STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID GREENE LILLY

A Member of the State Bar

No. 92-C-12350

Filed July 19, 1993

SUMMARY

Respondent was convicted of grand theft by embezzlement from the estate of a former client, of which respondent was the executor. The review department recommended that respondent be summarily disbarred, finding that both of the statutory requirements for summary disbarment were satisfied.

First, specific intent to steal was an element of respondent's offense. Second, although the offense was not committed in the course of the practice of law, it was committed in such a manner that a client of respondent's was a victim. The review department held that summary disbarment may be recommended based on victimization of a client even when the crime does not occur in the practice of law, and even though the betrayal of the client's trust occurred after the client's death. Because of the magnitude of respondent's theft, the review department concluded that his misconduct would result in disbarment regardless of alleged mitigating circumstances, justifying a summary disbarment recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Nancy J. Watson

For Respondent: Jeremiah Casselman

HEADNOTES

[1] **139 Procedure—Miscellaneous**
1699 Conviction Cases—Miscellaneous Issues
Summary disbarment excludes the opportunity for an evidentiary hearing.

[2 a, b] **101 Procedure—Jurisdiction**
162.90 Quantum of Proof—Miscellaneous
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Moral Turpitude—Per Se
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Summary disbarment is statutorily authorized if an attorney commits a California or federal felony as to which: (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement; and (2) the offense was committed in the course of the practice of law or in any manner such that a client of the attorney was a victim. If the State Bar Court determines that disbarment would be ordered by the Supreme Court without regard to mitigating circumstances, a recommendation of summary disbarment is justified.

[3] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
In considering whether to recommend summary disbarment, the State Bar Court is generally limited to determining whether the statutory and case law criteria have been met on the face of the conviction papers, although undisputed additional facts may also be taken into account.

[4a, b] **802.64 Standards—Appropriate Sanction—Limits on Mitigation**
1512 Conviction Matters—Moral Turpitude—Per Se
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
Where respondent, while acting as the executor of a deceased client's estate, embezzled more than $500,000 from such estate, the magnitude of the theft would result in disbarment regardless of alleged mitigating circumstances.

[5] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Where respondent committed grand theft by embezzlement, the felony conviction papers demonstrated that an element of respondent's offense was the specific intent to deceive, defraud, steal, or make or suborn a false statement.

[6a, b] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues
Where respondent embezzled funds from a deceased former client's estate while serving as the estate's executor, but not its attorney, neither the estate nor the beneficiaries of the estate were respondent's clients, nor did respondent commit the offense in the practice of law.

[7] **101 Procedure—Jurisdiction**
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
By statute, summary disbarment is available only for a narrow range of grievous misconduct. Grand theft by an attorney in the capacity of executor of an estate, though egregious, does not come within the statutory definition of an offense justifying summary disbarment unless it was committed in the practice of law or in such a manner that a client was a victim.

[8 a-d] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
The statutory requirement for summary disbarment that an attorney's crime be committed in such a manner that a client was a victim is met even when the victimization occurred outside the practice of law, and may apply even when the victim was a former or deceased client. Where an attorney is appointed under a former client's will as executor of the client's probate estate, and is convicted of grand theft by embezzlement from the estate, there is such a clear nexus between the crime and the trust and confidence of the client that was violated that the client-as-victim requirement for summary disbarment is satisfied.

ADDITIONAL ANALYSIS

Discipline
1610 Disbarment
Other
1541.10 Conviction Matters—Interim Suspension—Ordered
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

This proceeding, arising out of respondent Lilly's conviction for grand theft by embezzlement from a probate estate, was originally referred to the State Bar Court by the Office of the Chief Trial Counsel as a felony which did not qualify for summary disbarment under Business and Professions Code section 6102 (c). In papers filed with this court, the deputy trial counsel asserted that the crime did not occur in the practice of law, but was perpetrated by respondent[1] as executor for the probate estate of Martin Hiatt. The Office of the Chief Trial Counsel also asserted that respondent drafted the will which made him the executor of the estate. In ordering the interim suspension of respondent on March 1, 1993, we noted that the allegation that respondent drafted the will of Martin Hiatt raised the question whether a client was a victim of the crime within the meaning of Business and Professions Code section 6102 (c)[2] and directed the Office of the Chief Trial Counsel to readdress the issue of summary disbarment.

In addition to obtaining written responses from both parties, we requested the parties to appear at oral argument to address the issue whether summary disbarment was appropriate.

DISCUSSION

[1] In *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, we reviewed the history and constitutional parameters of summary disbarment which by definition excludes the opportunity for any evidentiary hearing in the State Bar Court prior to disbarment. **[2a]** Currently, section 6102 (c), effective in 1986, sets forth the statutory criteria for summary disbarment. Section 6102 (c) provides as follows: "After the judgment of conviction of an offense specified in subdivision (a) has become final . . . the Supreme Court shall summarily disbar the attorney if the conviction is a felony under the laws of California or of the United States which meets both of the following criteria: [¶] (1) An element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement. [¶] (2) The offense was committed in the course of the practice of law or in any manner such that a client of the attorney was a victim."

