemed mitigating by the judge. (D. p. 54.)

Respondent also testified in mitigation. As noted, he was admitted to practice in 1961 and 90 percent of his practice was in criminal defense. However, he had handled one or two eminent domain cases before Dane's. (R.T. pp. 584-586, 801.) Respondent felt "very sorry, very bad" about the Dane matter. In his heart, respondent felt that he had accounted to Dane for all interest owed him but would accept the conclusion that more money is owed Dane. Respondent told the hearing judge that he would accept any discipline "given out." (*Id.* at pp. 798-802.)

[6] Respondent showed cooperation by executing a detailed and broad pretrial stipulation. However, until near the very end of his testimony, he sought to show his innocence of misappropriation charges. He did this by testimony which was not credible, because it was often internally inconsistent or at odds with the documentary evidence. When he finally admitted that he had misappropriated funds, he also admitted that he concealed from a State Bar investigator that his trust account fell below the required amount; and, in May 1989, made a misleading statement to the investigator. (R.T. pp. 810-815; exh. 49.) Overall, the judge found these factors to be aggravating. (D. pp. 52-54.) Also found aggravating by the hearing judge were respondent's multiple acts of misconduct, his harm to Dane and indifference toward its rectification. (*Ibid.*)

[7] Respondent was privately reproved in 1968 for improperly stopping payment on a $500 check to another law firm for an agreed-upon share of fees from a client's settlement. (Exh. 46.) Per standard 1.7(a), Standards for Attorney Sanctions for Professional Misconduct ("stds.") (Trans. Rules Proc. of State Bar, div. V), the hearing judge decided that this reproval was too remote in time to merit "significant" weight on the issue of degree of discipline. The examiner has not objected and the judge's decision was appropriate in the circumstances. However, the judge did consider aggravating respondent's 1987 suspension for two years, stayed, on conditions including three months actual suspension. (D. pp. 52-54.) That suspension was based on respondent's stipulation that between 1978 and 1979, he received $119,775 of funds on behalf of his clients, the Korchins, in another eminent domain action. He commingled those funds with his personal funds. In July 1981, he repaid the clients just over $70,000, which represented the clients' proceeds from that eminent domain action less respondent's fees and costs. The parties did not stipulate that respondent had misappropriated any of the Korchins' funds. As we have seen, restitution to the Korchins came from funds respondent was holding for Dane. (See also D. pp. 17, 26 and 38.)

II. DEGREE OF DISCIPLINE

The hearing judge analyzed the issue of discipline largely under the standards. Concluding that aggravating circumstances weighed much greater than mitigating ones, he recommended disbarment. We exercise our independent review of the judge's disciplinary recommendation. As we shall see, his analysis is eminently sound on this record.

[8a] Before analyzing the issue of discipline, we pause to resolve respondent's contention urged upon us at oral argument: that the claimed passage of time in the conduct of this proceeding makes disbarment unfair. Respondent contends that the procedural history of the Dane matter permitted it to be consolidated with the Korchin matter. Had that been done, contends respondent, he would not likely be facing the current disciplinary recommendation enhanced by prior discipline five years earlier. **[9]** Because respondent did not brief his contention, we have considered it reluctantly. **[8b]** We deem it without merit. First, while consolidation of matters is preferred when reasonably possible and when not prejudicial (see Trans. Rules Proc. of State Bar, rule 262), it is not mandatory and "it is apparently common for disciplinary matters involving the same member to be handled independently." (*Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 57.) While Dane's complaint was filed with the State Bar in 1985, investigation by the district attorney's office attempting to trace the flow of funds through respondent's accounts was ongoing well into 1986. (Exh. 40.) State Bar investigation required an additional two years (see exh. 47) and the notice to show cause was not issued until April 1989. This chronology would not have permitted consolidation with the Korchin proceeding. There the notice to show cause issued in July 1985 and the parties' stipulated disposition was reached in September 1986. (Exh. 46.) Second, even if it had been possible to have consolidated the different proceedings, we cannot assume that suspension, instead of disbarment, would have been the recommendation, given the far greater seriousness of the misconduct in the Dane matter, compared to the Korchin matter. Finally, respondent has shown no prejudice whatever by the passage of time in the Dane matter. If anything, he seems to have benefited since he has been able to practice continuously except for a brief suspension in 1987. (Compare *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774.)

