PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **DONALD ROBERT LEVITT,** **Member No. 101040,** A Member of the State Bar.	**Case Nos.** **01-C-05215-JMR; 02-O-12115; 04-O-10766** **DECISION**

I. INTRODUCTION

For the reasons stated below, the court recommends that Respondent Donald Robert Levitt be suspended from the practice of law for two years, that execution of said suspension be stayed, and that Respondent be placed on probation for two years with conditions, including an actual suspension of nine months.

II. PERTINENT PROCEDURAL HISTORY

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges in State Bar Court case No. 02-O-12115 on November 26, 2003. Respondent filed his response on December 24, 2003.

On May 20, 2004, the Review Department of the State Bar Court commenced the proceedings in State Bar Court case No. 01-C-05215 by issuing an order, directing the hearing department to determine whether the facts and circumstances surrounding Respondent's conviction for a misdemeanor violation of Penal Code section 242 involved moral turpitude or other misconduct warranting discipline and, if so, to recommend the discipline to be imposed. A Notice of Hearing on Conviction was filed and properly served on May 27, 2004. Respondent filed his response on June 30, 2004.

Also on May 20, 2004, the State Bar filed another Notice of Disciplinary Charges in State Bar Court case No. 04-O-10766. The State Bar subsequently filed a motion to amend and an Amended Notice of Disciplinary Charges was filed in this case on December 10, 2004. Respondent filed his response to the Amended Notice on December 28, 2004.

The three proceedings were consolidated and tried together on January 4 and 5, 2005. The State Bar was represented by Mark Hartman and Respondent represented himself. Following closing arguments, the matter was ordered submitted.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 1, 1981, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

B. State Bar Court Case No. 01-C-05215 - Battery Conviction

1. Criminal Case

On January 9, 2002, a jury found Respondent guilty of violating Penal Code section 242, a misdemeanor battery. The facts and circumstances surrounding the conviction are set forth below.

On May 8, 2001, after school, Jennifer Zenovich and her friend, Gina Torres, went go-carting around Jennifer's neighborhood. Both Jennifer and Gina wore helmets. Jennifer wore a softball helmet that had a mouth guard with three bars that covered her mouth and extended to her ears. Jennifer also was wearing goggles. Jennifer and Gina were both 12-years-old. Jennifer's family had owned the go-cart since December of 1999 and Jennifer had been go-carting many times.

Jennifer drove the go-cart and Gina sat next to her. Jennifer drove on the street because there were no sidewalks in her neighborhood. The girls had left Jennifer's house and were riding for about ten minutes when Jennifer thought Gina had dropped a water bottle. Jennifer turned back to look at what had fallen, and while looking back, she accidently swerved the go-cart to the

left. The go-cart veered onto the end of Respondent's driveway and hit his garbage can, which was at the end of the driveway and partially on the curb for pick-up. The garbage can wobbled and fell over.

When Jennifer looked back up she saw a car coming directly at the go-cart. The car stopped just in front of the go-cart and at an angle. The car stopped perpendicular to the flow of traffic on the street and was partially blocking the street. The car was stopped so as to block the go-cart. Respondent was driving the car.

Respondent got out of his car and approached the girls. He left the engine running and his car door open. Standing over Jennifer, in an angry tone Respondent twice asked Jennifer what her name was before she responded "Jennifer." Respondent then asked Jennifer what her last name was and when she did not respond, Respondent raised his hand to about the height of his shoulder and hit Jennifer on the side of her face, making contact with her skin. Respondent testified that his reaction was the result of uncontrolled anger.

Jennifer quickly stood up. Jennifer urinated and defecated on herself when she stood up. Jennifer then took off her helmet and threw it at Respondent. Jennifer yelled to Gina to run for help. Both girls took off running in opposite directions. Shortly after starting to run, they both lost the flip-flops they were wearing, but continued to run. As a result of running home barefoot on the street, Jennifer developed blisters on the bottom of her feet.

Jennifer testified at the criminal trial that Respondent hit her in the face "really hard." (Exhibit 3, at p. 57:3.) Respondent claims that he "tapped" her on the side of the helmet. There is no clear and convincing evidence of how hard Respondent hit Jennifer. The police officer who arrived shortly after the incident noted that he did not see any bruising or marks on Jennifer's face. However, there is clear and convincing evidence that Respondent did hit Jennifer on the face.

In the criminal trial, Respondent testified that hitting Jennifer was just a "jerk reaction to her ... folding her legs as if she was going to get up and confront" him. (Exhibit 3, at p. 161:24-26.) In this proceeding, Respondent testified that Jennifer was not afraid of him, rather she was

"poised to attack." He also stated that he "tapped" her on the side of the head to get her to respond to a proper question under the circumstances. The court finds Respondent's explanation or justification for his behavior to be unbelievable.

On September 10, 2001, Respondent was charged in the Fresno County Superior Court with violating Penal Code section 242. On January 9, 2002, a jury found Respondent guilty of violating Penal Code section 242, battery.[1] On January 9, 2002, the Superior Court sentenced Respondent to 36 months of probation and ordered Respondent to attend an Anger Management program and to perform 50 hours of community service by July 13, 2002.[2]

On July 26, 2002, when Respondent appeared in court, he had not yet finished his community service. The Superior Court increased the community service hours required to be completed by Respondent from 50 to 75 hours, and extended the time in which to complete the 75 hours of community service to January 31, 2003.

2. Civil Case

On June 14, 2001, a civil complaint was filed against Respondent in Fresno County Superior Court entitled *Zenovich v. Donald R. Levitz* (sic), alleging personal injury and intentional tort and requesting punitive damages as a result of Respondent's actions on May 8, 2001. The named plaintiff was Katie Zenovich, guardian ad litem for Jennifer Zenovich ("Zenovich"). On July 24, 2001, Respondent filed a cross-complaint against Jennifer Zenovich, by and through her guardian ad litem.

