



ORIGINAL

PUBLIC MATTER

FILED

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STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

THE STATE BAR OF CALIFORNIA
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THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case Nos. 04-O-14550, 04-O-15190
KENDALL LEE BYRD,)
No. 108173,) NOTICE OF DISCIPLINARY CHARGES
A Member of the State Bar.)

NOTICE - FAILURE TO RESPOND!

IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR DEFAULT SHALL BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNLESS THE DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE RULES OF PROCEDURE OF THE STATE BAR, (3) YOU SHALL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOUR DEFAULT IS SET ASIDE, AND (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE.

STATE BAR RULES REQUIRE YOU TO FILE YOUR WRITTEN RESPONSE TO THIS NOTICE WITHIN TWENTY DAYS AFTER SERVICE.

IF YOUR DEFAULT IS ENTERED AND THE DISCIPLINE IMPOSED BY THE SUPREME COURT IN THIS PROCEEDING INCLUDES A PERIOD OF ACTUAL SUSPENSION, YOU WILL REMAIN SUSPENDED FROM THE PRACTICE OF LAW FOR AT LEAST THE PERIOD OF TIME SPECIFIED BY THE SUPREME COURT. IN ADDITION, THE ACTUAL SUSPENSION WILL CONTINUE UNTIL YOU HAVE REQUESTED, AND THE STATE BAR COURT HAS GRANTED, A MOTION FOR TERMINATION OF THE ACTUAL SUSPENSION. AS A CONDITION FOR TERMINATING THE ACTUAL SUSPENSION, THE STATE BAR COURT MAY PLACE YOU ON PROBATION AND REQUIRE YOU TO COMPLY WITH SUCH

1 **CONDITIONS OF PROBATION AS THE STATE BAR COURT DEEMS**
2 **APPROPRIATE. SEE RULE 205, RULES OF PROCEDURE FOR STATE**
3 **BAR COURT PROCEEDINGS.**

4 The State Bar of California alleges:

5 JURISDICTION

6 1. KENDALL LEE BYRD ("Respondent") was admitted to the practice of law in the
7 State of California on June 3, 1983, was a member at all times pertinent to these charges, and is
8 currently a member of the State Bar of California.

9 COUNT ONE

10 Case No. 04-O-14550
11 Rules of Professional Conduct, rule 3-110(A)
12 [Failure to Perform with Competence]

13 2. Respondent wilfully violated Rules of Professional Conduct, rule 3-110(A), by
14 intentionally, recklessly, or repeatedly failing to perform legal services with competence, as
15 follows:

16 3. On or about August 1, 2003, Andrew Kotyuk ("Kotyuk") met with Rita Whisenand
17 ("Rita"), a paralegal in Respondent's office, to discuss Respondent handling an opposition to a
18 probate matter. Rita informed Kotyuk what needed to be done on his behalf and that they could
19 handle the matter. She also informed him that the fees would be \$3000. At that meeting,
20 Kotyuk paid Rita \$3000 in advanced legal fees for Respondent. Rita signed the retainer
21 agreement with Kotyuk.

22 4. On or about August 6, 2003, Kotyuk went to Respondent's office to sign a
23 Declaration prepared by Respondent's office to be filed with the Opposition that Respondent
24 filed on Kotyuk's behalf later that day. At that time, Rita informed Kotyuk that Respondent
25 would not be appearing at the hearing the next day as "he did not feel qualified to handle a living
26 trust matter and would have another attorney appear" on behalf of Kotyuk.

27 5. On or about August 7, 2003, another attorney appeared for Respondent with Kotyuk.
28 The Judge continued the hearing to August 26, 2003.

 6. On or about August 14, 2003, Kotyuk telephoned Respondent's office and was only
 able to speak to Rita. Kotyuk informed Rita that he was terminating Respondent's services and

1 requested a refund of the advanced attorney fees he had paid to Respondent. Rita said that she
2 would forward that message to Respondent. Kotyuk then hired new counsel for his probate
3 matter. Kotyuk did not at any time, hear from Respondent regarding his requested refund.

4 7. By taking on a matter which he was not qualified to handle and failing to take
5 appropriate steps in that matter, Respondent intentionally, recklessly, or repeatedly failed to
6 perform legal services with competence.

7 COUNT TWO

8 Case No. 04-O-14550
9 Rules of Professional Conduct, Rule 1-300(A)
[Aiding the Unauthorized Practice of Law]

10 8. Respondent wilfully violated Rules of Professional Conduct, rule 1-300(A), by aiding
11 a person or entity in the unauthorized practice of law, as follows:

12 9. The allegations of paragraphs 3 through 6 are incorporated by reference.