[10a] Viewing the standards as guidelines in recommending the degree of discipline (see, e.g., *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 506), we note that standard 2.2 calls for disbarment for wilful misappropriation of entrusted funds, unless the misappropriation is "insignificantly small" or the "most compelling mitigating circumstances clearly predominate." Here, neither exception applies. Respondent's misappropriation was large, occurred over many years in many transactions, and was surrounded by a number of aggravating circumstances in his utter disregard of his fiduciary duties to Dane, his duty to the superior court to keep Dane's money intact and his trust account duties under rule 8-101. His culpability began with his incompetent representation even before receiving Dane's funds and continued over five years later with his pursuit of a lawsuit for Dane without Dane's consent. **[5b]** Given the many aggravating circumstances, we agree with the hearing judge that respondent's favorable character evidence, mainly from those who work with him, does not serve to show that disbarment is excessive.

Consideration of relevant Supreme Court opinions also convinces us that disbarment is the appropriate recommendation here. *Rimel* v. *State Bar* (1983) 34 Cal.3d 128, cited by the examiner, bears several similarities to the case before us. Rimel involved an attorney with no prior record of discipline in about 13 years of practice up to the time of misconduct. He committed misconduct in two matters. In one case, he held over $110,000 of trust funds to be used to wind up a business. Rimel represented his clients incompetently, allowing two default judgments to be entered; he failed to pay $12,000 in taxes owed by the clients; misled them about their affairs; issued checks without sufficient funds; misappropriated over $47,000 of their funds and entered into several business transactions with the clients without complying with the Rules of Professional Conduct. In the other matter, Rimel misappropriated $11,748 from his legal secretary who had asked that he collect some escrow funds while she was away from the area. In ordering disbarment, the Supreme Court majority emphasized the lack of any compelling

mitigation and several factors which indicated that continued practice would increase the risk that Rimel would repeat his misconduct. These factors involved the selfish disregard of client interests displayed by Rimel's misdeeds, that his offenses were "inextricably interwoven" with the practice of law and that he violated other important standards of conduct in addition to misappropriating client funds. (*Id.* at pp. 131-132.)

Although one matter was involved here, respondent has a recent prior record of suspension, making it at least as serious as Rimel's misconduct in two matters. Significantly, the factors which led the one justice to dissent in *Rimel* do not appear in the present case.

Since *Rimel*, the Supreme Court has decided several cases of attorney misappropriation of significant amounts of trust funds. Where the circumstances of the misappropriation have been sufficiently serious, the Supreme Court has disbarred the attorney even if the attorney had no prior record of discipline. (See *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067 [misappropriation of $29,000 of law firm funds in numerous transactions; unanimous Supreme Court vote for disbarment notwithstanding lack of prior record; far greater amount of favorable character testimony than the present case, and personal stress and family illness not urged here]; *Chang* v. *State Bar* (1989) 49 Cal.3d 114 [misappropriation of over $7,000 of trust funds in an apparently isolated transaction; disbarment notwithstanding lack of prior record; Court noting that attorney never acknowledged misconduct, made no restitution and displayed a serious lack of candor to the State Bar. Justice Mosk, while acknowledging the "devious and unprincipled nature" of Chang's misappropriation, emphasized that it was but one transaction involving one client and one law firm in opining that disbarment was excessive in that case]. See also *Grim* v. *State Bar* (1991) 53 Cal.3d 21.)

While respondent did represent a difficult client who was apparently convinced of an unrealistically high value of his realty and was unwilling to yield to the City's eminent domain power, had respondent not wished to serve this client, there were plenty of ethical choices open to respondent. These included withdrawal upon due notice before trial; or, in the alternative, preserving Dane's rights at trial and leaving his money intact in a proper trust account, if necessary calling on the courts' aid to help him if Dane refused to accept the recovery to which he was entitled. Instead, respondent clearly took advantage of Dane, who appeared to be disaffected by the legal system, to self-deal in a very large amount of trust funds. His 1987 suspension was for commingling of a large sum of trust funds in another eminent domain case and a large portion of his misappropriation of Dane's funds constituted restitution to his earlier victim. Since respondent was aware of Dane's financial pressures, respondent's misuse of his funds was especially tragic and harmful. **[10b]** His commencement of a civil lawsuit on behalf of his client without the client's knowledge or authority is unexplained. It only emphasizes, along with respondent's lack of competent representation of Dane, that, despite his many years as an attorney, respondent lacks basic understanding of the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct.

When we consider that in recommending lawyer discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession" (*Snyder* v. *State Bar* (1989) 49 Cal.3d 1302, 1307), we are additionally convinced as to the need to follow the hearing judge's recommendation of disbarment.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Daye Shinn, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys in this state. We further recommend that he be required to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the Supreme Court's order. We also recommend that costs be awarded the State Bar.

We concur:

PEARLMAN, P.J.
NORIAN, J.