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[1]At the criminal trial, the jury's instruction regarding "battery" included the following:

"Every person who willfully and unlawfully uses any force or violence upon the person of another is guilty of the crime of battery...

'[F]orce' and 'violence' are synonymous and mean any application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest touching, if done in an insolent, rude or angry manner, is sufficient...

The touching essential to a battery may be a touching of the person, of the person's clothing, or of something attached to or closely connected with the person." (Exhibit 3, at p. 205:15 to p. 206:8.)

[2]On January 11, 2002, Respondent filed a notice of appeal of his criminal conviction. On April 2, 2004, the appeal was dismissed by the Appellate Division of the court.

On March 25, 2002, a jury verdict was rendered in the civil case, awarding compensatory damages to Zenovich against Respondent in the amount of $25,000. In addition, as to special findings, the jury also found by clear and convincing evidence that Respondent committed oppression and malice in "the conduct upon which [it based its] finding of liability for either the first or second cause of action." (Exhibit 6, at pp. 22-23.) On March 26, 2002, the jury rendered another verdict in the case, awarding punitive damages to Zenovich against Respondent in the amount of $50,000. On the same day, the jury found for cross-defendant Zenovich and against cross-complainant Respondent. On June 19, 2002, the court entered judgment in favor of Zenovich and against Respondent for costs in the amount of $1,453.37.

Respondent has not paid Zenovich or anyone acting on Zenovich's behalf, any of the $75,000 awarded to Zenovich against Respondent.

3. Conclusions of Law - Other Misconduct Warranting Discipline

The State Bar contends that the facts and circumstances surrounding Respondent's criminal violation involves moral turpitude, relying, in part, on the jury's findings of malice and oppression in the civil case. The State Bar argues that the principles of collateral estoppel should be used to apply the civil findings to Respondent's misconduct in order to find his conviction involved moral turpitude. The court rejects the State Bar's argument for several reasons.

First, the State Bar's request for the application of collateral estoppel is untimely. The State Bar raised the issue of collateral estoppel for the first time during its closing argument after the close of evidence. The State Bar failed to give any notice that it intended to rely on the principles of collateral estoppel. Had the State Bar properly moved to apply collateral estoppel, Respondent would have been given sufficient notice and opportunity to offer all necessary evidence, including any evidence he may have wanted to offer to contradict, temper or explain the adverse evidence in the civil case. As set forth below, Respondent would have been entitled to this opportunity since the civil record is incomplete as to the nature and extent of his misconduct that the jury considered in finding that he acted with malice and oppression. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 209.)

Also, the evidence of the civil record offered by the State Bar is insufficient. There is no

evidence as to how "malice" or "oppression" were defined for purposes of the jury's findings. In *Kittrell*, the Review Department found that an attorney's guilt of malice, oppression or fraud, *as defined in that case*, with respect to the attorney's breaching of a fiduciary duty or with respect to his commission of an act of fraud, involved moral turpitude as a matter of law. (*In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at p. 208.) Moreover, neither a breach of fiduciary duty nor fraud is present in this case. Thus, without the definitions for malice or oppression, and without a finding of fraud or a fiduciary breach, the court cannot make a conclusive legal determination that Respondent committed acts involving moral turpitude. (*In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at p. 208.)

Even if the court were willing to make a legal determination of moral turpitude based on the jury's findings of malice and oppression, the court is unable to determine the factual basis for the jury's findings, and cannot determine the nature and extent of any acts that may have constituted moral turpitude. The only evidence of "malice" or "oppression" comes from the jury's special findings in its general verdict. The jury was asked whether there was clear and convincing evidence that Respondent committed oppression and malice in "the conduct upon which you base your finding of liability for *either* the first *or* second cause of action." (Exhibit 6, at p. 22-23; emphasis added.) The jury answered "yes" to both a finding of oppression and malice. However, since the findings use the disjunctive correlative conjunction of "either . . . or," the court cannot determine whether the jury found Respondent guilty of malice and oppression as to count one or two.[3] Under such circumstances, while the State Bar may rely on the underlying civil record to show the nature and extent of Respondent's actions, Respondent must be given an opportunity to attempt to contradict, tempter or explain the adverse evidence. (*In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at p. 209.) Respondent was not given such an opportunity.

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[3]The court is also concerned about relying on the factual allegations in the intentional tort cause of action that allege "Defendant battered plaintiff about the head and shoulders without excuse or justification." (Exhibit 6, at p. 2.) This allegation is remarkably inconsistent with the evidence offered in the criminal trial, including Jennifer's own statements.

Thus, based on the untimely request and the insufficiency of the evidence, the court finds that it would be unfair to apply collateral estoppel to the jury's findings to make a determination that Respondent's conduct involved moral turpitude.

Finally, separate and apart from the principles of collateral estoppel, the court does not find that the facts and circumstances of Respondent's conviction involve moral turpitude. Respondent cites to *In re Rothrock* (1940) 16 Cal.2d 449, a case involving the crime of assault with a deadly weapon, where the Supreme Court stated "[t]he commission of such lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to involve moral turpitude." (*Id.* at p. 459.) Respondent argues that his misconduct is less severe than that of the attorney in *Rothrock.* The court finds that Respondent's conduct was no more severe than that of attorneys in other cases involving assault crimes where moral turpitude also was not found. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52). As inappropriate as it may have been, Respondent's misconduct did not involve moral turpitude.

Notwithstanding, the court does find that the facts and circumstances surrounding Respondent's criminal violation constitute other misconduct warranting discipline. In the heat of anger, Respondent lost his temper and confronted a 12-year-old girl whom he did not know because she knocked over his garbage can. The court finds that Respondent's behavior does constitute other misconduct warranting discipline. (*In re Kelley* (1990) 52 Cal.3d 487.)