[2b] If we determine that the statutory criteria have been met, we must also determine whether the Supreme Court would order disbarment without regard to mitigating circumstances. (*In the Matter of Segall, supra*, 2 Cal. State Bar Ct. Rptr. at p. 81.) If so, then a recommendation of summary disbarment is justified.

[3] In considering whether to recommend summary disbarment, we are generally limited to a determination that the statutory and case law criteria have been met on the face of the conviction papers. The conviction conclusively establishes all of the elements of the crime. (Bus. & Prof. Code, § 6101; see, e.g., *In re Young* (1989) 49 Cal.3d 257, 268.) However, in addition to looking to the facts conclusively established by the conviction, we may also take into account undisputed additional facts. Thus, in *In the Matter of Segall, supra*, 2 Cal. State Bar Ct. Rptr. at p. 75, we also considered the undisputed fact that the amount of fraudulent billings by Segall exceeded $250,000. **[4a]** Here, it is undisputed that Martin Hiatt was respondent's client during Hiatt's lifetime;[3] that Hiatt appointed respondent executor

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1. This is the same respondent as in *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, which, effective in April of this year, resulted in respondent's actual suspension for three years and until he makes the requisite showing to resume the practice of law under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) According to the testimony in the preliminary hearing in the criminal case underlying the present proceeding, a State Bar deputy trial counsel, after discovering in the prior unrelated State Bar proceeding irregularities in respondent's trust account involving payments from the estate of Hiatt, alerted the district attorney's office, which initiated the criminal proceedings.

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

3. The Office of the Chief Trial Counsel has offered uncontradicted documents filed in the probate proceeding including a declaration under penalty of perjury executed by respondent Lilly that the decedent, Martin Hiatt, was a client.

of his will[4] and that respondent was ordered as part of his criminal sentence to make restitution of more than $500,000 embezzled from the estate of Hiatt.

[5] We first consider whether the referred felony conviction papers demonstrate that an element of the offense was the specific intent to deceive, defraud, steal, or make or suborn a false statement. Grand theft by embezzlement includes the specific intent to steal and is therefore a felony meeting the first prong of the test for summary disbarment under section 6102 (c). (CALJIC No. 14.02; 2 Witkin & Epstein, Cal. Crim. Law (2d ed. 1988) Necessity of Intent, § 584, p. 660.)

[6a] The second question we must address is whether the conviction papers demonstrate on their face that the crime was committed in the practice of law or "in any manner such that a client of the attorney was a victim." The Office of the Chief Trial Counsel was unable to find any reference in the criminal proceeding to the alleged fact that the respondent drafted the will of Martin Hiatt and no longer relies on that allegation in this proceeding. Respondent's counsel does not dispute that Martin Hiatt was a former client of respondent's, but argues that no "client" was a victim of the crime committed by respondent in his capacity as executor of the estate of Martin Hiatt. We agree with the parties that neither the estate nor the beneficiaries were respondent's clients and the offense was not committed in the practice of law.

[6b] As we noted in *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 373, an executor need not be an attorney and an attorney is not necessarily acting in the practice of law when acting as an executor. However, in *Layton, supra*, the attorney occupied a dual capacity as *both* attorney for the estate *and* executor. In such event, "the services that he renders in the dual capacity all involve the practice of law." (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 904.) Here, both sides agree that respondent was not also acting as attorney for the estate. Another attorney served in that capacity.

The Office of the Chief Trial Counsel nonetheless argues that respondent had a fiduciary duty to the estate and its beneficiaries which was akin to that which a lawyer owes a client and that summary disbarment is appropriate for grand theft by an attorney acting as an executor, even though the statutory criteria set forth in section 6102 (c) are not technically met. No precedent is cited for this position which the deputy trial counsel at oral argument characterized as a matter of first impression.

[7] The argument that grand theft by an attorney in the capacity of executor of an estate should categorically be treated the same as grand theft in the course of the practice of law is one that is better addressed to the Legislature. We can only apply existing law. In enacting section 6102 (c) after 30 years without any statutory provision for summary disbarment, the Legislature made summary disbarment available only for a narrow range of grievous misconduct. In this connection, we note that a large number of violent felonies are not within the ambit of section 6102 (c), including murder. Grand theft from an estate, as egregious as such conduct is, does not

