

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **07-O-10693-RAH**
)
JOHN HAMILTON KIBBLER,)
) **DECISION AND ORDER SEALING**
Member No. 164834,) **CERTAIN DOCUMENTS**
)
A Member of the State Bar.)

Introduction¹

In this original disciplinary proceeding, respondent JOHN HAMILTON KIBBLER² was accepted for participation in and has successfully completed the State Bar Court’s Alternative Discipline Program (ADP). Accordingly, the court recommends below that respondent be placed on two years’ stayed suspension and two years’ probation on conditions, including a nine-month suspension with credit given for the nine-month period during which respondent was involuntarily enrolled as an inactive member of the State Bar of California under section 6233.³

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

² Respondent was admitted to the practice of law in this state on June 17, 1993, and has been a member of the State Bar of California since that time. He has no prior record of discipline.

³ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

Pertinent Procedural History

Respondent's Acceptance into the ADP

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed the notice of disciplinary charges (NDC) in this case on December 2, 2009. Respondent filed his response to the NDC on December 18, 2009. Also, in an order filed on December 18, 2009, the court referred this case to the ADP for an evaluation of respondent's eligibility for participation in that program.

On January 25, 2010, respondent submitted, to the court, a Nexus Statement, which respondent executed under penalty of perjury. Respondent's Nexus Statement established the existence of a nexus between respondent's mental health issues and the stipulated misconduct in this case.

Respondent signed his initial LAP Participation Plan on December 14, 2009.

On February 10, 2010, the State Bar submitted its brief on the level of discipline. Respondent submitted his brief on the level of discipline on February 22, 2010.

On July 1, 2010, the court received a new LAP Participation Plan, which respondent signed on June 30, 2010.

The parties executed a Stipulation Re Facts and Conclusions of Law (Stipulation). The court approved and filed the Stipulation on July 2, 2010. The Stipulation sets forth the factual findings, legal conclusions, and mitigating and aggravating circumstances in this case.

Also, on July 2, 2010, the court lodged a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement) in which the court set forth (1) the level of discipline that the court will recommend to the Supreme Court if respondent successfully completes the ADP and (2) the level of discipline that the court will recommend if respondent

does not successfully complete the ADP. Finally, on July 2, 2010, respondent signed a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Contract).

On November 24, 2010, the court received an amendment to respondent's July 1, 2010 LAP Participation Plan.

On July 6, 2010, the court filed an order accepting respondent into the ADP beginning on July 2, 2010.

Respondent's Completion of the ADP

Since July 2, 2010, respondent has participated in both the ADP and the LAP. On July 6, 2010, the court filed an order involuntarily enrolling respondent as an inactive member of the State Bar of California beginning on October 4, 2010. (§ 6233.) Respondent was continuously on involuntary inactive enrollment under the court's July 6, 2010 order for nine months from October 4, 2010, through July 5, 2011.

On February 24, 2012, the court received, from respondent, a LAP Certificate of One Year of Participation in the Lawyer Assistance Program – Mental Health, certifying that, for at least the one-year period before February 7, 2012, respondent maintained his mental health stability and successfully participated in the LAP.

On February 27, 2012, the court filed an order in which it found that respondent successfully completed the ADP and took the case under submission for decision.

Findings of Fact and Conclusions of Law

The court adopts the facts and conclusions of law set forth in the Stipulation as the court's findings of fact and conclusions of law.⁴ Briefly, those facts and conclusions establish the following misconduct, aggravation, and mitigation.

⁴ A copy of the Stipulation is attached to this decision and incorporated by reference as if it were fully set forth herein.

Misconduct

In September 2005, in accordance with a superior court order approving a stipulation in a divorce proceeding in which respondent represented the husband, respondent was to deposit \$227,649.11 in proceeds from the sale of the marital home into his client trust account, distribute \$25,000 to each party, and then deposit/transfer the balance of proceeds into an interest bearing trust account in the names of the husband and wife. Respondent never deposited/transferred the balance of the proceeds into an interest bearing trust account of the husband and wife in willful violation of the superior court's order. (§ 6103) Respondent willfully misappropriated a total of at least \$64,367.46 of the sale proceeds for his own use and benefit. (Rule 4-100(A); § 6106 [moral turpitude].) In February 2007, respondent repaid the misappropriated funds using a loan respondent obtained from his sister.

Aggravation

In aggravation, respondent failed to account for the sale proceeds as requested by the wife's attorney.