C. State Bar Court Case No. 02-O-12115 - The Ferro Matter

On May 9, 2000, James M. Ferro ("Ferro") hired Respondent to represent him in his marital dissolution case, *In re the Marriage of Ferro v. Ferro.*

On May 9, 2000, Ferro gave Respondent a $2,500 check as an advance payment for costs and attorney's fees. Respondent deposited the $2,500 check in California Federal Bank account number 9734019486, his client trust account ("the CTA").

On or about May 15, 2000, Respondent wrote himself a check for $2,305 drawn on the

CTA and cashed the check. Respondent took the $2,305 as an advance for attorney's fees.

On or about May 22, 2000, Respondent wrote a check for $195 drawn on the CTA to pay court costs. This check was promptly cashed.

After the $195 check was cashed, the CTA contained no funds belonging to Ferro.

On or about June 6, 2000, Respondent sent Ferro an initial billing statement, which showed the following:

(a) that Respondent paid court costs of $195, which were covered by the $195 check drawn on the CTA;

(b) that Respondent charged Ferro $2,497.50 for "13.5 hours of professional legal services at $185.00 per hour"; and

(c) that Ferro thus owed Respondent $192 (i.e., the $2,305 advanced fees minus the $2,497.50 charged for professional legal services).

On or about June 26, 2000, Ferro gave Respondent a $2,000 check as an additional advance fee. Respondent deposited the $2,000 check in Union Bank account number 6280000505, his business account ("business account").

After the $2,000 deposit, Respondent's business account contained $1,808 belonging to Ferro (i.e., the $2,000 additional advance fee minus the $192 owed for fees after the initial billing statement). Ferro had a credit balance of $1,808.

On July 11, 2000, the Fresno County Superior Court held a hearing on Ferro's dissolution case. Judge John Fitch asked Respondent whether Ferro was behind in paying attorney's fees. Respondent replied: "He's well out in front by now he's got about a good thousand [dollars] credit I think at this point." (Exhibit 22, at p. 62:4-6.) Judge Fitch then ordered that "out of the funds held by Mr. Levitt for the attorney's fees for [Ferro], $1,000 is to be paid for attorney's fees" to Ronald G. Soloniuk, the lawyer representing Ferro's wife in the case. (*Id.*, at pp. 63-64.) The court ordered that the $1,000 should be paid by making payments of $300 a month starting on July 15. The court stated that "[t]he thousand dollars is going to be paid by Mr. Levitt." (*Id.* at p. 64:11-12.) The court noted that if the payments put Ferro's account "in the hole," then Respondent was to give Ferro "a statement that lets him know because after today it might." (*Id.*,

at p. 64:14-16.)

On or about July 11, 2000, the court entered a minute order confirming that Soloniuk be paid attorney's fees of $1,000 "from Mr. Levitt's fund." The clerk of the court promptly served Respondent with a copy of the minute order, which he received.

On or about July 11, 2000, Respondent sent Ferro another billing statement, which showed the following:

(a) that Ferro started with a credit of $1,808;

(b) that through 7-11-00, Respondent charged Ferro $1,313.50 for 7.1 hours of work at $185.00 per hour;

(c) that after deducting the $1,313.50 charge, Ferro had a credit of $494.50 (i.e., the $1,808 credit minus the $1,313.50 attorney's fees);

(d) that Respondent charged Ferro $1,000 "Per Judge's Order to pay Attorney Soloniuk $1,000.00;"

(e) that after the $1,000 charge for payment to Soloniuk, Ferro owed Respondent $505.50 (i.e., the $494.50 credit minus the $1,000 for Soloniuk);

(f) that Respondent charged Ferro another $1,000 as a "Further Retainer;" and

(g) that Respondent thus charged Ferro a total of $1,505.50 (i.e., the $505.50 outstanding balance plus the $1,000 further retainer).

Ferro received the billing statement dated July 11, 2000.

On July 24, 2000, the court filed the "Order After Hearing," which Soloniuk drafted. The order provided:

> Ferro shall pay to Petitioner's attorney, RONALD G. SOLONIUK, the sum of ONE THOUSAND DOLLARS ($1,000) as and for attorney's fees. Said payment of attorney's fees shall be paid out of the respondent's attorney's trust fund, if there are any funds available, If no funds are available, then [Ferro] shall to (sic) the petitioner's attorney, Ronald G. Soloniuk, the monthly sum payment $300.00, or more, commencing the fifteenth (15th) day of each and every month thereafter until paid in full." (Exhibit 23, at pp. 18-19.)

On or about September 27, 2000, Ferro sent Respondent a check for $2,000 as a further advance fee. Respondent received the $2,000 check and deposited the $2,000 in his business account.

On or about January 29, 2001, Respondent sent Ferro another billing statement wherein Respondent billed for a total of $2,738 based on 14.8 hours of work performed between July 11, 2000[4] and January 29, 2001, at $185 an hour. After Ferro received the bill, he went to Respondent's office and he and Respondent had an argument. Respondent performed no additional work on Ferro's case after January 29, 2001.

As of January 29, 2001, Respondent billed Ferro a total of $7,738 based on the following breakdown:

(1) $6,543[5] for legal services based on 35.4 hours at $185 an hour;

(2) $195 for court costs; and

(3) $1,000 to pay Soloniuk pursuant to the court's July 11, 2000 order.

However, despite his billing statements, Respondent never paid anything to Soloniuk. Respondent never moved the court for modification or reconsideration of the order regarding the $1,000 payment. Respondent never appealed the order.