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4. Respondent testified on cross-examination in *In the Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr. 185 regarding an "advance on fees" as executor he had received from the estate of Hiatt which he used to pay back funds owed to a different client. He also testified that he did not have court authorization for such payment before the hearing judge ruled such evidence of uncharged misconduct irrelevant to the culpability phase of the hearing and the examiner ceased this line of inquiry. As reflected in the preliminary hearing testimony now before us, the State Bar deputy trial counsel apparently then referred the issue for investigation and did not seek to introduce any evidence with respect thereto at the subsequent disciplinary phase of the State Bar Court trial. The hearing judge nonetheless, on her own initiative, made a finding in aggravation based thereon. We affirmed that finding in *In the Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr at p. 189, fn. 2, based on respondent's failure to ask the judge to strike the testimony as to the unauthorized fee advance in the culpability phase which allowed the testimony to remain part of the record to be considered at the disciplinary phase. However, we also did not give the finding in aggravation great weight because we could only discern therefrom the lack of court authorization without knowing whether there was beneficiary consent or other factors which might affect the question of whether the "fee advance" constituted an intentional act of theft versus a unilateral taking of funds to satisfy attorney fees which may have less serious consequences in attorney disciplinary cases. (See, e.g., *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317; *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.)

come within the definition of an offense justifying summary disbarment under section 6102 (c) *unless* it was committed in the practice of law *or* in such a manner that a client was a victim.

[8a] We must therefore address the applicability of the phrase in section 6102 (c) "or in any manner such that a client of the attorney was a victim" as an alternative basis for summary disbarment. Although the estate and its beneficiaries were clearly victims, they were not respondent's clients. At oral argument we asked both parties to focus on the question whether the crime was committed in such a manner that Martin Hiatt, Lilly's deceased former client, was also a victim within the meaning of section 6102 (c). Respondent's counsel assumed arguendo that the decedent could be characterized as a victim of respondent's crime, but argued that the crime must also be committed in the practice of law. He cited *In re Utz* (1989) 48 Cal.3d 468 and *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96 as supporting his position that summary disbarment is inapplicable under the circumstances established here. We disagree. Both cases stand for the proposition that the illegal conduct involved therein did not constitute the practice of law. However, neither Stamper nor Utz victimized any clients, so these cases do not affect our interpretation of the alternative provision of 6102 (c) that victimization of a client, even *outside* the practice of law, is grounds for summary disbarment.

[8b] Obviously, respondent was not representing the decedent as a current client at the time he committed embezzlement from the estate. However, section 6102 (c) does not expressly limit its scope to victimization of current clients. The word "client" without qualification as to whether it includes former living or deceased clients is also used in other legislation. Most notably, section 6068 (e) requires an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Similarly, Evidence Code section 950 defines client broadly for purposes of the attorney-client privilege. Both sections 6102 (c) and 6068 (e) clearly include deceased clients within their ambit with limited exceptions also spelled out by statute. (See, e.g., Evid. Code, § 960.)

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*." (*Cox* v. *Delmas* (1893) 99 Cal. 104, 123; accord, *Clancy* v. *State Bar* (1969) 71 Cal.2d 140, 146; *Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 372; see generally 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 95, p. 113.) "The fiduciary relationship makes it improper for an attorney to act contrary to . . . the interests of his present *or former* client." (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 102, p. 122, emphasis added.)

We must therefore consider whether the Legislature intended to embrace former clients within the ambit of section 6102 (c). More particularly, we must consider whether the Legislature intended client victims to include a deceased client whose estate is in the hands of the client's attorney now acting as executor.

In analyzing this issue we derive some guidance from *In re Utz*, *supra*, 48 Cal.3d 468. In determining that the term "offense" in section 6102 (c) was limited only to the actual offense and not the circumstances of its commission, the Supreme Court noted that "If the Legislature had intended the term 'offense' in section 6102, subdivision (c) to take on a broader meaning, it easily could have included additional terms" as it did in section 6102, subdivision (d). (*In re Utz*, *supra*, 48 Cal.3d at p. 483.) In contrast to the narrow term "offense," the Legislature used broad language in the second prong of section 6102 (c): "in any manner such that a client of the attorney was a victim." **[8c]** While we cannot address all the permutations that might arise with respect to former clients to determine whether the Legislature can fairly be said to have intended summary disbarment to apply in each conceivable situation, the most likely opportunity for an attorney to steal from a client who has named him or her as executor of the client's estate is after the client dies, when the attorney has direct access to all of the client's assets and the client is no longer there to hold him or her directly accountable for the misconduct.

[8d] It is not surprising that clients would look to their most trusted fiduciaries during their lifetime

to act as fiduciaries in managing their estates after their death. It is precisely because the attorney-client relationship is one of utmost confidence that the commission of a felony in betrayal of that confidence receives the harshest sanction the disciplinary system imposes. There is such a clear nexus between the felony committed here and the trust and confidence of the client that was violated, we must conclude that the Legislature intended the phrase "in any manner such that a client was a victim" in section 6102 (c) to include a deceased client whose trust is betrayed by the plundering of his estate by the attorney he named as executor.

[4b] In view of the magnitude of the theft involved in this case, even without a prior record of discipline, the Supreme Court would undoubtedly order disbarment regardless of alleged mitigating circumstances. (See, e.g., *In re Basinger* (1988) 45 Cal.3d 1348, 1358, fn. 3.) We therefore recommend to the Supreme Court that respondent David Greene Lilly be summarily disbarred.

We concur:

NORIAN, J.
STOVITZ, J.