13 10. By permitting Rita to meet with Kotyuk, give him legal advice, determine whether to
14 accept his case, set legal fees and sign retainer agreements, Respondent wilfully aided a person
15 or entity in the unauthorized practice of law.

16 COUNT THREE

17 Case No. 04-O-14550
18 Rules of Professional Conduct, rule 3-700(D)(2)
[Failure to Refund Unearned Fees]

19 11. Respondent wilfully violated Rules of Professional Conduct, rule 3-700(D)(2), by
20 failing to refund promptly any part of a fee paid in advance that has not been earned, as follows:

21 12. The allegations of paragraphs 3 through 6 are incorporated by reference.

22 13. On or about July 14, 2004, Kotyuk's wife hand-delivered a letter from Kotyuk to
23 Respondent requesting a refund of the advanced attorney fees that Kotyuk had paid Respondent.
24 Respondent informed her that he would have to check with Rita and get back to them.

25 14. Respondent provided no services to Kotyuk. Respondent did not earn any of the
26 advanced fees paid by Kotyuk. To date, Respondent has not refunded any portion of the \$3000
27 paid by Kotyuk in advanced fees.
28

15. By not refunding any portion of the \$3000 advance fee paid by Kotyuk, Respondent failed to refund promptly any part of a fee paid in advance that had not been earned.

COUNT FOUR

Case No. 04-O-14550
Business and Professions Code section 6068(i)
[Failure to Cooperate in State Bar Investigation]

16. Respondent wilfully violated Business and Professions Code section 6068(i), by failing to cooperate and participate in a disciplinary investigation pending against Respondent, as follows:

17. On or about September 23, 2004, the State Bar opened an investigation, case number 04-O-14550, pursuant to a complaint filed by Andrew Kotyuk (the “Kotyuk matter”).

18. On or about October 20, 2004, State Bar Investigator Joy Nunley wrote to Respondent regarding the Kotyuk matter. The investigator's letter was placed in a sealed envelope correctly addressed to Respondent at his State Bar of California membership records address. The letter was promptly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason.

19. The investigator's letter requested that Respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Kotuyk matter. Respondent did not respond to the investigator's letter or otherwise communicate with the investigator.

20. By not providing a written response to the allegations in the Kotyuk matter or otherwise cooperating in the investigation of the Kotyuk matter, Respondent failed to cooperate in a disciplinary investigation.

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1 COUNT FIVE

2 Case No. 04-O-15190
3 Rules of Professional Conduct, rule 3-110(A)
4 [Failure to Perform with Competence]

5 21. Respondent wilfully violated Rules of Professional Conduct, rule 3-110(A), by
6 intentionally, recklessly, or repeatedly failing to perform legal services with competence, as
7 follows:

8 22. On or about October 8, 2003, Louise Gilbert ("Gilbert") went to Respondent's office
9 and spoke to Respondent's paralegal, Rita Whisenand ("Rita"), regarding Respondent
10 representing her husband, Larry Gilbert ("Larry"), in a criminal matter filed against him in the
11 Riverside Superior Court, *People v. Gilbert*, Case Number RIF112354 ("Larry's criminal case").
12 Rita informed Gilbert that they would handle the case and that the fees would be \$2,500. At that
13 time, Gilbert paid \$2,500 to Rita for Respondent to represent Larry.

14 23. On or about October 9, 2003, Respondent made his first appearance in Larry's
15 criminal case in Riverside Superior Court.

16 24. In or about January 2004, the District Attorney's office offered Larry a plea bargain
17 which would require that Larry remain in a drug rehabilitation facility for a sentence length of 16
18 months. Respondent advised Gilbert and Larry that Larry should not accept the plea bargain as
19 Respondent was sure that Larry would not spend any time in jail and that he could do better for
20 Larry at trial. Larry did not accept the plea bargain.

21 25. In or about April 2004, Respondent requested another \$750 in advanced fees for
22 Larry's case. Gilbert paid the \$750 to Respondent at that time.

23 26. In or about May 2004, the District Attorney's office again offered Larry a plea
24 bargain which would require that Larry remain in a drug rehabilitation facility for a sentence
25 length of 20 months. Respondent advised Gilbert and Larry that Larry should not accept the plea
26 bargain as Respondent was sure that Larry would not spend any time in jail and that he could do
27 better for Larry at trial. Larry did not accept the plea bargain.

28 27. On June 21, 2004, Respondent appeared at trial on Larry's behalf. Respondent had
not done any investigation on Larry's behalf before trial. Respondent did not locate or attempt

1 to locate any evidence or witnesses on behalf of Larry for Larry's criminal case. On or about
2 June 23, 2004, Larry was convicted in the criminal case, and on or about August 3, 2004, Larry
3 was sentenced to 10 years in prison.