On or about February 18, 2001, Ferro sent a letter to Respondent by certified mail return receipt requested. In the letter, Ferro terminated Respondent's services and requested his file and an itemization of Respondent's billing. Ferro stated that if he did not receive a complete itemization of time spent by Respondent and a refund of any overcharges by March 1, Ferro would file for arbitration.

Respondent refused to sign for or accept delivery of Ferro's February 18, 2001 letter, and ultimately the letter was returned as undeliverable. Respondent testified that at the time the letter was sent he had already been fired by Ferro and he did not feel that he had an obligation to accept mail from a former client. Respondent further testified that if Ferro wanted to "get his attention," Ferro could have sent a letter by regular mail.

Shortly thereafter, Ferro requested to resolve his fee dispute with Respondent through the

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[4]The bill erroneously states July 11, *2001*.

[5]Based on number of hours, Respondent billed a total of $6,549. However, he provided a $.50 credit on his June 6, 2000 statement, and a $5.50 credit on his January 29, 2001 statement.

Fresno County Bar Association Fee Arbitration Program. On March 23, 2001, in his reply to the arbitration request, Respondent stated that the total amount of the fee charged was $7,738, and that Ferro had paid $6,500, and Respondent claimed an amount owed of $1,238. (Respondent's Response to Notice of Disciplinary Charges filed on December 24, 2003, attachment page 8.)

On June 5, 2001, Ferro failed to timely appear for the arbitration proceeding.[6] Respondent did appear. After waiting 25 minutes, the arbitrator proceeded without Ferro and ruled in Respondent's favor. (Exhibit D, at p. 4.) The arbitrator awarded Respondent $1,238 based on the information in the file, which included Respondent's response.[7] Ferro ultimately filed bankruptcy and listed Respondent as a creditor.

Ferro testified that after he missed the arbitration hearing, he talked to the Fresno County Bar Association and they told him he could sue Respondent in court or complain to the State Bar. Ferro complained to the State Bar.

Count One - Business and Professions Code Section 6103[8] - Violation of a Court Order

Section 6103 provides that an attorney's wilful disobedience or violation of a court order requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, constitutes cause for disbarment or suspension. The State Bar argues that Respondent violated section 6103 by not paying anything to Soloniuk after Respondent knew of the court order directing him to pay $1,000 to Soloniuk for attorney's fees from the funds he held for Ferro.

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[6] The arbitrator's award was offered by Respondent and admitted into evidence to impeach Ferro, who claimed he was only five minutes late for the arbitration. Ferro also claimed that he was told by the arbitrator's office that the matter was "dropped" when he got there and he claimed he never received a copy of the arbitrator's award. Ferro testimony is not believable and inconsistent with more reliable evidence. Based on Ferro's testimony and his general demeanor during trial, the court finds Ferro to be lacking in credibility.

[7] The court sets forth the findings of the arbitrator solely to illustrate that as of June 5, 2001, Respondent continued to assert that he was entitled to $7,738. (See, Bus. & Prof. Code §6204(e).)

[8] Unless otherwise noted, all further references to "section" are to the Business and Professions Code.

Respondent contends that he did not pay the court ordered $1,000 because sometime between July and September of 2000, Ferro told Respondent that he did not want to pay the amount and that Respondent was not to use any of the funds he was holding for Ferro to pay the amount. Respondent also claims that he did not pay the amount because he was never holding any money for Ferro in "trust" and the order provided that Respondent was to pay the $1,000 from money held in trust. The court rejects Respondent's arguments.

On July 11, 2000, the Fresno County Superior Court clearly ordered Ferro to pay $300 a month to Soloniuk until $1,000 was paid. The money was to be paid through Respondent. As the court stated: "The thousand dollars is going to be paid by Mr. Levitt." (Exhibit 22, at p. 64:11-12.) If Ferro's account with Respondent was short, Respondent was to notify Ferro. The first $300 payment was to occur four days later, by July 15, 2000. The court placed the obligation on Respondent to assure that the payment was made.

Although the subsequent written order was not artfully drafted, the order remained the same: Ferro was required to pay $1,000 to Soloniuk, and if Respondent was not currently holding $1,000 for Ferro, payments of no less than $300 a month were to be made by the 15th of the month.

As of July 11, 2000, Respondent was holding at least $300 for Ferro and could have made the first payment. There is not clear and convincing evidence that Ferro told Respondent not to pay the $1,000. However, even assuming Ferro did tell Respondent not to pay it, Respondent then had an obligation to seek a modification order from the court, inform the court of the situation, or if necessary, withdraw from representing Ferro. Respondent cannot allow his client to instruct him to violate a court order and then argue that instruction justifies his violation.

The court also rejects Respondent's argument that he was not required to make any payments because he was not holding any money in his "trust" account. Whether Respondent held Ferro's money in his client trust account or his business account does not obliterate his obligation to comply with the court order. Respondent cannot attempt to avoid the clear purpose of the court's order (i.e., payment to Soloniuk) by placing funds in his business account.

By failing to pay Soloniuk as ordered, there is clear and convincing evidence that

Respondent wilfully violated section 6103.

Count Two - Section 6106 - Moral Turpitude and Dishonesty

Section 6106 provides that the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, constitutes a cause for disbarment or suspension. The State Bar contends that Respondent violated section 6106 by charging Ferro for a $1,000 payment to Soloniuk when he had not paid anything to Soloniuk and by concealing from Ferro his failure to pay anything to Soloniuk.