Mitigation

In mitigation, respondent has no prior record of discipline, no significant harm resulted from respondent's misconduct, respondent was remorseful and repaid the misappropriated money, and respondent was going through a contentious divorce at the time he misappropriated the client/trust funds.

As noted above, respondent successfully completed the ADP on about February 27, 2012. Respondent's successful completion of the ADP required his successful participation in the LAP. Moreover, as noted above, this court was presented with a Certificate of One Year of Participation in the Lawyer Assistance Program – Mental Health, which evidences respondent's mental health stability for at least one year. In short, the record contains clear and convincing

evidence that respondent no longer suffers from the mental health issues that led to his misconduct. Accordingly, respondent is entitled to significant mitigation for his successful completion of the ADP.

DECISION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but rather, to protect the public, to preserve public confidence in the legal profession, and to maintain the highest possible professional standards for attorneys. (Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, std. 1.3;⁵ *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

To determine the appropriate level of discipline, the court reviewed and considered (1) respondent's and the State Bar's briefs on the issue of discipline, (2) the Stipulation (which sets forth the facts, conclusions of law, aggravation, and mitigation), (3) the standards, (4) respondent's Nexus Statement regarding the nexus between respondent's mental health issues and his misconduct, and (5) the Confidential Statement, which advised the parties of the discipline that the court would recommend if respondent successfully completed the ADP and if respondent failed to successfully complete the ADP. In determining the appropriate discipline to recommend if respondent successfully completed the ADP, the court considered the discipline recommended by the parties, the standards, and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 2.2, 2.3, and 2.6 and *McKnight v. State Bar* (1991) 53 Cal.3d 1025; *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1; and *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364.

⁵ All further references to standards are to this source.

After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or if he failed to successfully complete the ADP, respondent executed the Contract to participate in the ADP and began his period of participation in the ADP. Respondent thereafter participated in and successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Confidential Statement if respondent successfully completed the ADP.

The Confidential Statement provides that respondent should be required to give notice of his nine-month suspension in accordance with California Rules of Court, rule 9.20. However, this court does not recommend that respondent be required to comply with rule 9.20. If the Supreme Court adopts this court's recommendation and gives respondent credit for his nine-month inactive enrollment under section 6233 towards this court's recommended nine-month suspension, respondent will not be actually suspended from the practice of law and rule 9.20 will no longer be applicable in this proceeding.

Discipline Recommendation

The court recommends that respondent **John Hamilton Kibbler**, State Bar Number 164834, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. Kibbler is suspended from the practice of law for the first nine months of probation (with credit given for inactive enrollment, which was effective October 4, 2010, through July 5, 2011 (Bus. & Prof. Code, § 6233)).
2. Kibbler must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California.
3. Within 10 days of any change, Kibbler must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

4. Within 30 days after the effective date of discipline, Kibbler must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. At the direction of the Office of Probation, Kibbler must meet with the probation deputy either in person or by telephone. Kibbler must promptly meet with the probation deputy as directed and requested.
5. Kibbler must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10, and October 10. Under penalty of perjury, Kibbler must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Kibbler must also state whether there are any proceedings pending against him in the State Bar Court and, if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next 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 period of probation and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, Kibbler must answer fully, promptly and truthfully, any inquiries of the Office of Probation which are directed to him personally or in writing relating to whether he is complying or has complied with the probation conditions.
7. Within one year of the effective date of the discipline herein, Kibbler must provide to the Office of Probation satisfactory proof of his attendance at a session of the State Bar's Ethics School and of his passage of the test given at the end of that session. The school is offered periodically at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Kibbler's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar of Cal., rule 3201.)
8. Kibbler must comply with all provisions and conditions of his Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Kibbler must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement/Plan to the Office of Probation. Kibbler must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of Kibbler's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. Kibbler will be relieved of this condition after he provides the Office of Probation with satisfactory certification of his successful completion of the LAP.

9. The two-year probation will begin on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.) And, at the expiration of the period of probation, if Kibbler has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for two years will be satisfied and that suspension will be terminated.

No Professional Responsibility Examination

The court does not recommend that **John Hamilton Kibbler** be ordered to take and pass a professional responsibility examination because he took and passed the Multistate Professional Responsibility Examination during his participation in the State Bar Court's Alternative Discipline Program.

Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10; that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment; and that the costs be paid with **John Hamilton Kibbler's** bar membership fees for the year 2013. If he fails to pay costs as described, or as may be modified by the State Bar Court, costs are due and payable immediately.

Direction Re Decision and Order Sealing Certain Documents

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388(C) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized

individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed must be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: April ____, 2012.

RICHARD A. HONN
Judge of the State Bar Court