4 28. By failing to attempt to locate evidence or witnesses on Larry's behalf and failing to
5 adequately prepare for Larry's criminal case and causing Larry to receive a much longer
6 sentence than that offered on two separate occasions, Respondent intentionally, recklessly or
7 repeatedly failed to perform legal services with competence.

8 COUNT SIX

9 Case No. 04-O-15190
10 Rules of Professional Conduct, Rule 1-300(A)
[Aiding the Unauthorized Practice of Law]

11 29. Respondent wilfully violated Rules of Professional Conduct, rule 1-300(A), by
12 aiding a person or entity in the unauthorized practice of law, as follows:

13 30. The allegations of paragraphs 22 through 27 are incorporated by reference.

14 31. By permitting Rita to meet with Gilbert, give her legal advice, determine whether to
15 accept Larry's case and set the legal fees for Larry's case, Respondent wilfully aided a person or
16 entity in the unauthorized practice of law.

17 COUNT SEVEN

18 Case No. 04-O-15190
19 Rules of Professional Conduct, rule 3-700(D)(1)
[Failure to Release File]

20 32. Respondent wilfully violated Rules of Professional Conduct, rule 3-700(D)(1), by
21 failing to release promptly, upon termination of employment, to the client, at the request of the
22 client, all the client papers and property, as follows:

23 33. On or about September 7, 2004, Gilbert telephoned Respondent's office at the
24 telephone number which Respondent had given her and left a message requesting Larry's file on
25 behalf of Larry. Gilbert left at least nine messages for Respondent in the next two weeks, each
26 requesting Larry's file on behalf of Larry.

27 34. To date, neither Gilbert nor Larry has received Larry's file from Respondent.
28

35. By not releasing the file to Gilbert or Larry at Gilbert's request on behalf of Larry, Respondent failed, upon termination of employment, to release promptly to a client, at the request of the client, all the client's papers.

COUNT EIGHT

Case No. 04-O-15190
Business and Professions Code section 6068(i)
[Failure to Cooperate in State Bar Investigation]

36. Respondent wilfully violated Business and Professions Code section 6068(i), by failing to cooperate and participate in a disciplinary investigation pending against Respondent, as follows:

37. On or about October 21, 2004, the State Bar opened an investigation, case number 04-O-15190, pursuant to a complaint filed by Louise and Larry Gilbert (the “Gilbert matter”).

38. On or about November 19, 2004, State Bar Investigator Joy Nunley wrote to Respondent regarding the Gilbert matter. The investigator's letter was placed in a sealed envelope correctly addressed to Respondent at his State Bar of California membership records address. The letter was promptly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason.

39. The investigator's letter requested that Respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Gilbert matter. Respondent did not respond to the investigator's letter or otherwise communicate with the investigator.

40. By not providing a written response to the allegations in the Gilbert matter or otherwise cooperating in the investigation of the Gilbert matter, Respondent failed to cooperate in a disciplinary investigation.

NOTICE - INACTIVE ENROLLMENT!

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE

1 SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL
2 THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO
3 THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN
4 INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE
ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE
RECOMMENDED BY THE COURT. SEE RULE 101(c), RULES OF
PROCEDURE OF THE STATE BAR OF CALIFORNIA.

5 **NOTICE - COST ASSESSMENT!**

6 IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE,
7 YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY
8 THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF
THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE
SECTION 6086.10. SEE RULE 280, RULES OF PROCEDURE OF THE
STATE BAR OF CALIFORNIA.

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10 Respectfully submitted,

11 THE STATE BAR OF CALIFORNIA
12 OFFICE OF THE CHIEF TRIAL COUNSEL

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14 Dated: December 17, 2004

15 By: 

16 SUZAN J. ANDERSON
17 Deputy Trial Counsel
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I, the undersigned, over the age of eighteen (18) years, whose business address and place of employment is the State Bar of California, 1149 South Hill Street, Los Angeles, California 90015, declare that I am not a party to the within action; that I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service; that in the ordinary course of the State Bar of California's practice, correspondence collected and processed by the State Bar of California would be deposited with the United States Postal Service that same day; that I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit; and that in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of Los Angeles, on the date shown below, a true copy of the within

in a sealed envelope placed for collection and mailing as certified mail, return receipt requested, Article No.: 7160 3901 9844 3982 3557, at Los Angeles, on the date shown below, addressed to:

in an inter-office mail facility regularly maintained by the State Bar of California addressed to:

N/A

DATED: 12/17/04

SIGNED: Colleen George-Juarez
Colleen George-Juarez
Declarant