Respondent testified that he placed the $1,000 charge on his billing statement immediately after the court hearing in anticipation of Ferro giving him the money, but then sometime between July and September 2000, Ferro told Respondent he was not going to pay it. However, Respondent's claim that Ferro told Respondent not to pay the amount to Soloniuk fails to explain why Respondent's subsequent January 29, 2001 billing statement was calculated as if Respondent paid the $1,000, or why Respondent claimed $7,738 at the time of the arbitration, which amount also includes the $1,000. While it is plausible that Respondent merely overlooked the $1,000 on his January 29, 2001 billing statement, by the time of the fee dispute before the Fresno County Bar Association, Respondent should have corrected his statements. At the very least, his failure to do so constitutes gross negligence. Thus, the court finds that there is clear and convincing evidence that Respondent violated section 6106 by wrongfully charging Ferro $1,000 for a payment to Soloniuk that was never made.

Count Three - Rules of Professional Conduct, Rule 4-100(B)(3)[9] - Failure to Render Account

Rule 4-100(B)(3) requires that an attorney maintain complete records of all funds, securities, and other properties of a client coming into the possession of the attorney and render appropriate accounts to the client regarding them.

Sometime between January 29, 2001 and February 18, 2001, Ferro fired Respondent. On February 18, 2001, in response to Respondent's final billing statement, Ferro requested an

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[9]Unless otherwise noted, all further references to "rule" are to the Rules of Professional Conduct.

itemization of Respondent's bill. Respondent, however, never received this request because he refused to accept delivery of a letter from his former client.

Following Respondent's January 29, 2001 billing statement, Ferro was entitled to receive a further accounting or itemization of his bill even if his attorney-client relationship with Respondent had ended. Just as Ferro's obligation to pay a bill does not end with the termination of the relationship, Respondent's obligation to provide an accounting on that bill does not end. Respondent had more detailed records of the time he spent on Ferro's case as set forth in his time records, which he claims he gave to the arbitrator. However, a client or former client should not have to seek arbitration in order to obtain such an accounting. The court finds that Respondent's failure to accept Ferro's letter and provide an appropriate accounting in an attempt to resolve their fee dispute constitutes a violation of rule 4-100(B)(3).

Count Four - Section 6106 - Moral Turpitude and Dishonesty

The State Bar alleges that Respondent violated section 6106 when he made false assertions to Soloniuk and State Bar investigator William Stephens that Ferro had directed him not to pay the $1,000 to Soloniuk out of the funds Respondent held for Ferro. The State Bar claims that Respondent knew this statement was false when he made it.

Disciplinary charges must be proven by the State Bar by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) All reasonable doubts must be resolved in favor of the accused attorney. If equally reasonable inferences may be drawn from a proven fact, the inference leading to innocence must be chosen. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240.)

Furthermore, if the court is "unable to assess the relative credibility of the witnesses whose testimony conflicts, the doubt should be resolved in favor of the attorney since the burden in the disciplinary hearing is on the State Bar to establish by clear and convincing evidence that discipline is warranted." (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968.)

As set forth above, there is no clear and convincing evidence of whether or not Ferro told Respondent not to make the $1,000 payment. Attorney Soloniuk testified that it was an acrimonious dissolution. It is reasonable to assume that during such a bitter battle one party may

attempt to defy a court order regarding payment to the other party. Furthermore, based on the credibility issues with both Ferro and Respondent, the court cannot find that Respondent's statements were false at the time made. Thus, count four is dismissed with prejudice.

D. State Bar Court Case No. 04-O-10766 - The Higgins Matter

On June 10, 2003, Respondent filed a Voluntary Petition Under Chapter 7 in the Middle District of Florida, case no. 6-01-bk-006687-KSJ.

On August 15, 2003, Respondent was attempting to return material that he had specially ordered from J.E. Higgins Lumber Company ("Higgins Lumber Company") at 4734 East Jensen Avenue, Fresno, California 93745. However, Higgins Lumber Company refused to accept the return because its policy is that specially ordered material cannot be returned. After Respondent was told that the material could not be returned, he "dumped" it in front of the store. Respondent had paid about $650 for the material.

On the same day, Respondent subsequently purchased different materials from Higgins Lumber Company. Respondent gave Higgins Lumber Company a check in the amount of $478.22 as payment for the goods he purchased on August 15, 2003. The check was written against the "Fig Garden Torah Center" account and Respondent is the authorized signer on the account. Respondent testified that the Fig Garden Torah Center is a non-profit organization of which he is president. Respondent also claimed that he purchased flooring for a property owned by Fig Garden Torah Center.

On the same day, August 15, 2003, Respondent went to his bank and directed a stop payment on the $478.22 check he gave to Higgins Lumber Company. In the stop payment order, under the "[r]eason for stopping payment," Respondent stated that the check was "lost." (Exhibit 9, at p. 11.) The check was not lost and when Respondent signed the stopped payment order on August 15, 2003, he knew that the check was not lost.

On or about August 29, 2003, Janet Daniels, the credit manager at Higgins Lumber Company, telephoned Respondent regarding the stopped payment on the check. After she identified herself, Respondent hung up. Ms. Daniels was unable to reach Respondent by telephone after that time. On October 15, 2003, Ms. Daniels sent Respondent a demand letter for

payment.

On or about November 24, 2003, Higgins Lumber Company filed a Small Claims Court action against Respondent for the check Respondent issued to them on August 15, 2003 and stopped payment on. The action filed against Respondent is entitled *J.E. Higgins Lumber Co., Inc. v. Donald R. Levitt DBA Fig Garden Center,* case number 03-CESC03370 ("*Higgins v. Levitt*").

On December 9, 2003, Respondent prepared and subsequently served on Higgins Lumber Company a Notice of Bankruptcy Proceeding informing them that he had filed bankruptcy in Florida, that an automatic stay was in place pursuant to "Section 11 USC 362," and that no further action may be taken in the *Higgins v. Levitt* case. (Exhibit 13, at p. 1:16.)

On December 11, 2003, in response to Respondent's Notice of Bankruptcy proceeding, Janet Daniels from Higgins Lumber Company sent Respondent a letter requesting additional information. In her letter, Ms. Daniels stated that a letter directly from Respondent was not sufficient notice of the bankruptcy. She requested either a copy of the bankruptcy petition or formal notice of bankruptcy from Respondent's attorney. Respondent received but did not respond to Ms. Daniels's letter.

On December 15, 2003, Respondent filed the Notice of Bankruptcy Proceeding with the Fresno County Superior Court in the *Higgins v. Levitt* case.

Respondent filed his bankruptcy petition prior to his issuance of his check dated August 15, 2003 payable to Higgins Lumber Company. At no time did Respondent list Higgins Lumber Company as a creditor in his bankruptcy petition.

On or about April 15, 2004, State Bar investigator Robert Feher sent a letter to Respondent informing him of the complaint of Higgins Lumber Co. and requesting his response.

On or about April 20, 2004, Respondent contacted Janet Daniels of Higgins Lumber Co and offered to pay them $600 to settle the small claims court case.

On April 22, 2004, Janet Daniels appeared at a hearing in *Higgins v. Levitt* and advised the court that Higgins Lumber Company had received a cashier's check from Respondent in the amount of $600 as payment to settle their claim. The court entered judgment against Respondent

and dismissed the case without prejudice. Ms. Daniels asked the court to dismiss the matter without prejudice because she wanted to make sure she was able to cash the cashier's check before the matter was dismissed with prejudice.

Count One - Section 6106 - Moral Turpitude and Dishonesty

The State Bar contends that Respondent wilfully committed an act involving moral turpitude and dishonesty by stating on the stop payment order that the check to Higgins was "lost" when he knew that it was not lost.

In his defense, Respondent contends that under the California Commercial Code section 4403, the reason for the stop payment of a check has nothing to do with the validity of the stop payment. Respondent contends that the bank must issue the stop payment regardless of the reason for asking for one. Since the reason for the stop payment had nothing to do with its effectiveness, Respondent argues that it was not in any way "material" and there is no issue of him having fraudulently obtained the stop payment order. Respondent contends that "[o]nly having stated erroneous information is not enough." (Respondent's Points and Authorities on Trial Issues, filed on January 4, 2005, at p. 5:4-5.) Under Respondent's analysis, in order for a lie to equate to discipline, there must be some "material element of wrongdoing." (*Id.* at p. 5:6.)

The court rejects Respondent's contention. The court finds that lying to a bank regarding the reason for a stop payment order is a "material" issue for purposes of discipline. "The California Supreme Court has always reserved harsh language for an attorney's practice of issuing bad checks.... 'It is settled that the "continued practice of issuing [numerous] checks which [the attorney knows will] not be honored violates 'the fundamental rule of ethics - that of common honesty - without which the profession is worse than valueless in the place it holds in the administration of justice.' [Citations.]" (*Bowles v. State Bar* (1989) 48 Cal. 3d 100, 109.) Although the instant matter involves only one check, the court finds Respondent's deliberate misrepresentation sufficient to find a violation. Respondent's conduct was nothing more than a poorly veiled act of retaliation against Higgins Lumber Company as a result of its refusal to accept a return. The court finds that Respondent wilfully committed an act of dishonesty in violation of section 6106 by stating on the stop payment order that the check was lost when he

knew that it was not lost.

Count Two - Section 6106 - Moral Turpitude and Dishonesty

The State Bar alleges that when Respondent served the Notice of Bankruptcy Proceeding on Higgins Lumber Company and filed the Notice with the Fresno County Superior Court in *Higgins v. Levitt*, Respondent knew, or was at least grossly negligent if he failed to know, that the automatic stay of title 11 United States Code section 362 did not apply to his post-petition issuance of the $478.22 check to Higgins Lumber Company and did not affect the right of Higgins Lumber Company to receive payment of the check.[10]

Respondent acknowledges that he made a false statement to the court when he submitted the Notice of Bankruptcy Proceeding, but contends that he did not do it knowingly. Respondent's wife filed for divorce on December 1, 2003 - just eight days before he prepared the Notice. In addition, Respondent testified that he had recently moved to San Jose from Fresno, where he had lived his entire life. He also stated that he was having financial problems and his law practice was "in shambles." In addition, Respondent testified that he was having an ongoing dispute with his sister over his mother's estate. Respondent claims that because of these family and financial problems, he was not thinking clearing. He claims that he "honestly believed" that the liability to Higgins occurred before the bankruptcy filing. (Respondent's Points and Authorities on Trial Issues, filed on January 4, 2005, at p. 5:17.) Respondent stated that he realized for the first time that his liability to Higgins occurred after his bankruptcy after he received the April 15, 2004 letter from the State Bar investigator.

The court finds Respondent's explanation unbelievable. His liability to Higgins had occurred only four months prior to his filing of the Notice of Bankruptcy Proceeding. In light of Respondent's "dumping" of the specially ordered materials, his purchasing of additional material, and his stopping payment on the check, it seems unlikely that the events leading to his

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[10]Title 11 U.S.C. §362(a)(1) provides that the filing of a petition under Chapter 7 operates as a stay against "the commencement or continuation" of an "action or proceeding against the debtor that was or could have been commended before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

liability to Higgins would have been so easily forgotten. Ms. Daniels's telephone call on August 29, 2003, shortly after the transaction, should have been a reminder. Moreover, Respondent testified that he had been living in Florida for at least 180 days prior to filing his bankruptcy in Florida on June 10, 2003. Again, it seems unlikely that Respondent would be unable to remember whether or not the Higgins liability occurred before or after he had been living in Florida.

Even assuming the court were willing to accept Respondent's argument regarding his diminished capacity at the time he filed the Notice of Bankruptcy Proceeding, it does not explain why he failed to subsequently correct this mistake. In fact, had Respondent talked to Ms. Daniels on the telephone when she called in August, or had he answered her request for additional bankruptcy material in December, this issue would have come to light and could have been avoided or corrected. At the very least, it was Respondent's gross negligence in handling the matter that caused the false assertion to linger. Accordingly, the court finds that there is clear and convincing evidence that Respondent wilfully violated section 6106 by asserting that the Higgins complaint was stayed by his bankruptcy proceeding when he knew or should have known that it was not stayed.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)[11]

As set forth above, Respondent testified that during the Higgins matter, he was suffering from family and financial problems. He also claims that as a result of the mental turmoil he has seen a psychologist and is on medication. Other than his own testimony, Respondent did not offer any evidence to support these contentions. There is no evidence of how often or for how long Respondent sought treatment. More importantly, he failed to offer any evidence that he no

[11]All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct.

longer suffers from these mental problems. Notwithstanding, the court gives slight weight in mitigation to Respondent's family and financial problems as they relate to the Higgins matter. (Standard 1.2(e)(iv).)

Respondent entered into a factual stipulation with the State Bar and is given some mitigating credit based on his cooperation. (Standard 1.2(e)(v).)

No other mitigating circumstances were shown by clear and convincing evidence.

B. Aggravation

There are several aggravating factors. (Standard 1.2(b).)

Respondent has a prior record of discipline. (Standard 1.2(b)(i).) On May 10, 1996, in Supreme Court case No. S052073 (State Bar Court case No. 92-O-1933) Respondent was suspended for 60 days, execution stayed, and placed on two years probation with no actual suspension time. Between 1990-1993, in three client matters, Respondent stipulated to a total of seven violations, including rules 3-110(A), 3-700(D)(1), 4-100(A) and 3-200, and sections 6068(m) and 6068(g).

Respondent's current misconduct evidences multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

The State Bar contends that there are other acts of "uncharged misconduct" that have been shown by clear and convincing evidence and should be considered in aggravation. (Standard 1.2(b)(iii).) In particular, the State Bar contends that in the Higgins matter, Respondent should be found culpable of an additional section 6106 violation based on a determination that he took the material from Higgins Lumber Company without the intent to repay the debt, amounting to a theft. (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231.) In addition, the State Bar contends that as to the Jennifer Zenovich incident, Respondent should be found culpable of violating section 6068(d) based on Respondent's claim of property damage in his cross-complainant in the civil case, which the State Bar contends did not exist.

As the Supreme Court held in *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36, evidence may appropriately be considered as "uncharged misconduct" in aggravation so long as (1) the

evidence was elicited only for the relevant purpose of inquiring into the cause of the charged misconduct, (2) the evidence came from the attorney's testimony or evidence, and (3) the evidence was not relied on to establish an independent ground for discipline. The State Bar's allegations of additional "uncharged misconduct" fail to meet this test. The evidence was not elicited *only* for the relevant purpose of the charged misconduct, rather is was elicited and offered by the State Bar.[12] In addition, the court relied on the same evidence in the Higgins matter to find culpability under count one of that case. Accordingly, the court does not consider these appropriate uncharged acts of misconduct in aggravation.

Respondent's misconduct significantly harmed the public. (Standard 1.2(b)(iv).) Since Respondent failed to pay his bills at Higgins Lumber Company, it was forced to bring an action to collect.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) To date, Respondent has not paid any portion of the $75,000 to Jennifer Zenovich. Respondent argues that he has filed for bankruptcy and that the State Bar should not be able to undermine the bankruptcy laws and policies by requiring him to pay back the debt before there is a bankruptcy order.

Restitution is not, however, limited to legally enforceable claims. An attorney may be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008.) As the Supreme Court stated in disbarring an attorney, "the responsibilities of a lawyer differ from those of a layman; 'correspondingly, our duty to the public and to the lawyers of this state in this respect differs from that of the trial judge in administering criminal law.' [Citation.]" (*In re Distefano* (1975) 13 Cal.3d 476, 481.) Restitution forces an attorney to confront the harm caused as a result of his misconduct. (*Brookman v. State Bar, surpa,* 46 Cal.3d at p. 1009.) Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to pay any of the $75,000.

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[12]The appropriate procedure would be to seek to amend the notice of disciplinary charges in order to provide a respondent sufficient notice and opportunity to respond.

V. LEVEL OF DISCIPLINE

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from reproval to disbarment depending on the nature and extent of the attorney's misconduct. (Standards 1.7, 2.3, 2.6, 2.10 and 3.4.)

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

The State Bar recommends, inter alia, that Respondent be actually suspended for four years, execution stayed, and placed on five years probation including a three year actual suspension, citing to *Maltaman v. State Bar* (1987) 43 Cal.3d 924.[13] However, the court finds the misconduct in *Maltaman* to be much more serious and extensive than in the present case. For example, in one matter, Maltaman's misconduct spanned several years and included violating at least two court orders and being held in contempt twice. In the other matter, the attorney was found to have used deceitful means in litigation by presenting a knowingly false order to a judicial officer, willfully disobeying a sanctions order and displaying offensive personality

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[13]The State Bar also recommends that Respondent be ordered to pay restitution of $1,000 plus interest to Ferro. The evidence does not support such a recommendation. Although Respondent improperly left the $1,000 charge on his billing statement, even if that amount were deducted, the evidence shows that Ferro still owed Respondent $238. To the extent that there is a fee dispute over the hours billed by Respondent, this is not the proper forum to resolve it.

demonstrating disrespect for a judicial officer. Although the Supreme Court stated that no mitigating circumstances existed, it went on to state that since the attorney had no prior record of discipline, the State Bar Court's recommendation of disbarment was unnecessary. (*Id.* at p. 958.) The Supreme Court ordered the attorney suspended for five years, execution stayed, and placed him on probation for five years with one year actual suspension. *Maltaman v. State Bar* does not support the high level of discipline suggested by the State Bar.[14]

In a conviction referral proceeding, "discipline is imposed according to the gravity of the crime and the circumstances of the case." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

"[P]ast disciplinary cases involving attorneys convicted of assaultive crimes have generally resulted in actual suspension of varying lengths." (*In the Matter of Burns, supra,* 3 Cal. State Bar Ct. Rptr. at p. 415, fn. omitted; *In re Otto* (1989) 48 Cal.3d 970; *In re Hickey* (1990) 50 Cal.3d 571; and *In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. 52.)

With respect to Respondent's criminal conviction on hitting a 12-year old, the court finds *In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. 52 to be the most instructive. In *Stewart*, the Review Department of the State Bar Court recommended a 60-day period of actual suspension, inter alia, where, during a domestic disturbance with his wife, the attorney fought with police, was verbally abusive and made racial slurs. In aggravation, it was noted that Respondent had a prior record of discipline which resulted in a 90-day actual suspension; the attorney engaged in multiple acts of misconduct; and the attorney showed indifference to the seriousness of his actions and their potential harm to others. It also was found that the attorney was very experienced in family law and domestic disturbance issues and that he should have appreciated the seriousness of the potential harm that could have resulted from his actions. No mitigating circumstances were found.

With respect to Respondent's act of dishonesty in the Ferro matter, where he charged the

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[14]Respondent did not propose any level of discipline, rather he argued that the conviction should not be considered moral turpitude, and argued against a finding of culpability in the other matters.

client $1,000 for payment to the client's ex-wife's counsel, but did not comply with the court order, and in the Higgins Lumber Company matter, where he stopped payment on a $478.22 check in an obvious attempt to "get back" at the store for refusing to accept his return of merchandise, there is no question that Respondent's acts of dishonesty violated the high ethical standards that attorneys are expected to maintain. "These acts manifest an 'abiding disregard of "'the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice.'" (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147, citations omitted.) Dishonest behavior by an attorney constitutes grounds for suspension or disbarment, even if no harm results. (*Ibid.*, citing *Garlow v. State Bar* (1982) 30 Cal.3d 912, 917.)

In *Levin v. State Bar, supra,* 47 Cal.3d 1140, the Supreme Court suspended the attorney for three years, stayed, and placed him on three years probation, with six months actual suspension, for his acts of dishonesty. The attorney made false statements to opposing counsel; communicated repeatedly with a party whom he knew to be represented; settled a case without client's permission and forged signature on a settlement check and release; and failed to deliver the settlement funds to the client. In mitigation, he had no prior record of discipline in 18 years; there was excessive delay in State Bar's prosecution; he had no subsequent misconduct; and he cooperated with the State Bar.

In another similar case, *In the Matter of Petilla, supra,* 4 Cal. State Bar Ct. Rptr. 231, the attorney was given a two-year stayed suspension, two-year probation, and a 60-day actual suspension for borrowing money from credit cards without intending to repay it, incurring gambling debts of $19,000 and then attempting to discharge the debts in bankruptcy. In mitigation, he had no prior record of discipline in 16 years.

After reviewing and considering the facts and circumstances surrounding Respondent's conviction, his misconduct in the two other matters, and the aggravating and mitigating circumstances, the court finds that Respondent's criminal act is not as egregious as that of the attorney's battery on a police officer in *Stewart*; his dishonesty surrounding his refusal to pay for his purchase did not involve the practice of law as in *Levin*; and his misconduct regarding his

billing statement in Ferro was not as serious or widespread as in *Levin*. However, unlike the attorneys in *Petilla* and *Levin,* Respondent has a prior record of discipline, albeit his misconduct took place more than seven years ago.

Therefore, in balancing all relevant factors, including aggravating and mitigating circumstances and the misconduct in the three separate matters, the court concludes that a period of nine months of actual suspension from the practice of law followed by a period of probation would be appropriate for Respondent's dishonesty and criminal conviction for battery.

VI. RECOMMENDED DISCIPLINE

ACCORDINGLY, this court recommends that Respondent Donald Robert Levitt be suspended from the practice of law in California for two years, that execution of the suspension be stayed, and that Respondent be placed on probation for two years with the following conditions:

1. Respondent shall be actually suspended from the practice of law for the first nine months of his probation;
2. During the probation period, Respondent shall comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent shall submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent shall state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report shall be submitted on the next following quarter date, and cover the extended period.
   In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period;
   Subject to the assertion of applicable privileges, Respondent shall answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to Respondent personally or in writing, relating to whether Respondent is complying or has complied

with the conditions contained herein;

4. Within 10 days of any change, Respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

5. Within one year of the effective date of the discipline herein, Respondent shall provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and Respondent shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201);

6. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

7. At the expiration of the period of this probation, if Respondent has complied with all the terms of probation, the order of the Supreme Court suspending Respondent from the practice of law for two years that is stayed shall be satisfied and that suspension shall be terminated.

It is further recommended that Respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within the period of his actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage.

It is further recommended that Respondent be ordered to comply with rule 955 of the

California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein. **Wilful failure to comply with the provisions of rule 955 may result in revocation of probation; suspension; disbarment; conviction of contempt; or criminal conviction.**

VII. COSTS

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and payable in accordance with section 6140.7.

Dated: April 5, 2005

JOANN M. REMKE
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on April 5, 2005, I deposited a true copy of the following document(s):

DECISION, filed April 5, 2005

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DONALD ROBERT LEVITT
1561 WILLOW BRAE
SAN JOSE CA 95125

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MARK HARTMAN, *Enforcement, San Francisco*

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **April 5, 2005.**

Laine Silber

Laine Silber
Case Administrator
State Bar Court